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No. 53920-5

(King County Superior Court No. 03-2-25260-3 SEA)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOSEF VENTENBERGS, KENDALL TRUCKING, INC., a Washington
Corporation, RONALD HAIDER, and HAIDER CONSTRUCTION,
INC., a Washington Corporation,

Plaintiffs/Appellants,

v.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE PUBLIC
UTILITIES, and CHUCK CLARKE, in his official capacity as Director of
Seattle Public Utilities,

WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a Waste
Management of Seattle, a Delaware Corporation,

RABANCO, LTD., a Washington corporation,

Defendants/Respondents.

OPENING BRIEF OF APPELLANT

William R. Maurer, WSBA No. 25451
Jeanette M. Petersen, WSBA No. 28299
Charity Osborn, WSBA No. 33782
Attorneys for Plaintiffs/Appellants

INSTITUTE FOR JUSTICE
Washington Chapter
811 First Avenue, Suite 625
Seattle, Washington 98104
Telephone: (206) 341-9300

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INTRODUCTION

Despite the benefits to consumers and the economy from an open market, the City of Seattle (the “City”) granted monopolies for the hauling of construction, demolition and land clearing waste (“CDL”) to two large, influential corporations. Plaintiff/Appellant Josef Ventenbergs (“Ventenbergs”) is a Seattle entrepreneur who wishes to legally haul CDL for compensation in the City. Plaintiff/Appellant Ronald Haider (“Haider”) is a small construction contractor who wishes to hire Ventenbergs to haul CDL from his construction sites in the City. While transactions between these two entrepreneurs should be a simple matter of free agreement, the City has made voluntary transactions between them illegal by passing an ordinance that ensures that only two companies – Defendants/Respondents Rabanco, Ltd. (“Rabanco”) and Waste Management of Washington, Inc. (“Waste Management”) – may offer CDL hauling services to Seattle consumers. Because the City closed the CDL hauling market in Seattle to only its favored companies, Ventenbergs faces the possibility of losing his livelihood and Haider is forced to hire only those companies chosen by the City.

The City’s actions violate constitutional provisions explicitly written to protect people like Ventenbergs and Haider. The City’s disregard of the specific mandates of the state constitution are even more

egregious because the City's restrictions on Ventenbergs' and Haider's rights do not rest on any reasonable ground necessary to the maintenance or protection of public health and safety:

Q: Of the goals you listed under your public health and safety justifications, which ones can only be achieved through limiting competition to the two entities?

A: I don't know that any of them are dependent on that.

(Clerk's Papers 924.) (Deposition of Ray Hoffman, p. 182, ll. 9-13.)

Rather, the City merely sought to eliminate Rabanco and Waste Management's competitors in order to preserve the market share of these two companies. This Court is now tasked with deciding whether the City may, within the dictates of the Washington Constitution, act as the business agent of two corporations in order to protect such corporations from competition.

ASSIGNMENTS OF ERROR

1. Does the creation of monopolies for reasons unrelated to public health and safety violate article I, section 12 of the Washington Constitution by granting privileges that are not on the same terms equally available to all other corporations?

The trial court erred when it concluded that the City's creation of monopolies for two large, influential corporations for reasons unrelated to public health and safety did not violate the prohibition against the

government's grant of special privileges contained in article I, section 12 of the Washington Constitution. Clerk's Papers (CP) at 1331-32.

2. Is the hauling of CDL a "city service" and, if so, may the City create a monopoly in such a service if the monopoly is unrelated to the achievement of any public health or safety goals?

The trial court erred when it concluded that CDL hauling is a "city service" and that the right to pursue a specific profession may be infringed if the activity monopolized is a "city service." (CP 1331-32.)

3. Did the City's creation of two monopolies, without the express authorization of the legislature and in violation of the City Charter, exceed its statutory authority?

The trial court erred when it did not find the City acted beyond its statutory authority by creating two monopolies in CDL hauling when no statute expressly grants the City authority to create such monopolies and the City's Charter explicitly forbids such action.

4. Did the City exceed its authority when it issued contracts without following the procedural mandates of RCW 35.21.156?

The trial court erred when it concluded that the City was not required to follow the procedures mandated by RCW 35.21.156 when issuing contracts for the privilege of hauling CDL in the City. (CP 1332.)

5. Did the City's taking of Haider's right to freely alienate his property and the transfer of that right to two private entities constitute a private taking in violation of article I, section 16 of the Washington Constitution?

The trial court erred when it did not find that the City's actions constituted an unconstitutional private taking of Haider's property.

6. Did the City violate article I, section 23 of the Washington Constitution when it impaired the contract between Ventenbergs and Haider?

The trial court erred when it concluded that the City's actions did not unconstitutionally impair a valid contract between Ventenbergs and Haider. (CP 1330-31.)

STATEMENT OF THE CASE

The City restricted the market in hauling CDL—a specific and unique type of solid waste hauling that shares none of the attributes of a traditional utility—to two companies. However, CDL has certain attributes that distinguish it, and its collection, from commercial and residential waste.

A. Solid Waste

There are several different types of solid waste.¹ How a specific type of waste is classified determines how it is collected, transported, treated, disposed of, and regulated.

¹ “Solid waste” is defined as “all putrescible and nonputrescible solid and semisolid wastes, including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage [sic] sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials.” RCW 70.95.030(22).

1. Residential Waste

Residential solid waste is solid waste picked up from a residence. SMC 21.36.016(4). In the City, residential waste is collected by companies with which the City contracts. (CP 485.) These companies retrieve waste on a regular, weekly schedule over set routes in the City. (CP 486.) After the companies collect residential waste, such material must be brought to specific City-owned transfer stations, transported to Union Pacific's Seattle Intermodal Facility (the "Argo Yard"), and ultimately disposed of in a landfill in arid Gilliam County, Oregon. (CP 487-90.) Appellants have not challenged the City's regulation of residential waste.

2. Commercial Waste

Commercial waste is defined as Municipal Solid Waste ("MSW") and CDL collected from commercial establishments in the City.² Although defined to include CDL, commercial waste that excludes CDL is collected, treated, and disposed of differently than CDL (for ease of reference, Appellants refer to commercial waste that excludes CDL as "Commercial Waste"). In the City, Waste Management and Rabanco collect Commercial Waste pursuant to contracts with the City. (CP 491.)

² "MSW" is defined as solid wastes excluding special wastes (contaminated soils and asbestos), unacceptable wastes (radioactive, dangerous, and hazardous wastes), recyclable materials, compostable wastes, and CDL. SMC 21.36.014(14).

Like residential waste, Commercial Waste is collected on a regular schedule and on set routes throughout the City. (CP 492-93.) After Commercial Waste is collected, it must be brought to transfer stations, transferred to Argo Yard, and ultimately disposed of in the landfill in Gilliam County that receives residential waste. (CP 494-96.) Appellants have not challenged the City's regulation of Commercial Waste.

3. CDL

CDL is comprised of waste produced at construction³ and demolition⁴ sites, as well as waste from efforts to clear land of vegetation.⁵ (CP 497-98.) CDL is produced at specific sites for limited periods of time. (CP 499-500.) When a contractor or homeowner anticipates producing CDL, a hauler is called and asked to drop off a container at the site. (CP 500.) The customer fills the container with CDL and the hauler later returns to remove the container. CDL hauling typically involves heavy demand for containers over short periods of time. (CP 501.) CDL is collected irregularly and is dependent on construction and demolition

³ Construction Waste consists of scraps of wood, concrete, masonry, roofing, siding, structural metal, wire, fiberglass insulation, building materials, plastics, Styrofoam, twine, bailing and strapping materials, cans and buckets, and other packaging materials and containers. SMC 21.36.012(13)(a).

⁴ Demolition Waste consists of largely inert waste that results from the demolition or razing of buildings, roads or other manmade structures. SMC 21.36.012(13)(b). It includes concrete, brick, wood and masonry, composition roofing and roofing paper, steel, and copper. SMC 21.36.012(13)(b).

⁵ Landclearing Waste is natural vegetation and minerals from clearing and grubbing land for development, such as stumps, brush, vines, tree branches and bark, mud, dirt, sod and rocks. SMC 21.36.012(13)(c).

site schedules and CDL haulers typically are not given or assigned designated routes. (CP 501-02.) Because CDL hauling is project specific, the traffic and noise impact of CDL collection typically does not vary based on the number of haulers available to service customers. (CP 503.) Regardless of the number of haulers, one truck must drop off a container and one truck must collect the container. (CP 503.) Importantly, once Rabanco and Waste Management collect CDL, the City does not mandate where the material is taken or ultimately disposed. (CP 504-05.)

B. Exercise of State and City Jurisdiction Over Solid Waste

1. State Control

Since 1961, the Washington Utilities and Transportation Commission (the “WUTC”) has held the authority to regulate every waste company in the state. (CP 506-07.) In exchange for providing adequate service in their service territories, in 1961, the state granted existing companies certificates of convenience and necessity to operate within such territories. (CP 507.) Thus, companies already providing services in 1961 were “grandfathered in” and granted authority to continue providing such services for an indefinite period of time.⁶ *See* RCW 81.77.040.

According to the City, the WUTC has not vigorously enforced its restrictions on CDL hauling. (CP 511.) In response, a small industry of

⁶ To qualify for a new certificate in a territory not served by another hauler, an applicant must apply for such a certificate to the WUTC. *See* RCW 81.77.040.

independent CDL haulers developed, including Kendall Trucking. (CP 512.)

2. City Preemption of State Control

WUTC jurisdiction is preempted⁷ when a solid waste collection company operates “under a contract of solid waste disposal with any city or town” RCW 81.77.020. Although the statute does not expressly preempt WUTC jurisdiction over solid waste haulers operating without a contract with a municipality, both the WUTC and the City view the WUTC’s jurisdiction in a municipality as ending once the municipality enters into solid waste contracts with any solid waste hauler. (CP 513.)

3. The Contracts With Rabanco and Waste Management

In the early 1990’s, the City chose to contract with private companies to provide commercial solid waste hauling. (CP 514.) The City offered the opportunity to negotiate only to Waste Management and Rabanco and did not bid out or otherwise offer the contracts to any other company. (CP 516-17.) The City entered into separate contracts with Rabanco and Waste Management to haul commercial solid waste in the City, with such contracts effective April 1, 2001. (CP 515.)

Although the contracts deal with both Commercial Waste and CDL, there are significant differences in how the contracts deal with each

⁷ WUTC jurisdiction is also preempted when solid waste producers self-haul such waste. See RCW 81.77.020 and WAC 480-70-011(g).

type of waste. Under the contracts, Seattle is divided into two collection zones for the collection of Commercial Waste,⁸ with each company responsible for distinct zones. (CP 520-21.) The contracts mandate that the companies deliver Commercial Waste to certain transfer stations. (CP 527.) The City has a contract with Washington Waste Systems, Inc. to transport all such Commercial Waste to the Gilliam County landfill. (CP 528.)

CDL is dealt with differently. Unlike Commercial Waste, each company competes with the other to collect CDL throughout the entire City. (CP 529.) And although the City has a right to direct CDL to any specific transfer station, the City has not exercised that right and does not exert any control over (or even monitor) where CDL is ultimately disposed. (CP 530-31.)

Other aspects of the contracts highlight the unique nature of CDL and its collection. Self-hauling of CDL is permitted and the City exercises no control over where self-hauled CDL is taken or ultimately disposed. (CP 531-32.) Moreover, under the contracts, the City takes title to CDL collected from commercial establishments, meaning that the CDL produced by such establishments becomes the City's property when it is

⁸ The contracts call this "MSW," which is all solid waste collected from commercial establishments under the contract except special wastes, unacceptable wastes, recyclable materials, compostable wastes, and CDL. (CP 521.)

picked up by one of the contracted haulers. (CP 533.) The City does not, however, take title – either because of inadvertence or design – to CDL collected from residences; thus, residential CDL becomes the property of the hauler collecting the CDL, and not the City. (CP 533-34.)

4. The City Ordinances

After the contracts became effective, Rabanco complained to the City that it had lost approximately 40 percent of its market share in CDL hauling to companies that did not have contracts with the City. (CP 537.) Because no City ordinance actually made it illegal to haul CDL in Seattle, the City modified the Seattle Municipal Code (“SMC”) to include CDL in the definition of “City’s Waste” in SMC 21.36.012(5).⁹ The result is that “City’s Waste” now includes residential and nonresidential waste generated in the City, including CDL. SMC 21.36.030 makes it illegal for any company to haul City’s Waste except Rabanco and Waste Management.

C. The Appellants

Appellant Joe Ventenbergs is the founder and owner of Kendall Trucking, Inc. Ventenbergs began working as a CDL hauler in 1993 and started his own CDL-hauling business in 1994. (CP 537.) Over the next decade, Ventenbergs built Kendall Trucking into a successful business by

⁹ The City accomplished this by removing CDL from the list of materials excluded from the definition of “City’s Waste.”

offering timely and efficient service at rates considerably lower than those charged by Rabanco and Waste Management, and by catering specifically to other small businesses. (CP 538.) Today, he owns two trucks and 35 dumpsters and uses two subcontractors. (CP 537.)

Ventenbergs has never been cited or ticketed for the operation of his business. (CP 538.) When he founded his company in 1994, he made every effort to comply with state and local laws. (CP 538.) No one informed him that he needed a certificate of convenience and necessity or any other designation from the WUTC to collect CDL. (CP 538.) In fact, despite his numerous interactions with state and governmental agencies over the years, Ventenbergs never knew that his business was out of compliance with any law or regulation until the City faxed him a letter in February 2003 informing him that it had passed a law that made Kendall Trucking's operations illegal. (CP 539.)

Ventenbergs wishes to earn a living conducting a useful and necessary business hauling CDL in the City while conforming to all environmental and safety requirements. (CP 539.) If the challenged ordinance is upheld, his business will not likely survive. (CP 539.)

One of Ventenbergs' best customers is small business owner and Appellant Ron Haider. (CP 541.) Kendall Trucking has been on call to serve Haider's CDL hauling requirements since Haider founded his

successful remodeling and roofing business, Haider Construction, Inc., in 2001. (CP 541-42.) Before the City made their relationship illegal, Haider and Ventenbergs developed an ongoing and effective relationship for hauling CDL from Haider Construction sites. (CP 541-42.)

Haider prefers using Kendall Trucking because the service he receives from Kendall Trucking is less expensive, more efficient, and more responsive than Rabanco's or Waste Management's. (CP 541.) Haider appreciates the fact that Kendall Trucking caters to small businesses like Haider Construction, while larger companies tend to concentrate on their larger and more lucrative customers. (CP 541.) Haider wants to continue his relationship with a service provider who has helped to make his business successful. (CP 542-42.)

D. The Superior Court Proceedings

On May 13, 2003, Appellants commenced this action against the City in King County Superior Court. (CP 1-9.) On October 21, 2003, Appellants amended their Complaint to add Waste Management and Rabanco as defendants. (CP 21-30.) The parties filed cross-motions for summary judgment. (CP 63-85, 440-443, 449-478.) On February 23, 2004, the trial court granted Respondents' motions, denied Appellants' motion, and denied the City's request for injunctive relief. (CP 1321-24.) This timely appeal followed. (CP 1315-24.)

SUMMARY OF ARGUMENT

This case presents a number of issues of first impression in Washington. When this Court measures the City's actions against the applicable constitutional and statutory provisions, however, it is clear that the City's actions violated the express provisions of the Washington Constitution and far exceeded the City's statutory authority. This Court should therefore reverse the trial court.

When the City passed its ordinance permitting only Rabanco and Waste Management to haul CDL, the City violated article 1, section 12 of the Washington Constitution. Article 1, section 12 was specifically enacted to prevent economic favoritism and the grant of special privileges to corporations by the government. By its words, this clause forbids the government from granting special privileges to corporations that are not available to all other corporations. The City's violation of this provision is even more egregious in light of uncontradicted evidence that none of the purported health and safety justifications were actually related to restricting the market to only two companies.

Moreover, the City's creation of such monopolies was neither authorized by the state legislature nor permitted by the City's Charter. To the extent that the City was authorized to act in this area, and chose to contract with private haulers, the legislature required the City to follow

certain procedures, none of which the City followed. In so doing, the City exceeded its statutory authority and acted in a manner inconsistent with the legislature's requirements for City action.

The City also violated Haider's right to freely alienate his property and transferred this right to private entities when it mandated that he could only contract with Rabanco and Waste Management to haul waste from his worksites. This action violated article I, section 16 of the Washington Constitution, which prohibits the government from taking property and transferring that property to private individuals.

Finally, the City's actions impaired the contracts between Ventenbergs and Haider in violation of article I, section 23 of the Washington Constitution.

ARGUMENT

A. Standard of Review

Review of summary judgment orders is *de novo* and this Court engages in the same analysis as the trial court. *Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 392, 879 P.2d 276 (1994). Summary judgment is appropriate when there are no genuine issues of fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

B. The City's Creation of Monopolies Violates the Privileges or Immunities Clause of the State Constitution

Article I, section 12 of the Washington Constitution provides:

Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. I, §12. The City's actions facially violate this clause in that the City has granted to two corporations a privilege that upon the same terms is not equally available to all corporations.

1. The Scope and Purpose of the Privileges or Immunities Clause

Washington's privileges or immunities clause was specifically designed to prohibit the government from granting to corporations special privileges that are not readily available to all others. The City's actions here violate both the words and spirit of article I, section 12.

In analyzing a constitutional provision, Washington courts look first to the plain language of the text and accord it its reasonable interpretation; the words of the text will be given their common and ordinary meaning, as determined at the time they were drafted.

Washington Water Jet Workers Ass'n v. Yarbrough, __ Wn.2d __, 90 P.3d 42, 2004 Wash. LEXIS 360, at *8 (May 13, 2004).

a. Plain Language

When read in its entirety, article I, section 12, entitled “Special Privileges and Immunities Prohibited,” plainly and unambiguously prohibits the government from granting special privileges or immunities to persons or corporations “which upon the same terms shall not equally belong to all citizens, or corporations.” A dictionary published in 1889 (the year the Washington Constitution was drafted) defines “Privilege” as, “A right peculiar to the person on whom conferred, not to be exercised by another or others.” *A Dictionary of the Law* 811 (1889) (excerpts of which are attached to this brief as Attachment 1). Specifically, a “Special or exclusive privilege” is defined as, “Any particular or individual authority or exemption existing in a person or class of persons, and in derogation of common right; as, the grant of a monopoly.” *Id.* at 812 (emphasis added).¹⁰ Thus, article I, section 12 specifically forbids the government from granting a “special” or “peculiar” “right” “favor” or “advantage” “not to be exercised by another or others” or “not enjoyed by all” – including a monopoly.

¹⁰ Similarly, a turn-of-the-century general dictionary defined “privilege” to include, “A peculiar benefit, favor, or advantage; a right or immunity not enjoyed by all, or that may be enjoyed only under special conditions; a prerogative, franchise or permission A special right or power conferred on or possessed by one or more individuals, in derogation of the general right; also, the law or grant conferring it.” II *A Standard Dictionary of the English Language* 1417 (Isaac K. Funk et al. eds., 1903) (portions of which are attached to this brief as Attachment 2).

b. Historical Context

To determine the meaning of a constitutional provision, the court may consider the intent of the framers and the history of events and proceedings contemporaneous with its adoption. *Water Jet*, 2004 LEXIS at *21.

The Political Climate in 1889. “In the years immediately preceding Washington’s constitutional convention, the political life of our emerging state was dominated by the populist movement, which strongly influenced Washington’s constitution.” *Id.* at *25. Populism “emphasized a philosophy of protection for small businesses and the working citizen.” *Id.* at *26 (emphasis added).

The populists wished to protect personal, political, and economic rights from both the government and [big] corporations, and they strove to place strict limitations on the powers of both. To achieve this, the populists strove to erect a “fire wall between the public and private sectors.”

Id. at *26-27 (quoting Hugh Spitzer, *Washington’s Constitution and How It Affects Us*, Seattle Post-Intelligencer, Nov. 16, 1997, at E1) (emphasis added) (internal citations omitted) (brackets in the original).

The Constitutional Convention. Article I, section 12 is consistent with, and springs from, this political climate. Article I, section 12, and its focus on preventing the government from granting special privileges to corporations “demonstrates that our framers were concerned with undue

political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority.”

Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 808, 83 P.3d 419 (2004). Specifically, the framers’ addition of a reference to corporations indicates that the framers viewed corporations “as manipulating the lawmaking process.” *Id.*; see also Jonathon Thompson, *The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1251 (1996) (Washington’s reference to corporations “reflected the contemporary populist suspicion of the political influence accompanying large concentrations of wealth”). “Our framers’ concern with avoiding favoritism toward the wealthy clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves.” *Grant County*, 150 Wn.2d at 808.

The framers were correctly and presciently concerned that large corporations would use their influence to obtain special rights or advantages to the disadvantage of individuals and small businesses. For this reason, they crafted a strongly worded prohibition against such favoritism. It is this prohibition that the City of Seattle has violated.

2. Appellants' Interests Are Protected By The Privileges Or Immunities Clause

For a violation of the privileges or immunities clause to occur, the law or its application must confer a privilege to a class of citizens or to a corporation. *Grant County*, 150 Wn.2d at 812.

a. The Right At Issue Is Fundamental

The protections of article I, section 12 apply to those rights that are fundamental attributes to an individual's national or state citizenship. *Id.* at 812-13 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).¹¹ Thus, the first step in determining whether the City's actions violate article I, section 12 is to determine whether the City's actions implicate a privilege, *i.e.*, a fundamental right of state citizenship. *Grant County*, 150 Wn.2d at 814.

Plaintiffs' First Amended Complaint sought to vindicate Appellants' right "to pursue their livelihoods free from the interference of unreasonable and illegal governmental favoritism." (CP 22.) In Washington, "The right to hold specific private employment and follow a

¹¹ *Vance* itself paraphrases the classic statement of the scope of the privileges and immunities guaranteed by Article IV, Section 2 of the United States Constitution in *Corfield v. Coryell*, 4 Wash. C.C. 371, 6 F. Cas. 546 (No. 3, 230) (CCED Pa. 1825). In that case, Justice Washington, sitting as Circuit Justice, held that this provision protected only fundamental rights and not every public benefit established by positive law. Justice Washington held that such fundamental rights would "be more tedious than difficult to enumerate," but included the right "to pursue and obtain happiness" and the right of the citizen to pass through or reside in another state "for purposes of trade, agriculture, professional pursuits, or otherwise" *Corfield*, 6 F. Cas. 551-52.

chosen profession free from unreasonable government interference is a fundamental right which comes within the liberty and property concepts of the Fifth Amendment.” *Plumbers & Steamfitters Union Local 598 v. Washington Pub. Power Supply Sys.*, 44 Wn. App. 906, 915, 724 P.2d 1030 (1986) (underline emphasis added). *See also Duranceau v. City of Tacoma*, 27 Wn. App. 777, 780, 620 P.2d 533 (1980) (“The right to hold specific private employment free from unreasonable government interference is a fundamental right which comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.”) (internal quotation marks and citations omitted); *AK-WA, Inc. v. Dear*, 66 Wn. App. 484, 492, 832 P.2d 877 (1992).

Federal case law also recognizes that the right to follow a chosen profession is a fundamental attribute of citizenship by virtue of the Fifth and Fourteenth Amendments. *See Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (Fourteenth Amendment includes a generalized right to choose one’s field of private employment, albeit subject to reasonable governmental regulation); *Examining Bd. of Eng’rs v. Otero*, 426 U.S. 572, 604 (1976) (protection of the right to work for a living in a common occupation was the purpose of the Fourteenth Amendment); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (“the right to hold specific private employment and to follow a chosen profession free from unreasonable

governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment”). As the U.S. Supreme Court has stated:

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that was the purpose of the [Fourteenth] Amendment to secure.

Traux v. Raich, 239 U.S. 33, 41 (1915).¹²

Ventenbergs’ right to pursue his chosen profession is therefore a fundamental attribute of his state and national citizenship that is protected by article I, section 12.

b. Washington Precedent Recognizes The Right To Pursue One’s Profession as Protected by the Privileges or Immunities Clause

Washington courts have long struck down laws unreasonably interfering with the pursuit of one’s chosen profession as inconsistent with article I, section 12. For instance, in *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 209 P.2d 270 (1949), the City of Wenatchee prohibited the activity of non-resident photographers within the City. The court concluded such a restriction violated article I, section 12. The court relied

¹² The weight of authority in favor of classification of such a right as fundamental is so strong that even the City recognized it in its briefing. (CP 1218.) (City’s Reply in Support of Defendants’ Motions for Summary Judgment, at 2 n. 1.) Nonetheless, the City attempted to redefine the right Appellants seek to vindicate as the “right to obtain a city contract.” *Id.* This is not the right Ventenbergs seeks to vindicate. Rather, Ventenbergs simply seeks to earn an honest living in his chosen profession of CDL hauling and it is this right the City has unconstitutionally violated.

on authority stating that the common welfare must be advantaged to a substantial degree to justify the exercise of the police power. Specifically, the court held:

[I]t is not within the bounds of reason to prohibit particular classes of business, lawful in themselves, for the enrichment of another class. Such subversion of competition is not in the public interest, and the police power can only be addressed to that end. . . . Ordinances operating to restrain competition and tending to create monopolies or confer exclusive privileges are generally condemned.

Ralph, 34 Wn.2d at 642 (internal quotation marks and citation omitted) (emphasis added). The court also quoted with favor language from a New Jersey decision holding that if “the dominant purpose be the service of private interests under the cloak of the general public good, it must be adjudged a perversion of the [police] power.” *Ralph*, 34 Wn.2d at 642-43 (quoting *New Jersey Good Humor, Inc. v. Board of Comm’rs of Borough of Bradley Beach*, 11 A.2d 113, 117 (N.J. 1940)). The court concluded that because the ordinance was passed “with the primary purpose of protecting local photographers from lawful competition, and was thereby designed to serve private interests in contravention of common rights, it must be condemned as an abuse of the police power, and, therefore, unreasonable and unlawful.” *Ralph*, 34 Wn.2d at 644.

Similarly, in *Spokane v. Macho*, 51 Wash. 322, 98 P. 755 (1909), the City of Spokane passed an ordinance making it unlawful for employment offices to make willful representations to those seeking employment and take a fee for such employment. The court held that this ordinance violated the privileges or immunities clause, explaining:

[T]hose engaged in a business lawful and orderly in itself, although subject to license and regulation, cannot be made a class upon which a penal statute shall operate to the exclusion of others; for the crime defined is not peculiar to the business of employment agencies, but common to all, and to be sustained must include within its terms all who may be likewise guilty.

Id. at 325.

Here, Appellants' claims are substantively similar to those found by the Washington Supreme Court to fall within the protections of the privileges or immunities clause.

3. The City's Actions Were Based On No Reasonable Ground

When governmental favoritism is alleged, the court looks to see if the law applies equally to all persons within a designated class and if there is a reasonable ground for distinguishing between those who fall within the class and those who do not. *United Parcel Serv., Inc. v. Department of Revenue*, 102 Wn.2d 355, 367, 687 P.2d 186 (1984); *see also McDaniels v. J.J. Connelly Shoe Co.*, 30 Wash. 549, 555, 71 P. 37 (1902) (classification must be made upon some "reasonable and just difference

between the persons affected and others”). Thus, laws that grant an economic benefit must rest on “real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.” *State ex rel. Bacich v. Huse*, 187 Wash. 75, 83-4, 59 P.2d 1101 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass’n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979). Article I, section 12 has “a harder ‘bite’ where a small class is given a special benefit, with the burden spread among the majority.” *Grant County*, 150 Wn.2d at 807. Here, no reasonable ground exists between companies that have contracts to haul CDL and those that do not.

The City proffered three reasons for its regulation of commercial solid waste: (i) to ensure that commercial solid waste ended up in the arid Gilliam County landfills that meets the City’s environmental goals, (ii) lower rates, and (iii) greater recycling opportunities. (CP 542.) (RP 27.) None of these goals are at all dependent on restricting the market in CDL hauling to two companies:

Q: Of the goals you listed under your public health and safety justifications, which ones can only be achieved through limiting competition to the two entities?

A: I don’t know that any of them are dependent on that.

(CP 543.) (Deposition of Ray Hoffman, p. 182, ll. 9-13). All these goals can be achieved with more than two haulers operating in the City. (CP

543.) (RP 79.) As the attorney for the City stated at oral argument, “is this absolutely the only way to accomplish this? Well, no.” (RP 27.)

a. Ultimate Disposal

The ultimate disposal rationale relates only to residential and Commercial Waste because the City exempts CDL from its mandate that such waste be hauled to Gilliam County and, in fact, the City has no idea where such waste ultimately ends up. (CP 543.) The City also does not control disposal of self-hauled CDL. (CP 544.) Further, the City failed to explain why it could not contract with additional haulers and require such haulers to dispose of CDL in an environmentally sound manner, similar to the unexercised and unenforced environmental obligations contained in the contracts with Rabanco and Waste Management. (CP 607, 691.) Thus, the City’s claim that it sought to control where CDL is ultimately disposed is therefore entirely unmet and cannot justify the restriction of the CDL market.

b. Lower Rates

The City admitted that CDL hauling rates actually increased for some after the contracts were executed. (CP 544.) Moreover, the City made no effort to require that the rates actually be lower than those set by the WUTC. Nor did Respondents offer any explanation why, if the City was so concerned about rates, it could not regulate rates in a more diverse

market instead of requiring customers to use these particular, and often more expensive, haulers.

c. Recycling

Under its general police powers, the City has the ability to require greater recycling efforts. (CP 545.) Indeed, during the proceedings before the trial court, the City adopted stringent new recycling rules. *See* SMC 21.36.082-.083. Thus, the City is not prevented from achieving any of its goals through reasonable regulation of an open market in CDL hauling.

Appellants have not challenged the City’s ability to direct waste to environmentally acceptable landfills, to regulate rates, or to require recycling. However, not one of these goals is achieved by restricting the market to just two companies.¹³ The City’s alleged goals are completely unrelated to the restriction of the market and therefore do not constitute “real and substantial” differences “bearing a natural, reasonable, and just relation to the subject matter of the act.”

d. Desire to Avoid Lawsuit

In actuality, the City restricted the market in CDL hauling to Rabanco and Waste Management for one reason—to avoid a lawsuit by the two companies against the City. (CP 518-19.) “The negotiations

¹³ In contrast, the City chose to allow Rabanco and Waste Management to compete with one another in the CDL hauling market in order to foster competition and provide an incentive for better service to Seattle consumers. (CP 546.) This legitimate goal is actually undermined by restricting the market to only two companies.

[between the City and the two companies] focused on minimizing legal risk associated with takings by focusing on those companies that had the certificates, so those were the companies we focused on.” (CP 516.) (Deposition of Ray Hoffman, p. 114, ll. 2-5.) That is, the City believed that it would be liable to the two companies for the market value of the companies’ certificates if the City were to contract with other haulers. (CP 516.) The City therefore chose to violate the constitutional rights of Ventenbergs in order to avoid violating the rights of Waste Management and Rabanco.

However, this rationale has been abandoned by the City, which now admits that such a lawsuit was without merit. (RP 41-43.) At oral argument, the trial court and the City agreed with Appellants that the threat of a lawsuit was not a legitimate concern for the City and that restricting the CDL hauling market based on such a concern was not a legitimate exercise of the police power:

THE COURT: Let me interrupt you and ask all three counsel, Mr. Patton and counsel for Waste Management and Rabanco. My gut tells me that the City shouldn’t be making decisions on this kind of thing because they are afraid of a lawsuit. That’s not what the police power is all about, is it?

MR. PATTON (for the City): Your Honor, I agree with you. That’s not the purpose of making a decision to contract with Waste Management or Rabanco.

(RP 41-42.) In that regard, it is clear that a desire to avoid a lawsuit the City now recognizes was meritless does not bear a “natural, reasonable, and just relation” to hauling CDL. On this point, at least, the trial court correctly recognized that the desire to avoid a lawsuit – especially one that the City concedes was without merit – was not a reasonable or proper ground for restricting the market to only two companies.¹⁴

4. The City’s Actions Were Not Justified By the Police Power

Under our state constitution, the government has the power to enact regulations that promote the health, peace, safety and general welfare of the people of this state. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 27, 992 P.2d 496 (2000). “A statute is a valid exercise of police power if it (1) tends to correct some evil or promote some interest of the State, and (2) bears a reasonable and substantial relationship to accomplishing its purpose.” *Id.* at 27 (internal quotation marks and citations omitted). As the United States Supreme Court has explained:

To justify the State in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions

¹⁴ Much of the companies’ submissions before the trial court concerned whether a lawsuit would or would not have succeeded. For purposes of deciding the summary judgment motions, the trial court assumed that such a suit would not have succeeded. (RP 65.)

upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton v. Steele, 152 U.S. 133, 137 (1894) (emphasis added).

Here, there was no public purpose for restricting the market. (CP 924.) (Deposition of Ray Hoffman, p. 182, ll. 9-13.) “[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose.” *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). Even if one were to accept, for the sake of argument, that contracting with Rabanco and Waste Management fulfills some legitimate public health and safety goal, restricting the market simply does not bear a real and substantial relationship to accomplishing that purpose. The City has never articulated a relationship between any legitimate purpose and the accomplishment of such a purpose through restriction of the market. In fact, the City has explicitly indicated that such goals can be met with more than two haulers. (CP 923.) (Deposition of Ray Hoffman, p. 181, ll. 6-7.) (“The City can achieve its solid waste goals by contracting with one or more companies.”) (Emphasis added.)

Where the government exercises its police power to interfere with the free market, article I, section 12 requires a carefully crafted solution. The City certainly could have accomplished its stated goals using other, less restrictive, means. It could have, for instance, maximized competition

and customer choice by issuing multiple contracts to CDL haulers instead of issuing only two contracts to Waste Management and Rabanco. Instead, the City chose the most restrictive option of monopolizing the market completely, wielding a regulatory meat cleaver where the constitution requires the precision of a scalpel.

When the City passed an ordinance making Kendall Trucking's operations illegal, it deprived Ventenbergs not only of his livelihood, but also of a fundamental attribute of his state and national citizenship. Because the City restricted the market solely to insulate Waste Management and Rabanco from competition and thereby avoid a lawsuit, there existed no legitimate public goal to be achieved by such a restriction. Because the City possessed no reasonable ground to restrict the CDL hauling market, the City's actions were in excess of its police power.

C. Characterizing the Creation of Monopolies a "City Service" Does Not Insulate the City from the Application of Article I, Section 12

For the first time at oral argument, the City declared that CDL hauling is a "city service," and argued that it was therefore unconstrained by the restrictions of the privileges or immunities clause in the Washington Constitution. (RP 34.)¹⁵ The trial court agreed, holding that

¹⁵ The City argued that *Shaw Disposal, Inc. v. Auburn*, 15 Wn. App 65, 546 P.2d 1236 (1976) allowed them to restrict the market to two companies. (RP 51.) However, *Shaw* simply addressed the question of whether a code city needed to conduct a public bidding

the provision of solid waste services is a “government function which the government can control either by performing the function itself or by contracting to have it done without a competitive bidding process” (CP 1331-32.) The trial court therefore concluded “hauling solid waste within the City of Seattle is not a fundamental right to which the privileges and immunity clause would pertain.” (CP 1332.)

1. CDL Hauling is Not a “City Service”

The trial court erred in holding that CDL hauling is a “city service” that displaces the specific mandates of the Washington Constitution. As an initial matter, neither the City nor the trial court pointed to any definition of the term “city service.” Appellants have found no statute, ordinance, or legislative enactment that defines the term “city service” or provides that CDL hauling constitutes a “city service.” In fact, Appellants have uncovered no use or definition of the term “city service” in any context in judicial decisions reported in the Washington Reports.

Because this is an undefined term, it is unclear what activities qualify as a “city service.” It is also unclear what restraints exist on the ability to declare a private economic activity a “city service,” thus

process to issue a waste collection contract. *Id.* at 66-67. It did not dispose of the issue of the constitutionality of a city’s creation of two monopolies where no public purpose exists. In that regard, *Shaw* did not involve a constitutional challenge to Auburn’s issuance of a contract. *Id.* at 66 (“*Shaw Disposal* does not suggest that there is a restriction in the state constitution.”).

permitting a municipality's chosen monopolist to exclusively provide such service without competition from the free market.¹⁶ As the term "city service" appears to be incapable of definition, it is not surprising that neither the City nor the trial court explained the legal principles under which a municipality escapes the mandatory provisions of the Washington Constitution by simply calling something a "city service."

2. CDL Hauling is Not a Government Function

The trial court erroneously concluded that because CDL hauling is a "city service," it is a "government function" that is not subject to the privileges or immunities clause. Unlike the term "city service," the term "government function" is defined in Washington law. However, the provision of CDL hauling, even if accomplished by a city, is not a "government function."

A municipal corporation may act in one of two capacities – governmental or proprietary. *Okeson v. City of Seattle*, 150 Wn.2d 540, 549, 78 P.3d 1279 (2003). Provision of utility services—such as CDL hauling—is a proprietary function because the service is provided to

¹⁶ For instance, Tacoma provides high-speed Internet access through its Click!Network. See <<http://www.click-network.com/Consumer/CableModem/Default.htm>>. Is high-speed Internet access a "city service"? If so, why? If not, why not? Does the provision of this service mean that Tacoma could choose one provider and exclude all other providers from operating within Tacoma? If so, where does this leave the free market or customer choice?

customers upon request. *Id.* at 550. The trial court therefore erred in finding that CDL hauling is a “government function.”

Importantly, when a municipality provides a proprietary service, it is not excused from complying with the requirements of the constitution. “The general rule of law is that a state or municipality cannot avoid the constitutional limitations upon state action by claiming the shield afforded proprietary functions.” *Hillside Community Church v. City of Tacoma*, 76 Wn.2d 63, 65, 455 P.2d 350 (1969).

Thus, even if CDL hauling is properly characterized as the provision of a utility service and a proprietary function of the City, the City is not shielded from the application of the privileges or immunities clause. The privileges or immunities clause prohibits the infringement of fundamental rights in order to grant economic favoritism to corporations and contains no exception for granting special privileges when such privileges are related to the provision of services by a municipality.

3. The City Is Not Insulated By Operation of RCW 81.77.020

RCW 81.77.020 provides that a certificate of convenience and necessity is not required for haulers that operate “under a contract of solid waste disposal with any city or town.” While the City has argued that its decision to restrict the market was constitutionally permissible because CDL hauling is a “city service,” this statute neither explicitly nor

implicitly transforms CDL hauling into a municipal service. Rather, it merely provides that haulers operating under a solid waste contract with a city or town are exempted from the state regulatory scheme.

4. That the City Could Municipalize CDL Hauling Does Not Mean It May Violate Article I, Section 12

Citing *Smith v. Spokane*, 55 Wash. 219, 104 P. 249 (1909), the City has argued that providing CDL hauling services is a municipal power that the City may exercise in its absolute and unfettered discretion. In *Smith*, however, the Court addressed Spokane's municipalization of waste hauling services; it did not address a municipality's grant of a monopoly to a private corporation to collect solid waste. *See Smith*, 55 Wash. at 219. By its terms, the privileges or immunities clause prohibits governments from offering privileges to corporations, but it specifically does not apply to privileges granted to municipal corporations. Wash. Const. art. I, § 12.

Moreover, courts have held that even when cities municipalize an activity like CDL hauling, the exercise of such power must promote public health. For example, in *Parker v. Provo City Corp.*, 543 P.2d 769, 770 (Utah 1975), the Supreme Court of Utah held that the City of Provo exceeded its power by enacting an ordinance prohibiting the collection and disposal of waste¹⁷ by anyone other than the City of Provo. "By its

¹⁷ The Supreme Court of Utah took pains to distinguish the waste involved from garbage.

prohibition of a legitimate endeavor, which is not shown to bear a reasonable relation to public health, [the City] cannot, under its power to protect the public health, invade a private property right.” *Id.* Here, the City’s creation of monopolies was not necessitated by any public health or safety rationale. Rather, the City decided to restrict the CDL hauling market in order to avoid a lawsuit.

Accordingly, the City’s argument that it was permissible for it to put Kendall Trucking out of business because it could have municipalized the entire CDL industry to the exclusion of Rabanco and Waste Management affords the City no comfort. (RP 54.)

D. The City’s Creation of Monopolies Exceeds Its Authority

The trial court erred by not finding that the City exceeded its authority by monopolizing the CDL hauling industry without a direct grant of authority and in contravention of the City’s Charter.

1. City Lacks Authority to Monopolize CDL Hauling

The waste material involved here is shown to be corrugated cardboard, sawdust, lumber scraps, plastic wrappings, packing materials of various natures, paper, tin cans, bottles, some paint and varnish containers and general rubbish. Nowhere in the record do we find that this waste is garbage, kitchen refuse, or a by-product which may be deemed deleterious to the public health. The definition section of the subject ordinance makes a definite distinction between garbage and waste.

Parker, 543 P.2d at 769-70.

Municipalities have only those powers expressly granted, necessarily or fairly implied, or those incident to the powers expressly granted, or essential to the declared objects and purposes of the municipality. *Port of Seattle v. Washington Util. & Transp. Comm'n*, 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979); *Seattle v. Amalgamated Transit Union*, 118 Wn.2d 639, 643, 826 P.2d 167 (1992). Moreover, “where any fair, reasonable, substantial doubt exists, such doubt is resolved against the municipality.” *Parker v. Provo City Corp.*, 543 P.2d at 770.

The United States Supreme Court has held that “the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them.” *Water, Light & Gas Co. v. Hutchinson*, 207 U.S. 385, 397 (1907) (internal quotation marks and citation omitted); *see also City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 14 (1898) (“[h]ad the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect”); *Parker*, 543 P.2d at 770.

Here, Appellants have uncovered no legislation granting the City the express authority to award exclusive franchises for CDL hauling, nor can it be argued that exclusivity is indispensable to the City’s exercise of

its powers. (CP 923.) (Deposition of Ray Hoffman, p. 181, ll. 6-7.) (“The City can achieve its solid waste goals by contracting with one or more companies.”) (Emphasis added.); (RP at 51.) (By Mr. Patton: “[I]s this absolutely the only way you can accomplish this? Well, no.”).

Persuasively, in a similar case the Supreme Court of Utah held that the City of Provo exceeded its authority by enacting an ordinance that municipalized the collection and disposal of “waste matter” within city limits. After reviewing the claimed statutory authority, the court explained, “Obviously, there is no express grant, nor can it be fairly implied; and certainly it is not indispensable to the purposes and objects of [the City].” *Parker*, 543 P.2d at 770. As a result, the court held that the City exceeded its authority and voided the challenged ordinance. *Id.*

Without an express or indispensable legislative grant of authority to monopolize the CDL hauling industry, the City’s reliance on Washington precedent to justify its actions fails. For example, the City has maintained that *Snohomish County P.U.D. v. Broadview Television Co.*, 91 Wn.2d 3, 586 P.2d 851 (1978) demonstrates that the legislature intended to give cities the broadest possible authority to manage and operate solid waste handling systems. This case, however, holds nothing of the sort. *Broadview Television* involved a challenge to the public utility district’s authority to set rates for use of its utility poles. As such, it

simply does not address whether the legislature expressly provided municipalities in Washington with the power to grant exclusive franchises for CDL hauling.

No Washington statute expressly provides or fairly implies that the City possesses the authority to restrict the CDL hauling market to all but two companies. As the legislature has not provided the City with this power, its grant of exclusive franchises here is impermissible.

Hutchinson, 207 U.S. at 397; *Parker*, 543 P.2d at 770.

2. City Charter Explicitly Forbids Creation of Monopolies

Not only does the City lack an express or fairly implied grant of legislative authority to monopolize the CDL hauling industry, the City's Charter expressly prohibits such activity. The City's Charter provides, "No exclusive franchise or privilege shall be granted for the use of any street or other place or any part thereof." *See* Charter of the City of Seattle, art. IV, sec. 18. Accordingly, the City's grant of exclusive franchises to Rabanco and Waste Management is not "necessarily or fairly implied" or "indispensable" to the exercise of its power when the City's organic governing document specifically forbids it from granting such privileges.

E. The City’s Actions Violate the Mandates of RCW 35.21

The trial court concluded that Washington law permits the City to award exclusive contracts for CDL hauling without following the procedures contained in RCW 35.21.156. The trial court explained:

The plaintiffs also allege that the City, by not entertaining a bidding process for hauling CDL waste violated RCW 35.21.156. This statute sets forth requirements for bidding relating only to construction of capital facilities for waste transfer and disposal, not hauling. RCW 35.21.120 applies to “any service related to solid waste handling (including hauling)” and requires no such competitive process.

(CP1332.) This interpretation of the statutory scheme is simply erroneous.

As an initial matter, the trial court failed to accurately quote the applicable text of RCW 35.21.120. That statute provides, in operative part:

A city or town may by ordinance provide for the establishment of a system or systems of solid waste handling for the entire city or town or for portions thereof. A city or town may provide for solid waste handling by or under the direction of officials and employees of the city or town or may award contracts for any service related to solid waste handling including contracts entered into under RCW 35.21.152.

RCW 35.21.120 (emphasis added). RCW 35.21.120 authorizes a city or town to award contracts for “any service” related to solid waste handling systems and, by its terms, specifically requires reference to RCW 35.21.152. RCW 35.21.120 does not, however, describe the process by

which a city awards such contracts. Accordingly, RCW 35.21.120 is merely the first statute that must be examined when determining whether a city has complied with the applicable regulatory scheme.

The second statute a court must examine is RCW 35.21.152. This statute provides, in part:

A city or town may construct, lease, condemn, purchase, acquire, add to, alter, and extend systems, plants, sites, or other facilities for solid waste handling, and shall have full jurisdiction and authority to manage, regulate, maintain, utilize, operate, control, and establish the rates and charges for those solid waste handling systems, plants, sites or other facilities owned or operated by the city or town.

RCW 35.21.152 (emphasis added). Importantly, this statute also provides municipalities with the authority to enter into agreements with public or private parties to “[c]onstruct, lease, purchase, acquire, manage, maintain, utilize, or operate publicly or privately owned or operated solid waste handling systems, plants, sites, or other facilities” *Id.* (emphasis added). Again, while this statute describes the authority possessed by cities and towns to maintain and operate “systems, plants, sites, or other facilities for solid waste handling,” RCW 35.21.152, like RCW 35.21.120, does not describe the process by which a city exercises its authority.

That mandatory process governing a city's solid waste handling system is memorialized in RCW 35.21.156. This statute provides that the legislative authority of a city or town

may contract with one or more vendors for one or more of the design, construction, or operation of, or other service related to, the systems, plants, sites, or other facilities for solid waste handling in accordance with the procedures set forth in this section. Solid waste handling systems, plants, sites, or other facilities constructed, purchased, acquired, leased, added to, altered, extended, maintained, managed, utilized, or operated pursuant to this section, RCW 35.21.120 and 35.21.152, whether publicly or privately owned, shall be in substantial compliance with the solid waste management plan applicable to the city or town

RCW 35.21.156 (emphasis added). Importantly, RCW 35.21.156 requires reference to *both* RCW 35.21.120 and 35.21.152. As RCW 35.21.120 and 35.21.152 grant municipalities the authority to enact ordinances and manage "solid waste handling systems," and RCW 35.21.156 specifically governs "contracts" for "solid waste handling systems," a municipality must comply with the requirements contained in RCW 35.21.156 when awarding a contract for solid waste hauling.

In that regard, RCW 35.21.156 creates an exhaustive list of requirements that must be met before a city is permitted to execute contracts pursuant to RCW 35.21. For example, RCW 35.21.156(2) requires that a city publish notice of its requirements and request submission of qualifications statements or proposals. The statute also

requires that such notice be published in the official newspaper of the city “at least once a week for two weeks not less than sixty days before the final date for the submission of qualifications statements or proposals.” RCW 35.21.156(2). Once the legislative authority of a city decides to proceed with the consideration of qualifications or proposals, the city must then designate a representative to evaluate the vendors that submitted qualifications statements or proposals. RCW 35.21.156(3). If two or more vendors submit qualifications or proposals that meet the criteria established by the city, discussions and interviews must be held with at least two vendors. *Id.* And prior to entering into a contract with a vendor, the legislative authority of the city must make written findings – after holding a public hearing on the proposal – that it is in the public interest to enter into the contract and that the contract is financially sound. RCW 35.21.156(6).

Here, it is undisputed that the City failed to comply with any of the procedural mandates of RCW 35.21.156. Instead, it simply began negotiating with Rabanco and Waste Management and awarded exclusive contracts to these two corporations. (CP 547-48.)

The City has maintained that it was not required to follow the procedural requirements of RCW 35.21.156. At the same time, however, the City has claimed authority to grant monopolies for the hauling of CDL

pursuant to RCW 35.21.152. The City’s attempt to sidestep the procedural requirements of RCW 35.21.156 while claiming authority to monopolize CDL hauling pursuant to RCW 35.21.152 fails as a matter of law because the City is trying to have it both ways – it wishes to use RCW 35.21.152 as authority to monopolize hauling and avoid RCW 35.21.156 because it failed to follow any of the requirements in that statute.

RCW 35.21.156(1) applies to the “design, construction, or operation of, or other service related to, the systems, plants, sites, or other facilities for solid waste handling . . .” (emphasis added). RCW 35.21.152, the statute under which the City claims authority, concerns “solid waste handling systems, plants, sites, or other facilities”—precisely the facilities and services described in RCW 35.21.156. If RCW 35.21.156, which mandates procedures for contracting for “solid waste handling systems, plants, sites, or other facilities,” does not apply, then RCW 35.21.120 and RCW 35.21.152 also do not apply and the City lacks the legislative authority to enter into such contracts.

The trial court erroneously held that the City was not required to comply with RCW 35.21.156 when granting monopolies in the CDL hauling industry. (CP 1332.) Because the City failed to comply with any of the procedural mandates of RCW 35.21.156, this Court should hold that

the City exceeded its authority in executing the contracts with Rabanco and Waste Management.

F. The City's Actions Constitute an Unconstitutional Taking of Private Property

The trial court erred in failing to find that the City's taking of the right to freely alienate property and the transfer of that right to two private entities constitutes a taking in violation of article I, section 16 of the Washington Constitution.

The chief incidents of ownership of property are the right to possession, use, enjoyment, and the ability to sell or dispose of property. *Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597, 599, 528 P.2d 471 (1974). The right to dispose of property is a fundamental attribute of property ownership. *Manufactured Housing Cmty's v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000) (property in a thing consists not merely of ownership and possession, but the unrestricted right of use, enjoyment and disposal).

As discussed above, the City takes title only to CDL produced by commercial establishments; either through inadvertence or design, it does not take title to CDL produced by residential customers. (CP 547.) Up until the time residential CDL is picked up, and to the extent the homeowner does not wish to retain the CDL, Haider therefore owns the

CDL and has the right to possess, use, enjoy, sell, and dispose of CDL produced at his residential construction sites. (CP 547.) Once Rabanco or Waste Management collects CDL from a residential construction site, however, those incidents of ownership pass and the companies then own the property. *See Manufactured Housing*, 142 Wn.2d at 364. Requiring Haider to transfer ownership of residential CDL to Rabanco or Waste Management destroys his right to dispose of his property and transfers this valuable property right to Rabanco and Waste Management, two private entities. In so doing, the City takes Haider's property because anything that disposes of the elements of property (including the right to dispose of it) destroys that property right in the owner and transfers it to Rabanco and Waste Management. *See id.*

The taking and transfer of this private property right to private entities violates article I, section 16 and its mandate that, "Private property shall not be taken for private use" Only Rabanco and Waste Management possess and have the use of residential CDL – the public does not use it in any way. *Manufactured Housing*, 142 Wn.2d at 371-72. The worth of the property to be disposed is unimportant; none of the case law mandates that property must have a value before the right to dispose of it attaches. The enforcement of the City's ordinances therefore

constitutes an appropriation of Haider's property rights and an unconstitutional transfer of such rights to private parties.

G. The City's Creation of Monopolies Violates Article I, Section 23 of the Washington Constitution

The trial court erred by concluding that the City's ordinances did not interfere with a valid contract between Appellants. The trial court justified the City's impairment of their contract, explaining "performance on the contract between Mr. Ventenbergs (who had neither [a] certificate nor a contract with the city) and Mr. Haider during the April 2001 to October 2002 period, and thereafter, was in violation of state law and their contract for this performance was void as against public policy." (CP 1331.)

As discussed above, the City, Rabanco, Waste Management and the WUTC all viewed the WUTC's jurisdiction over solid waste hauling in Seattle as ending once the City executed its contracts with Rabanco and Waste Management. Importantly, there existed no City ordinance that made it illegal to haul CDL in Seattle from April 1, 2001 until the effective date of the ordinance in November 2002. (CP 546.) Appellants were not parties to the contracts between the City and Rabanco and Waste Management. The oral contracts between Appellants were therefore valid from April 1, 2001 until November 2002 and the City's subsequent

ordinances substantially impaired these contracts by making them violations of City law. *Margola Assoc. v. Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993) (impairment is substantial if the complaining party relied on the supplanted part of the contract).

Even when an area is heavily regulated, the contract clause protects an impaired contract if the impairment is not justified by “a broad societal purpose.” *Birkenwald Dist. Co. v. Heublein, Inc.*, 55 Wn. App. 1, 8, 776 P.2d 721 (1989). “[E]ven minimal impairment of contractual expectations violates the contract clause where there is no real exercise of police power to justify the impairment.” *Id.* at 9. Special interest legislation with no showing of an attempt to address an important general social problem cannot stand under the clause. *Id.* Further, purely financial obligations of a state do not necessarily come within the ambit of the police powers. “If they did, the contract clause would be simply gutted.” *Caritas Serv’s, Inc. v. Department of Social and Health Serv’s*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994).

Here, there is no public health and safety reason to restrict the market to two entities. There was no “broad societal purpose” to the ordinances such that would justify the impairment of Appellants’ contracts. Because the ordinances constitute special legislation in favor of Rabanco and Waste Management – without any attempt to address an

important general social problem – the laws cannot stand under the contract clause.

Appellants entered into a mutually beneficial and valid contractual relationship that both wished to preserve. The challenged legislation substantially impaired that relationship when it made Ventenbergs' performance under the contract illegal and forced Haider Construction and its customers to use a service provider Haider believes offers inferior service. There is no reasonable or necessary legislative purpose justifying this impairment and the City's ordinances violate article I, section 23.

CONCLUSION

This Court should reverse the decision of the trial court.

Article 1, section 12 of the Washington Constitution was specifically enacted to prevent economic favoritism and the grant of special privileges to corporations by the government. The record here contains uncontradicted evidence that the City interfered with Ventenbergs' fundamental right to follow his profession and granted exclusive franchises to Rabanco and Waste Management for CDL hauling for reasons unrelated to any public health or safety concern. Accordingly, this Court should hold that SMC 21.36.012(5) and SMC 21.36.030 unconstitutionally violate article I, section 12.

The City's creation of CDL hauling monopolies was neither authorized by the state legislature nor permitted by the City's Charter. This Court should hold that the City's enactment of SMC 21.36.012(5) and SMC 21.36.030 exceeded its authority.

The City failed to comply with any of the procedural mandates of RCW 35.21.156 when granting monopolies in the CDL hauling industry. Accordingly, this Court should hold that the City exceeded its authority in executing the contracts with Rabanco and Waste Management.

The City violated Appellant Haider's right to freely dispose of his property and transferred this right to private entities by mandating that he contract with Rabanco or Waste Management to haul waste from his worksites. This Court should hold that the operation of SMC 21.36.012(5) and SMC 21.36.030 violates article I, section 16 of the Washington Constitution, which prohibits the government from taking and transferring private property for private use.

Finally, the City invalidated Appellants' contracts when it made Ventenbergs' performance illegal and forced Haider to contract with Rabanco and Waste Management instead. As a result, this Court should hold that the enactment of SMC 21.36.012(5) and SMC 21.36.030 impaired Appellants' contracts in violation of article I, section 23 of the Washington Constitution.

RESPECTFULLY submitted this 28th day of June 2004.

INSTITUTE FOR JUSTICE
Washington Chapter

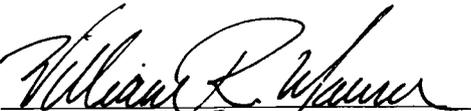
By 
William R. Maurer, WSBA #25451
Jeanette M. Petersen, WSBA #28299
Charity Osborn, WSBA #33782
811 First Avenue, Suite 625
Seattle, Washington 98104
(206) 341-9300
Attorneys for Appellants

EXHIBIT ONE

110

A

DICTIONARY OF LAW,

CONSISTING OF

JUDICIAL DEFINITIONS AND EXPLANATIONS

OF

WORDS, PHRASES, AND MAXIMS,

AND AN

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DICTIONARY AND COMPENDIUM OF AMERICAN
AND ENGLISH JURISPRUDENCE.

BY

WILLIAM C. ANDERSON,

OF THE PITTSBURGH BAR.

CHICAGO:

T. H. FLOOD AND COMPANY,

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1889.

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Print means, apparently, a picture, something complete in itself, similar in kind to an engraving cut or photograph.¹

Although the law recognizes a distinction between a "painting" and a "print," a copyright of the former will protect the owner in the sale of copies which may appropriately be called prints or lithographic copies.² See COPYRIGHT; DESIGN, 2; NOCITUR. A SOCIIS.

Printed. The "printed" copy of the title of a book or other article required by Rev. St., § 4956, to be deposited with the Librarian of Congress, may be printed with a pen.³

The place from which a newspaper is issued to subscribers is the place where it is "printed and published," although the press-work is done in another city.⁴

That one may subscribe by a printed name, see SUBSCRIBER, 1.

Printer. In a statute, may include the publisher of a newspaper.⁵

Printing. See COPYRIGHT; ORIGINAL, 2; PUNCTUATION; WRITING.

PRIOR; PRIORITY. Prior: a going before. Priority: precedence; legal preference.

A debt, incumbrance, or invention, is said to have or to take priority over another or others; and United States law, over State law. Compare JUNIOR, 3.

In paying the debts of a decedent, his executor or administrator must observe the rules of priority; otherwise, on deficiency of assets, if he has paid those of a lower degree first, he will have to pay those of a higher degree out of his own funds.⁶

See TEMPUS, Prior, etc.

PRISON.⁷ A public building in which may be confined persons charged with or convicted of a crime, and persons who can give important testimony on the trial of criminal cases. Compare JAIL; PENITENTIARY; REFORMATORY.

A "state prison," in its general sense, means a place of confinement for state prisoners; that is, for persons charged with political offenses, and confined for reasons of state. But in some States the term designates the penitentiary maintained by the State for the confinement of prisoners convicted of certain crimes, in distinction from other prisons maintained and used by counties and cities.⁸

Prison bounds, or limits; rules of prison. A district around a prison within which a debtor, released from confinement under bond, may go at large.

A slight, temporary, unintentional overstepping of the line is not such breach of the condition not to go beyond the limits set as will render the sureties liable for the debt.¹

Prison breach, or breaking. The act of a prisoner in escaping from the place in which he is in lawful custody; also, the act of breaking into such place to aid a prisoner in escaping.² See ESCAPE, 2.

Prisoner. A person deprived of his liberty by virtue of judicial or other lawful process.

Not then, necessarily, a person confined within the walls of a prison, as see IMPRISONMENT; BAIL, 2.

Rev. St., § 5341, provides that a person convicted of an offense against the United States and sentenced for a term longer than one year, may, by direction of the court, be confined in a State prison.³

To the same effect are §§ 5342 and 5348. Congress here recognizes a distinction between a "sentence," and an "order" for the execution of the sentence: the "order" is not necessarily a part of the judgment.⁴

There is no reason, in principle, why the prisoner should be present when an order changing the place of his confinement is signed by the court.⁴

PRIVATE.⁵ Affecting or belonging to a single person or persons, as distinguished from the people at large; opposed to public or state. Compare PUBLIC; PRIVY.

As, private or a private — agent, boundary, bridge, carrier, charity, corporation, conveyance, counsel, easement, examination of a married woman or witness, law — act or statute, nuisance, person, property, rights, wrong, *qq. v.*

Privateer. A vessel owned and officered by private persons, but acting under a commission from a hostile or belligerent state, usually called "letters of marque,"⁶ *q. v.*

PRIVIES. See PRIVY, 2.

PRIVILEGE.⁷ 1. Exemption from such burdens as others are subjected to.⁸

A right peculiar to the person on whom conferred, not to be exercised by another or others.⁹

¹ Randolph v. Simon, 29 Kan. 406 (1883).

² See 4 Bl. Com. 130; 43 N. J. L. 555.

³ Exp. Karstendick, 93 U. S. 396 (1876).

As to condition of prisons and the prison system, at the close of the last century, see McMaster's Hist. Peop. U. S., Vol. 1, pp. 98-102.

⁴ Exp. Waterman, 33 F. R. 30 (1887).

⁵ L. *privatus*, apart; *privus*, sundered, single.

⁶ [Woolsey, Int. Law, § 127; 1 Kent, 96.

⁷ L. *privilegium*, *q. v.*

⁸ State v. Betts, 24 N. J. L. 537 (1854), Potts, J.

⁹ City of Brenham v. Brenham Water Co., 67 Tex. 552 (1887), Stayton, A. J.

Brown, J.; Rosenbach v. Dreyfuss, 2 F. R. 221 (1880); 5 Blatch. 335; 97 U. S. 365.

¹ Yuengling v. Schile, *ante*.

² Schumacher v. Schwenke, 30 F. R. 691 (1887).

³ Chapman v. Ferry, 18 F. R. 539 (1883).

⁴ Boyer v. Hoboken, 44 N. J. L. 131 (1882).

⁵ Bunce v. Reed, 16 Barb. 350 (1853).

⁶ 2 Bl. Com. 511; 1 Story, Eq. §§ 553, 557, 837.

⁷ F. prison: L. *prænsio*, *prehensio*, a seizing, seizure.

⁸ Martin v. Martin, 47 N. H. 52 (1866), Perley, C. J.

The exercise of mental power cannot be a privilege: it is not derived from a law granting a special prerogative contrary to common right.¹

A right peculiar to an individual or body.²

An exemption or immunity; as, from taxation.³ See under Tax, 2.

Personal privilege. Such privilege as is granted to or concerns an individual person. **Real privilege.** In English law, a privilege granted to a place.

Illustrations of personal privileges are: a debtor's claim for exemption; immunity from taxation; a widow's rights; most disabilities, as, disability in a feme-covert. Many such privileges may be waived.

Special or exclusive privilege. Any particular or individual authority or exemption existing in a person or class of persons, and in derogation of common right; as, the grant of a monopoly.⁴

Within the meaning of the prohibition in the constitution of New York against granting to private corporations "any exclusive privilege," describes grants in the nature of monopolies, of such inherent or statutory character as to make impossible the co-existence of the same right in another.⁵

Grants of special privileges are strictly construed; whatever is not given in unequivocal terms is withheld.⁶ See FRANCHISE, 1; MONOPOLY.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁷

This provision is confined to such privileges and immunities as are fundamental; which belong of right to the citizens of all free governments; and which have always been enjoyed by citizens of the several States, from the time of their becoming free, independent, and sovereign. What these fundamental principles are may be comprehended under these heads: protection by the government, and enjoyment of life and liberty, with the right to acquire and possess property and to pursue and obtain happiness and safety, subject to such restraints as the government may prescribe for the general good of the whole.^{8, 9}

¹ Lawyers' Tax Cases, 8 Heisk. 649 (1875), Turney, J.; 4b. 473-75.

² Ripley v. Knight, 123 Mass. 519 (1878), Endicott, J.

³ See Tennessee v. Whitworth, 117 U. S. 146 (1886); 9 Baxt. 546; Louisville, &c. R. Co. v. Gaines, 3 F. R. 278-79 (1880); 80 Ky. 274; 2 N. M. 169; 4 Tex. Ap. 317.

⁴ See Elk Point v. Vaughn, 1 Dak. 118 (1875); 1 Utah, 111; 1 Bl. Com. 272.

⁵ Trustees of Exempt Firemen's Fund v. Roome, 98 N. Y. 323 (1883), Finch, J.

⁶ Moran v. Commissioners, 2 Black, 722 (1862); Delaware Railroad Tax, 18 Wall. 225 (1873); Hannibal, &c. R. Co. v. Missouri Packet Co., 125 U. S. 271 (1888), cases.

⁷ Constitution, Art. IV, sec. 2.

⁸ Corfield v. Coryell, 4 Wash. 380 (1823), Washington, J.; Felkner v. Tighe, 39 Ark. 357 (1882).

⁹ Slaughter-House Cases, 16 Wall. 75-78 (1872).

The privileges and immunities intended are those which are common to the citizens of a State under its constitution and laws, by virtue of their being citizens. Special privileges enjoyed in one State are not secured in other States.¹

That section of the Constitution is directed against State action. Its object is to place the citizens of each State upon the same footing with citizens of other States, and inhibit discriminative legislation.^{2, 3}

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁴

The privileges of a citizen are those which he has as a citizen, first, of the United States, and, second, of the State where he resides as a member of society. The XIVth Amendment forbids the States to abridge the former, but not so the latter—one of which, for example, is marriage.⁵

"Privileges and immunities" are words of very comprehensive meaning. They include, at least, the right of a citizen of one State to pass into any other State for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personalty; to take and hold realty; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.⁶

The right to practice law in the State courts is not a privilege or immunity of a citizen of the United States, within the meaning of the XIVth Amendment; nor does the Amendment affect the power of the State to prescribe the qualifications for admission to the bar.⁷

Abridgment of the right to sell intoxicating liquors is not forbidden;⁸ nor of the right of trial by jury in suits at common law pending in the State courts.⁹

The Amendment refers to actions of the political body denominated a State: no agency of a State or of the officers or agents by whom its powers are executed, shall deny to any persons within its jurisdiction the equal protection of the law.¹⁰

See IMMUNITY; PROCESS, 1, Due; SUFFRAGE.

2. Exemption from arrest, *q. v.*

3. A communication from a client to his attorney which the latter may not divulge without the consent of the client. See COMMUNICATION, Privileged, 1.

4. The constitutional provision (intended to secure free expression of opinion) that for any speech or debate in either house of a

¹ Paul v. Virginia, 8 Wall. 168 (1868), Field, J.

² United States v. Harris, 106 U. S. 643 (1882), Woods, Justice.

³ Slaughter-House Cases, 16 Wall. 75-78 (1872).

⁴ Constitution, Amd. Art. XIV, sec. 1. Ratified July 28, 1868.

⁵ Exp. Kinney, 3 Hughes, 12-13 (1879), cases.

⁶ Ward v. Maryland, 12 Wall. 430 (1870), Clifford, J.

⁷ Bradwell v. Illinois, 16 Wall. 137-42 (1874).

⁸ Bartemeyer v. Iowa, 18 Wall. 133 (1873).

⁹ Walker v. Sauvinet, 92 U. S. 92 (1875).

¹⁰ Exp. Virginia, 100 U. S. 346-47 (1879), Strong, J.

legislature the member shall not be questioned in any other place.¹

The privileges of members of Parliament are: of speech, of person, of domestics, and of goods.²

"A breach of privilege is any contempt of the high court of Parliament, whether relating to the House of Lords or to the House of Commons."

5. In maritime law, the lien of a seaman on a vessel for wages. See LIEN, Maritime.

6. In civil law, a claim on a thing which exists apart from possession, and until waiver or satisfaction.

Privileged. Enjoying a peculiar right or immunity: as, privileged from arrest, a privileged communication, *qq. v.*

A privileged debt is payable prior or in preference to some other debt. See PRIORITY.

PRIVILEGIUM. L. A private law: an enactment which conferred upon a person some anomalous or irregular right, or imposed some such obligation or punishment.

PRIVITY. See PRIVY, 2.

PRIVY.³ 1, *adj.* (1) Connected with; concerned with; affected alike.

(2) In the sense of "private," used in the English phrases privy council, privy seal, *qq. v.*

Privy verdict. A verdict given privily to the judge, out of court; similar to a sealed verdict.⁴ See further VERDICT.

2, *n.* A person so connected with another in an estate, a right, or a liability as to be affected as he is affected.

Privies are persons between whom some connection exists, arising from a mutual contract: as, donor and donee; lessor and lessee; or, persons related by blood: as, ancestor and heir.⁵

Privies in blood. Ancestor and heir, and co-parceners. *Privies in estate.* Lessor and lessee, donor and donee, and joint-tenants.

Privies in representation. Testator and executor, intestate and administrator. *Privies in law.* Are created by the law casting land upon a person, as, in escheat.⁵

Privity. (1) Mutual or successive relationship to the same rights of property.⁶

(2) Participation; complicity.

May refer to some fault or neglect in which one personally participates; as, in the expression, "loss occasioned without the privity" of another vessel.¹

Privity of contract. Something on which an obligation, an engagement, a promise can be implied.²

No action lies where there is no privity of contract. Thus, B cannot maintain an action against C, where A, who is under a contract to sell an article to B, is induced by C to sell to C himself.³

The holder of a bill or check cannot sue the bank for refusing payment, in the absence of proof that the bill was accepted by the bank or charged against the drawer.⁴

When one suffers loss from the negligence of another, and there is neither fraud or collusion nor privity of contract, the person causing the loss is not liable therefor, unless the act is one immediately dangerous to the lives of others, or is an act not performed in pursuance of a legal duty.⁵

The rule undoubtedly is that a person cannot be affected by any evidence, decree, or judgment to which he was not actually, or in consideration of law, a privy. This rule has been departed from so that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is also evidence; as, in cases of public rights of way, immemorial customs, disputed boundaries, and pedigrees.⁶

A party claiming through another is estopped by that which is established as to that other respecting the same subject-matter.⁷

The ground upon which persons standing in this relation to a litigating party are bound by the proceedings is, that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded.⁸ See ADJUDICATION, Former.

Because they are identified in interest, the admission of one privy binds his fellows.⁹ See RES, *Inter alios*.

PRIZE. 1. Ordinarily, some valuable thing, offered by a person for the doing of a thing by others, into the strife for which he does not enter.¹⁰ See BET; LOTTERY.

¹ Lord v. Steamship Co., 4 Saw. 300 (1877), cases; R. S. § 4283; 102 U. S. 541.

² Cary v. Curtis, 3 How. 247 (1845), Daniel, J. See also 4 Pet. 83; 7 Ct. Cl. 526; 3 Ga. 430; 41 Iowa, 516; 20 Minn. 431; 35 N. H. 16; 54 *id.* 378; 48 Barb. 82; 64 Pa. 246; 4 Lea, 123.

³ Ashley v. Dixon, 48 N. Y. 430 (1872).

⁴ Bank of the Republic v. Millard, 10 Wall. 152 (1869); First Nat. Bank of Washington v. Whitman, 94 U. S. 344 (1876).

⁵ Savings Bank v. Ward, 100 U. S. 205-6 (1879), cases, Clifford, J.

⁶ Patterson v. Gaines, 6 How. 599 (1848), cases, Wayne, J.

⁷ Stacy v. Thrasher, 6 How. 59-60 (1848).

⁸ 1 Greenl. Ev. § 523, cases; Litchfield v. Goodnow, 123 U. S. 551 (1887), cases.

⁹ 1 Greenl. Ev. § 189. See generally 1 Harv. Law Rev. 226-32 (1887), cases.

¹⁰ Harris v. White, 81 N. Y. 539 (1880), Folger, C. J.

¹ See Constitution, Art. I, sec. 6.

² 1 Bl. Com. 164.

³ Privy. L. *privatus*, apart: *privus*, single.

⁴ 3 Bl. Com. 377; 5 Phila. 124; 6 *id.* 520.

⁵ 1 Greenl. Ev. § 189. As to privies in estate, see 20 Am. Law Rev. 339-411 (1885), cases.

⁶ 1 Greenl. Ev. § 189; 6 How. 59; 15 Barb. 588.

EXHIBIT TWO

A. Netto v. ...

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OF THE

English Language

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UNDER THE SUPERVISION OF

ISAAC K. FUNK, D. D., LL. D., Editor-in-Chief

FRANCIS A. MARCH, LL. D., L. H. D., Consulting Editor DANIEL S. GREGORY, D. D., LL. D., Managing Editor

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APPENDIX

RELEVANT ORDINANCES AND STATUTES

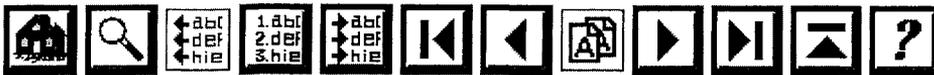


Seattle City Charter

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ARTICLE IV. Legislative Department. Section 18. EXCLUSIVE FRANCHISES PROHIBITED

No exclusive franchise or privilege shall be granted for the use of any street or other place or any part thereof.



THE SEATTLE MUNICIPAL CODE

*** CURRENT THROUGH OCTOBER 20, 2003 (ORDINANCE 121317) ***

TITLE 21 UTILITIES
SUBTITLE III SOLID WASTE[1]
CHAPTER 21.36 SOLID WASTE COLLECTION
SUBCHAPTER I GENERAL PROVISIONS

Seattle Municipal Code § 21.36.012

21.36.012 Definitions C--E.

1. "Can" means a watertight, galvanized, sheet metal or plastic container not exceeding thirty-two (32) gallons in capacity, fitted with at least one (1) sturdy handle and a tight cover equipped with a handle, except in the case of sunken cans, such can to be rodent and insect proof and to be kept in a sanitary condition at all times. Alternative containers such as bags, boxes and bundles may be used in place of cans for materials in excess of the customer's primary container. A can or alternate container shall not exceed sixty (60) pounds for each thirty-two (32) gallons of nominal capacity.

2. "Can-unit pickup" means a pickup of a group of cans made of durable corrosion-resistant, nonabsorbent material, watertight, with a close-fitting cover and two handles. Size to exceed twenty (20) gallons, but not to exceed thirty-two (32) gallons or four (4) cubic feet.

3. "Cart" (also at times referred to as "toter" or "wheeled container") means a watertight plastic container, not greater than one-half ($1/2$) cubic yard in capacity and equipped with wheels, handles and a tight-fitting cover. "Wheeled containers" means containers capable of being mechanically unloaded into the contractor's collection vehicles.

4. "City" means The City of Seattle.

5. "City's Waste" means all residential and nonresidential solid waste generated within the City, excluding Unacceptable Waste, Special Waste, and materials destined for recycling, which materials shall contain no more than ten (10) percent non-recyclable material, by volume. City's Waste includes all such waste, regardless of which private or public entity collects or transports the waste. City's Waste includes all waste remaining after recycling.

6. "Clean wood waste" means and will consist of wood pieces generated as byproducts from manufacturing of wood products, hauling and storing of raw materials, tree limbs greater than four (4) inches in diameter and wood demolition waste (lumber, plywood, etc.) thrown away in the course of remodeling or construction, and waste approved for wood-waste recycling by the Director of the Seattle Public Utilities. It excludes clean yardwaste, treated lumber, wood pieces, or particles containing chemical preservatives, composition roofing, roofing paper, insulation, sheetrock, and glass.

7. "Commercial establishment" means any nonresidential location from which the solid waste is collected by the contractor, and includes the nonresidential portion of mixed use buildings.

8. "Commercial waste" means MSW and CDL collected from commercial establishments within the City.

9. "Compacted material" means material which has been compressed by any mechanical device either before or after it is placed in the receptacle handled by the collector.

Seattle Municipal Code § 21.36.012

10. "Compactor disconnect/reconnect cycle" means the service of disconnecting a compactor from a drop box or container prior to taking it to be dumped and then reconnecting the compactor when the drop box or container is returned to the customer's site.

11. "Compostable waste" means any organic waste materials that are source separated for processing or composting, such as yard waste and food waste.

12. "Composting" means the controlled degradation of organic waste yielding a product for use as a soil conditioner.

13. "Construction, Demolition and Landclearing Waste" or "CDL Waste" means waste comprised primarily of the following materials:

a. Construction waste: waste from building construction such as scraps of wood, concrete, masonry, roofing, siding, structural metal, wire, fiberglass insulation, other building materials, plastics, styrofoam, twine, baling and strapping materials, cans and buckets, and other packaging materials and containers.

b. Demolition waste: solid waste, largely inert waste, resulting from the demolition or razing of buildings, roads and other man-made structures. Demolition waste consists of, but is not limited to, concrete, brick, bituminous concrete, wood and masonry, composition roofing and roofing paper, steel, and minor amounts of metals like copper. Plaster (i.e., sheet rock or plaster board) or any other material, other than wood, that is likely to produce gases or leachate during its decomposition process and asbestos wastes are not considered to be demolition waste.

c. Landclearing waste: natural vegetation and minerals from clearing and grubbing land for development, such as stumps, brush, blackberry vines, tree branches, tree bark, mud, dirt, sod and rocks.

14. "Container" means a bundle, bundle-of-yardwaste, can, cart or detachable container used for collection of garbage, recyclable materials or yardwaste.

15. "Container collection" means collection of commercial or residential waste, recyclable materials or yardwaste from bundles, bundles-of-yardwaste, cans, carts, or detachable containers.

16. "Contaminated soils" means soils removed during the cleanup of a remedial action site, or a dangerous waste site closure or other cleanup efforts and actions which contain harmful substances but are not designated dangerous wastes. Contaminated soils may include excavated soils surrounding underground storage tanks, vector wastes (street and sewer cleanings), and soil excavated from property underlying industrial activities.

17. "Contractor" means those contracting with the City to collect and dispose of solid waste as described in this section, or the authorized representative of such contractors.

18. "Dangerous waste" means those solid wastes designated in WAC 173-303-070 through WAC 173-303-103 as dangerous or extremely hazardous waste.

19. "Detachables container" means a watertight, all-metal container, not less than one-half ([1/2]) cubic yard in capacity and equipped with a tight-fitting metal or other City-approved cover. The term shall also apply to containers of other material of similar size when approved by the Director of Seattle Public Utilities. Containers two (2) cubic yards and under shall be equipped with at least three (3) wheels.

20. "Director of Seattle Public Utilities" means the Director of Seattle Public Utilities of The City of Seattle and authorized employees.

21. "Disposal site" means the areas or facilities where any final treatment, utilization, processing or deposition of solid waste occurs. See also the definition of interim solid waste handling site.

22. "Drop box" (also at times referred to as "rolloff" or "lugger" or "dino") means a metal container, of three (3) to forty (40) cubic-yard-capacity, capable of being mechanically loaded onto a collection vehicle for transport to a disposal facility.

23. "Dumpster" means the same as "detachable container."

24. "Dwelling unit" in addition to its ordinary meaning includes a room or suite of rooms used as a residence and which has cooking facilities therein, but does not include house trailers in trailer courts, rooms in hotels or motels, or cells or rooms in jails or government detention centers.

Seattle Municipal Code § 21.36.012

25. "Energy recovery" means a process operating under federal and state environmental laws and regulations for converting solid waste into usable energy and for reducing the volume of solid waste.

HISTORY: Ord. 120947 § 1, 2002: Ord. 120250 § 1(part), 2001: Ord. 118396 § 138, 1996: Ord. 116412 § 3, 1992: Ord. 115589 § 1, 1991: Ord. 115231 § 1, 1990: Ord. 114723 § 3, 1989: Ord. 114205 § 1(part), 1988: Ord. 113502 § 2(part), 1987: Ord. 112942 § 1(part), 1986: Ord. 112171 § 1(part), 1985: Ord. 96003 § 1(part), 1967.

THE SEATTLE MUNICIPAL CODE

*** CURRENT THROUGH OCTOBER 20, 2003 (ORDINANCE 121317) ***

TITLE 21 UTILITIES
SUBTITLE III SOLID WASTE[1]
CHAPTER 21.36 SOLID WASTE COLLECTION
SUBCHAPTER I GENERAL PROVISIONS

Seattle Municipal Code § 21.36.014

21.36.014 Definitions F--P.

1. "Fraternity, sorority or group student house" means a building occupied by and maintained exclusively for students affiliated with an academic or professional college or university or other recognized institution of higher learning, which is regulated by such institution.

2. "Garbage" means all discarded putrescible waste matter, including small dead animals weighing not over fifteen (15) pounds, but not including sewage or sewage sludge or human or animal excrement or yardwaste.

3. "Garbage can" means the same thing as "can." The term shall also apply to containers of similar size and weight when approved by the Director of Seattle Public Utilities.

4. "Garbage container" means either:

a. A garbage can; or

b. A micro-can, mini-can, or thirty-two (32), sixty (60) to sixty-five (65) gallon cart, or ninety (90) to ninety-six (96) gallon cart supplied by the City or collector and approved by the Director of Seattle Public Utilities for use under the solid waste collection contract.

5. "Hazardous substances" means any liquid, solid, gas or sludge, including any material, substance, product, commodity or waste, regardless of quantity, that exhibits any of the physical, chemical or biological properties described in WAC 173-303-090, 173-303-101, 173-303-102 or 173-303-103.

6. "Health Officer" means the Director of the Seattle-King County Department of Public Health or his/her designated representative.

7. "Household hazardous wastes" means any discarded liquid, solid, contained gas, or sludge, including any material, substance, product, commodity or waste used or generated in the household, regardless of quantity, that exhibits any of the characteristics or criteria of dangerous waste set forth in Chapter 173.303 WAC.

8. "Incineration" means a process of reducing the volume of solid waste operating under federal and state environmental laws and regulations by use of an enclosed device using controlled flame combustion.

9. "Interim solid waste handling site" means any interim treatment, utilization or processing site engaged in solid waste handling which is not the final site of disposal. Transfer stations, drop boxes, baling and compaction sites, source separation centers, and treatment are considered interim solid waste handling sites.

10. "Litter" means solid waste such as, but not limited to, disposable packages and containers dropped, discarded or otherwise disposed of upon any property.

11. "Micro-can" means a twelve (12) gallon container that is supplied by the City, made of galvanized metal or plastic, and meets the approval of the Director of Seattle Public Utilities.

12. "Mini-can" means a fifteen (15) to twenty (20) gallon container that is supplied by the contractor, made of galvanized metal or plastic, and meets the approval of the Director of Seattle Public Utilities.

13. "Mixed-use building" means a building with both residential and commercial solid waste with common garbage chute(s), and/or the residential and commercial solid waste generated in such building cannot be readily separated.

14. "MSW" means solid waste excluding special wastes, unacceptable wastes, recyclable materials, compostable wastes and CDL.

15. "Overloaded" means a toter or container whose contents exceed one (1) foot above the top of the toter or container.

16. "Passenger vehicle" means any motor vehicle with a passenger car license plate.

17. "Permanent service" means service provided for a period of more than ninety (90) days.

18. "Person" means any governmental entity, or any public or private corporation, partnership or other form of association, as well as any individual.

19. "Planting strip" means that part of a street right-of-way between the abutting property line and the curb or traveled portion of the street, exclusive of any sidewalk.

20. "Primary collection area" means for each contractor that area of the City within which that contractor has been designated the exclusive provider of commercial MSW collection services, except in special cases where individual customers have requested, and been granted by the City, the right to receive such services by the City's other commercial MSW collection contractor.

21. "Private transfer stations" means the transfer station owned and operated by Waste Management of Seattle at 7155 West Marginal Way S.W., the transfer station owned and operated by Rabanco at 3rd Avenue South and Lander Street, and such other transfer stations or facilities that a private entity may operate at present and in the future for handling the City's waste.

22. "Public place" means and includes streets, avenues, ways, boulevards, drives, places, alleys, sidewalks and planting (parking) strips, squares, triangles, and rights-of-way, whether open to the use of the public or not, and the space above or beneath the surface of the same.

23. "Public transfer stations" means the City's South Transfer Station at 2nd Ave. South and South Kenyon, the North Transfer Station at North 34th Street and Carr Place North, and such other transfer stations that the City may operate in the future for handling the City's waste.

HISTORY: Ord. 120250 § 1(part), 2001: Ord. 119737 § 1, 1999: Ord. 118396 § 139, 1996: Ord. 116419 § 4, 1992: Ord. 115589 § 2, 1991: Ord. 114723 § 4, 1989: Ord. 114205 § 1(part), 1988: Ord. 113502 § 2(part), 1987: Ord. 112942 § 1(part), 1986: Ord. 112171 § 1(part), 1985: Ord. 96003 § 1(part), 1967.

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SUBTITLE III SOLID WASTE[1]
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SUBCHAPTER I GENERAL PROVISIONS

Seattle Municipal Code § 21.36.016

21.36.016 Definitions R--Z.

1. "Recyclable materials" means those solid wastes that are separated for recycling or reuse, such as papers, metals and glass, that are identified as recyclable material pursuant to The City of Seattle's Comprehensive Solid Waste Plan.

2. "Recycling" or "recycle" means transforming or remanufacturing waste materials into usable or marketable materials for use other than incineration (including incineration for energy recovery) or other methods of disposal.

3. "Refuse" means either garbage or rubbish or both garbage and rubbish, and includes litter, but excludes yardwaste.

4. "Residence" or "residential" means any house, dwelling, multiunit residence, apartment house, trailer court or any building put to residential use. The term does not include mixed use buildings.

5. "Return Trip" means a trip to pick up material that was originally unavailable for collection through no fault of the collector.

6. "Roll-off collection" means the collection of commercial waste by means of a drop box.

7. "Rubbish" means all discarded nonputrescible waste matter excluding yardwaste.

8. "Scavenging" means removal of material at a disposal site or interim solid waste handling site without the approval of the site owner or operator or of the Health Officer.

9. "Secondary collection area" means for each contractor that area of the City within which the City's other commercial MSW collection contractor is the designated primary MSW collection service provider, and in which the contractor may provide such services only to individual customers who have requested, and been granted by the City, the right to receive such services from the contractor.

10. "Service unit" means a "garbage container."

11. "Small quantity generator hazardous waste" means any discarded liquid, solid, contained gas or sludge, including any material, substance, product, commodity or waste used or generated by businesses, that exhibits any of the characteristics or criteria of dangerous waste set forth in Chapter 173.303 WAC, but which is exempt from regulation as dangerous waste.

12. "Solid waste" means all putrescible and nonputrescible solid and semisolid wastes, including but not limited to garbage, rubbish, yardwaste, ashes, industrial wastes, infectious wastes, swill, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials. This includes all liquid, solid and semisolid materials which are not the primary products of public, private, industrial, commercial, mining and agricultural operations. Solid waste includes, but is not limited to sludge from wastewater treatment plants, seepage from septic tanks, wood waste, dangerous waste, and problem wastes, as well as other materials and substances that may in the future be included in the

definition of "solid waste" in RCW 70.95.030. Solid waste does not include recyclable materials (including compostable waste) collected from commercial establishments.

13. "Solid waste container" means a garbage container, detachable container, or any other secure, rigid, watertight container with a tight-fitting lid.

14. "Special category wastes" means wastes whose disposal is limited by certain restrictions and limitations, as identified in Section 21.36.029.

15. "Special Event Service" means services requiring container and/or drop box delivery and pickup at events which serve the general public with a duration of one (1) week or less, and which are not part of a series of events sponsored by the same customer. Examples of qualifying events include Bumbershoot, Folklife and Seafair. Payment for services will include daily rental, time rates, disposal charges as well as applicable taxes.

16. "Special pickup" means a pickup requested by the customer at a time other than the regularly scheduled pickup time, but which does not involve the dispatch of a truck.

17. "Special Waste" means contaminated soils, asbestos and other waste specified by Washington Waste Systems in the Special Waste Management Plan included in the Operations Plan as requiring special handling or disposal procedures.

18. "Street" means a public or private way, other than alleys, used for public travel.

19. "Street side litter collection" means collection of MSW from City-supplied containers located on public right-of-way.

20. "Sunken can" means a garbage can which is in a sunken covered receptacle specifically designed to contain garbage cans and where the top of the garbage can is approximately at the ground level.

21. "Temporary service" means service that is required for a period of ninety (90) days or less in conjunction with containers or drop boxes. Temporary service and its associated rates are not to be used for the first ninety (90) days of service when the customer requests, and the contractor provides, service for more than ninety (90) days.

22. "Toter" means the same as "cart."

23. "Unacceptable Waste" means all waste not authorized for disposal at the Columbia Ridge Landfill and Recycling Center or successor site designated by the City, by those governmental entities having jurisdiction or any waste the disposal of which would constitute a violation of any governmental requirement pertaining to the environment, health or safety. Unacceptable Waste includes any waste that is now or hereafter defined by federal law or by the disposal jurisdiction as radioactive, dangerous, hazardous or extremely hazardous waste and vehicle tires in excess of those permitted to be disposed of by the laws of the disposal jurisdiction.

24. "WUTC" means the Washington Utilities and Transportation Commission of the State of Washington.

25. "Yardwaste" means plant material (leaves, grass clippings, branches, brush, flowers, roots, wood waste, etc.); debris commonly thrown away in the course of maintaining yards and gardens, including sod and rocks not over four (4) inches in diameter; and biodegradable waste approved for the yardwaste programs by the Director of the Seattle Public Utilities. It excludes loose soils, food waste; plastics and synthetic fibers; lumber; any wood or tree limbs over four (4) inches in diameter; human or animal excrement; and soil contaminated with hazardous substances.

HISTORY: Ord. 120591 § 1, 2001; Ord. 120250 § 1(part), 2001; Ord. 118396 § 140, 1996; Ord. 116419 § 5, 1992; Ord. 115589 § 3, 1991; Ord. 115231 § 2, 1990; Ord. 114723 § 5, 1989; Ord. 114205 § 1(part), 1988; Ord. 113502 § 2(part), 1987; Ord. 112942 § 1(part), 1986; Ord. 112171 § 1(part), 1985; Ord. 96003 § 1(part), 1967.

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SUBCHAPTER II SOLID WASTE COLLECTION

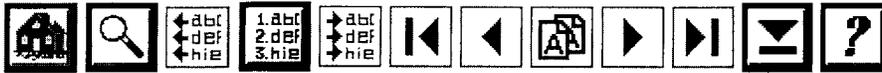
Seattle Municipal Code § 21.36.030

21.36.030 Unlawful hauling of City's Waste--Exceptions.

It is unlawful for anyone, except the following, to haul City's Waste through the streets in the City:

- A. The University of Washington or its contractor;
- B. Military establishments or their contractors;
- C. The City's solid waste contractors;
- D. Anyone authorized to collect solid waste in the City under RCW Chapter 81.77;
- E. Business concerns, as to City's Waste originating within their own establishments; and
- F. The Seattle Housing Authority or its contractor; provided, however, that the exempted persons and organizations may be required to deposit such City's Waste at disposal, processing, or recovery sites provided and/or designated by the Director of Seattle Public Utilities pursuant to Section 21.36.018.

HISTORY: Ord. 118396 § 145, 1996: Ord. 116419 § 10, 1992: Ord. 116220 § 1, 1992: Ord. 113502 § 4, 1987: Ord. 107208 § 2, 1978: Ord. 96003 § 3, 1967.



Seattle Municipal Code

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SMC 21.36.082 Commercial recycling required.

A. Recycling Required. As of January 1, 2005, all commercial establishments, including those entities authorized to haul their own waste pursuant to SMC 21.36.030 , shall separate paper, cardboard and yard waste for recycling, and paper, cardboard or yard waste shall be deposited in garbage cans, detachable containers, drop boxes or in the garbage disposal pit at the City's Recycling and Disposal Stations after that date.

B. Enforcement.

1. As of March 31, 2004, the Director of Seattle Public Utilities shall begin a program of educational outreach regarding these new recycling requirements.
2. As of January 1, 2005, the Director of Seattle Public Utilities shall establish a program of placing educational notice tags on garbage cans, detachable containers and drop boxes with significant amounts of paper, cardboard or yard waste.
3. As of January 1, 2006, civil infractions shall apply to any violation of this section pursuant to SMC Section 21.36.922.

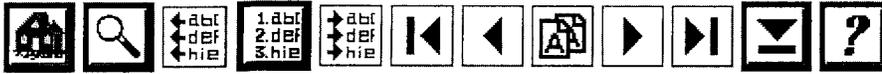
C. Exceptions.

1. Existing Structures: Existing commercial structures that do not have adequate storage space for recyclable materials may be exempt from all or portions of this ordinance if so determined by the Director of Seattle Public Utilities. The Director of Seattle Public Utilities, in cases where space constraints are determined to exist, shall also evaluate the feasibility of shared recycling containers by contiguous businesses or multifamily structures.
2. New or Expanded Structures: New structures permitted in commercial zones that have demonstrated difficulty in meeting the solid waste and recyclable materials storage space specifications required under SMC Section 23.47.029  Subsections B, C and D may be exempt from all or portions of this ordinance as determined by the Director of Seattle Public Utilities.

(Ord. 121372 Section 1, 2003.)

Link to [Recent ordinances](#) passed since 3/31/04 which may amend this section. (Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances. For more information, contact the Seattle City Clerk's Office at 206-684-5175, or by e-mail at clerk@seattle.gov)





Seattle Municipal Code

Information retrieved June 25, 2004 3:14 PM

SMC 21.36.083 Residential recycling required.

A. Recycling Required. As of January 1, 2005, all residents living in single-family structures, multifamily structures and mixed-use buildings, including those entities authorized to haul their own waste pursuant to SMC 21.36.030, shall separate paper, cardboard, glass and plastic bottles and jars and aluminum and tin cans for recycling, and no paper, cardboard, glass or plastic bottles and jars and aluminum or tin cans shall be deposited in a garbage can, detachable container, or drop box or in the garbage disposal pit at the City's Recycling and Disposal Stations after that date.

B. Enforcement.

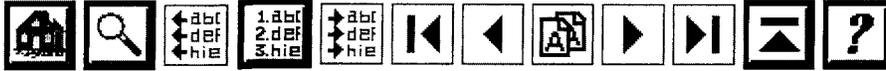
1. As of March 31, 2004, the Director of Seattle Public Utilities shall begin a program of educational outreach regarding these new recycling requirements.
2. As of January 1, 2005, the Director of Seattle Public Utilities shall establish a program of placing educational notice tags on garbage cans, detachable containers and drop boxes with significant amounts of paper, cardboard, glass and plastic bottles and jars and aluminum and tin cans.
3. As of January 1, 2006, residential customers that self-haul their garbage shall be prohibited from disposing of garbage with significant amounts of paper, cardboard, or glass or plastic bottles or jars or aluminum or tin cans at the City's Recycling and Disposal Stations.
4. As of January 1, 2006, any violation of this section by residential curbside or backyard customers shall result in refusal of curbside garbage collection services. Residential customers shall be required to remove these items from garbage containers before they will be collected.
5. As of January 1, 2006, any violation of this section by detachable container and drop box customers shall result in an additional collection rate of \$50 per detachable or drop box collection.

C. Exceptions.

1. Existing structures: Existing multifamily structures that do not have adequate storage space for recyclable materials may be exempt from all or portions of this ordinance if so determined by the Director of Seattle Public Utilities. The Director of Seattle Public Utilities, in cases where space constraints are determined to exist, shall also evaluate the feasibility of shared recycling containers by contiguous businesses or multifamily structures.
2. New or Expanded Structures: New multifamily structures permitted in commercial zones or expanded multifamily structures that have demonstrated difficulty in meeting the solid waste and recyclable materials storage space specifications required under SMC Section 23.47.029  Subsections A, B, C and D may be exempt from all or portions of this ordinance as determined by the Director of Seattle Public Utilities.

(Ord. 121372 Section 2, 2003.)

Link to Recent ordinances passed since 3/31/04 which may amend this section. (Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances. For more information, contact the Seattle City Clerk's Office at 206-684-5175, or by e-mail at clerk@seattle.gov)



or appertaining thereto located within one mile of the limits of such city or town, with full jurisdiction and authority to manage, regulate and control the same beyond the limits of the corporation and to operate the same free or for toll. [1965 c 7 § 35.21.110. Prior: 1895 c 130 § 1; RRS § 5476.]

35.21.120 Solid waste handling system—Contracts.

A city or town may by ordinance provide for the establishment of a system or systems of solid waste handling for the entire city or town or for portions thereof. A city or town may provide for solid waste handling by or under the direction of officials and employees of the city or town or may award contracts for any service related to solid waste handling including contracts entered into under RCW 35.21.152. Contracts for solid waste handling may provide that a city or town provide for a minimum periodic fee or other method of compensation in consideration of the operational availability of a solid waste handling system, plant, site, or other facility at a specified minimum level, without regard to the ownership of the system, plant, site, or other facility, or the amount of solid waste actually handled during all or any part of the contract period. When a minimum level of solid waste is specified in a contract for solid waste handling, there shall be a specific allocation of financial responsibility in the event the amount of solid waste handled falls below the minimum level provided in the contract.

As used in this chapter, the terms "solid waste" and "solid waste handling" shall be as defined in RCW 70.95.030. [1989 c 399 § 1; 1986 c 282 § 18; 1965 c 7 § 35.21.120. Prior: 1943 c 270 § 1, part; Rem. Supp. 1943 § 9504-1, part.]

Severability—Legislative findings—Construction—Liberal construction—Supplemental powers—1986 c 282: See notes following RCW 35.21.156.

Contracts with vendors for solid waste handling: RCW 35.21.156.

35.21.130 Solid waste or recyclable materials collection—Ordinance. A solid waste or recyclable materials collection ordinance may:

(1) Require property owners and occupants of premises to use the solid waste collection and disposal system or recyclable materials collection and disposal system, and to dispose of their solid waste and recyclable materials as provided in the ordinance: PROVIDED, That a solid waste or recycling ordinance shall not require any retail enterprise engaged in the sale of consumer-packaged products to locate or place a public recycling collection site or buy-back center upon or within a certain distance of the retail establishment as a condition of engaging in the sale of consumer-packaged products; and

(2) Fix charges for solid waste collection and disposal, recyclable materials collection and disposal, or both, and the manner and time of payment therefor including therein a provision that upon failure to pay the charges, the amount thereof shall become a lien against the property for which the solid waste or recyclable materials collection service is rendered. The ordinance may also provide penalties for its violation. [1989 c 431 § 51; 1965 c 7 § 35.21.130. Prior: 1943 c 270 § 1, part; Rem. Supp. 1943 § 9504-1, part.]

Severability—1989 c 431: See RCW 70.95.901.

35.21.135 Solid waste or recyclable materials collection—Curbside recycling—Reduced rate. (1) Each city or town providing by ordinance or resolution a reduced solid waste collection rate to residents participating in a residential curbside recycling program implemented under RCW 70.95.090, may provide a similar reduced rate to residents participating in any other recycling program, if such program is approved by the jurisdiction. Nothing in this section shall be interpreted to reduce the authority of a city to adopt ordinances under RCW 35.21.130(1).

(2) For the purposes of this section, "reduced rate" means a residential solid waste collection rate incorporating a rebate, refund, or discount. Reduced rate shall not include residential solid waste collection rate based on the volume or weight of solid waste set out for collection. [1991 c 319 § 404.]

Severability—Part headings not law—1991 c 319: See RCW 70.95F.900 and 70.95F.901.

35.21.140 Garbage—Notice of lien—Foreclosure.

A notice of the city's or town's lien for garbage collection and disposal service specifying the charges, the period covered by the charges and giving the legal description of the premises sought to be charged, shall be filed with the county auditor within the time required and shall be foreclosed in the manner and within the time prescribed for liens for labor and material. [1965 c 7 § 35.21.140. Prior: 1943 c 270 § 1, part; Rem. Supp. 1943 § 9504-1, part.]

35.21.150 Garbage—Lien—Priority. The garbage collection and disposal service lien shall be prior to all liens and encumbrances filed subsequent to the filing of the notice of it with the county auditor, except the lien of general taxes and local improvement assessments whether levied prior or subsequent thereto. [1965 c 7 § 35.21.150. Prior: 1943 c 270 § 1, part; Rem. Supp. 1943 § 9504-1, part.]

35.21.152 Solid waste handling—Agreements—Purposes—Terms and conditions. A city or town may construct, lease, condemn, purchase, acquire, add to, alter, and extend systems, plants, sites, or other facilities for solid waste handling, and shall have full jurisdiction and authority to manage, regulate, maintain, utilize, operate, control, and establish the rates and charges for those solid waste handling systems, plants, sites, or other facilities owned or operated by the city or town. A city or town may enter into agreements with public or private parties to: (1) Construct, lease, purchase, acquire, manage, maintain, utilize, or operate publicly or privately owned or operated solid waste handling systems, plants, sites, or other facilities; (2) establish rates and charges for those systems, plants, sites, or other facilities; (3) designate particular publicly or privately owned or operated systems, plants, sites, or other facilities as disposal sites; and (4) sell the materials or products of those systems, plants, or other facilities. Any agreement entered into shall be for such term and under such conditions as may be determined by the legislative authority of the city or town. [1989 c 399 § 2; 1977 ex.s. c 164 § 1; 1975 1st ex.s. c 208 § 1.]

35.21.154 Solid waste—Compliance with chapter 70.95 RCW required. Nothing in RCW 35.21.152 will relieve a city or town of its obligations to comply with the requirements of chapter 70.95 RCW. [1989 c 399 § 3; 1975 1st ex.s. c 208 § 3.]

35.21.156 Solid waste—Contracts with vendors for solid waste handling systems, plants, sites, or facilities—Requirements—Vendor selection procedures. (1) Notwithstanding the provisions of any city charter, or any law to the contrary, and in addition to any other authority provided by law, the legislative authority of a city or town may contract with one or more vendors for one or more of the design, construction, or operation of, or other service related to, the systems, plants, sites, or other facilities for solid waste handling in accordance with the procedures set forth in this section. Solid waste handling systems, plants, sites, or other facilities constructed, purchased, acquired, leased, added to, altered, extended, maintained, managed, utilized, or operated pursuant to this section, RCW 35.21.120 and 35.21.152, whether publicly or privately owned, shall be in substantial compliance with the solid waste management plan applicable to the city or town adopted pursuant to chapter 70.95 RCW. Agreements relating to such solid waste handling systems, plants, sites, or other facilities may be for such term and may contain such covenants, conditions, and remedies as the legislative authority of a city or town may deem necessary or appropriate. When a contract for design services is entered into separately from other services permitted under this section, procurement shall be in accordance with chapter 39.80 RCW.

(2) If the legislative authority of the city or town decides to proceed with the consideration of qualifications or proposals for services from vendors, the city or town shall publish notice of its requirements and request submission of qualifications statements or proposals. The notice shall be published in the official newspaper of the city or town at least once a week for two weeks not less than sixty days before the final date for the submission of qualifications statements or proposals. The notice shall state in summary form (a) the general scope and nature of the design, construction, operation, or other service, (b) the name and address of a representative of the city or town who can provide further details, (c) the final date for the submission of qualifications statements or proposals, (d) an estimated schedule for the consideration of qualifications, the selection of vendors, and the negotiation of a contract or contracts for services, (e) the location at which a copy of any request for qualifications or request for proposals will be made available, and (f) the criteria established by the legislative authority to select a vendor or vendors, which may include but shall not be limited to the vendor's prior experience, including design, construction, or operation of other similar facilities; respondent's management capability, schedule availability and financial resources; cost of the services, nature of facility design proposed by the vendor; system reliability; performance standards required for the facilities; compatibility with existing service facilities operated by the public body or other providers of service to the public; project performance guarantees; penalty and other enforcement provisions; environmental protection measures to be

used; consistency with the applicable comprehensive solid waste management plan; and allocation of project risks.

(3) If the legislative authority of the city or town decides to proceed with the consideration of qualifications or proposals, it may designate a representative to evaluate the vendors who submitted qualifications statements or proposals and conduct discussions regarding qualifications or proposals with one or more vendors. The legislative authority or representative may request submission of qualifications statements and may later request more detailed proposals from one or more vendors who have submitted qualifications statements, or may request detailed proposals without having first received and evaluated qualifications statements. The legislative authority or its representative shall evaluate the qualifications or proposals, as applicable. If two or more vendors submit qualifications or proposals that meet the criteria established by the legislative authority of the city or town, discussions and interviews shall be held with at least two vendors. Any revisions to a request for qualifications or request for proposals shall be made available to all vendors then under consideration by the city or town and shall be made available to any other person who has requested receipt of that information.

(4) Based on criteria established by the legislative authority of the city or town, the representative shall recommend to the legislative authority a vendor or vendors that are initially determined to be the best qualified to provide one or more of the design, construction or operation of, or other service related to, the proposed project or services. The legislative authority may select one or more qualified vendors for one or more of the design, construction, or operation of, or other service related to, the proposed project or services.

(5) The legislative authority or its representative may attempt to negotiate a contract with the vendor or vendors selected for one or more of the design, construction, or operation of, or other service related to, the proposed project or services on terms that the legislative authority determines to be fair and reasonable and in the best interest of the city or town. If the legislative authority or its representative is unable to negotiate such a contract with any one or more of the vendors first selected on terms that it determines to be fair and reasonable and in the best interest of the city or town, negotiations with any one or more of the vendors shall be terminated or suspended and another qualified vendor or vendors may be selected in accordance with the procedures set forth in this section. If the legislative authority decides to continue the process of selection, negotiations shall continue with a qualified vendor or vendors in accordance with this section at the sole discretion of the legislative authority until an agreement is reached with one or more qualified vendors, or the process is terminated by the legislative authority. The process may be repeated until an agreement is reached.

(6) Prior to entering into a contract with a vendor, the legislative authority of the city or town shall make written findings, after holding a public hearing on the proposal, that it is in the public interest to enter into the contract, that the contract is financially sound, and that it is advantageous for the city or town to use this method for awarding contracts compared to other methods.

(7) Each contract shall include a project performance bond or bonds or other security by the vendor that in the judgment of the legislative authority of the city or town is sufficient to secure adequate performance by the vendor.

(8) The provisions of chapters 39.12, 39.19, and *39.25 RCW shall apply to a contract entered into under this section to the same extent as if the systems and plants were owned by a public body.

(9) The vendor selection process permitted by this section shall be supplemental to and shall not be construed as a repeal of or limitation on any other authority granted by law.

The alternative selection process provided by this section may not be used in the selection of a person or entity to construct a publicly owned facility for the storage or transfer of solid waste or solid waste handling equipment unless the facility is either (a) privately operated pursuant to a contract greater than five years, or (b) an integral part of a solid waste processing facility located on the same site. Instead, the applicable provisions of RCW 35.22.620, and 35.23.352, and chapters 39.04 and 39.30 RCW shall be followed. [1989 c 399 § 7; 1986 c 282 § 17. Formerly RCW 35.92.024.]

*Reviser's note: Chapter 39.25 RCW was repealed by 1994 c 138 § 2.

Legislative findings—Construction—1986 c 282 §§ 17-20: "The legislature finds that the regulation, management, and disposal of solid waste through waste reduction, recycling, and the use of resource recovery facilities of the kind described in RCW 35.92.022 and 36.58.040 should be conducted in a manner substantially consistent with the priorities and policies of the solid waste management act, chapter 70.95 RCW. Nothing contained in sections 17 through 20 of this act shall detract from the powers, duties, and functions given to the utilities and transportation commission in chapter 81.77 RCW." [1986 c 282 § 16.]

Liberal construction—Supplemental powers—1986 c 282 §§ 16-20: "Sections 16 through 20 of this act, being necessary for the health and welfare of the state and its inhabitants, shall be liberally construed to effect its purposes. Sections 16 through 20 of this act shall be deemed to provide an alternative method for the performance of those subjects authorized by these sections and shall be regarded as supplemental and additional to powers conferred by the Washington state Constitution, other state laws, and the charter of any city or county." [1986 c 282 § 21.]

Severability—1986 c 282: See RCW 82.18.900.

35.21.157 Solid waste collection—Rate increase notice. (1) A city that contracts for the collection of solid waste, or provides for the collection of solid waste directly, shall notify the public of each proposed rate increase for a solid waste handling service. The notice may be mailed to each affected ratepayer or published once a week for two consecutive weeks in a newspaper of general circulation in the collection area. The notice shall be available to affected ratepayers at least forty-five days prior to the proposed effective date of the rate increase.

(2) For purposes of this section, "solid waste handling" has the same meaning as provided in RCW 70.95.030. [1994 c 161 § 2.]

Findings—Declaration—1994 c 161: "The legislature finds that local governments and private waste management companies have significantly changed solid waste management services in an effort to preserve landfill space and to avoid costly environmental cleanups of municipal landfills. The legislature recognizes that these new services have enabled the state to achieve one of the nation's highest recycling rates.

The legislature also finds that the need to pay for the cleanup of past disposal practices and to provide new recycling services has caused solid waste rates to increase substantially. The legislature further finds that

private solid waste collection companies regulated by the utilities a transportation commission are required to provide public notice but that city-managed solid waste collection systems are not. The legislature declares it to be in the public interest for city-managed systems to provide public notice of solid waste rate increases." [1994 c 161 § 1.]

35.21.158 Collection and transportation of recyclable materials by recycling companies or nonprofit entities—Reuse or reclamation—Application of chapter. Nothing in this chapter shall prevent a recycling company or nonprofit entity from collecting and transporting recyclable materials from a buy-back center, drop-box, or from a commercial or industrial generator of recyclable materials, or upon agreement with a solid waste collection company.

Nothing in this chapter shall be construed as prohibiting a commercial or industrial generator of commercial recyclable materials from selling, conveying, or arranging for transportation of such material to a recycler for reuse or reclamation. [1989 c 431 § 33.]

Severability—1989 c 431: See RCW 70.95.901.

35.21.160 Jurisdiction over adjacent waters. The powers and jurisdiction of all incorporated cities and towns of the state having their boundaries or any part thereof adjacent to or fronting on any bay or bays, lake or lakes, sound or sounds, river or rivers, or other navigable waters are hereby extended into and over such waters and over any tidelands intervening between any such boundary and any such waters to the middle of such bays, sounds, lakes, rivers, or other waters in every manner and for every purpose that such powers and jurisdiction could be exercised if the waters were within the city or town limits. In calculating the area of any town for the purpose of determining compliance with the limitation on the area of a town prescribed by RCW 35.21.010, the area over which jurisdiction is conferred by this section shall not be included. [1969 c 124 § 1; 1965 c 7 § 35.21.160. Prior: 1961 c 277 § 4; 1909 c 111 § 1; RRS § 8892.]

35.21.163 Penalty for act constituting a crime under state law—Limitation. Except as limited by the maximum penalty authorized by law, no city, code city, or town, may establish a penalty for an act that constitutes a crime under state law that is different from the penalty prescribed for that crime by state statute. [1993 c 83 § 1.]

Effective date—1993 c 83: "This act shall take effect July 1, 1994." [1993 c 83 § 11.]

35.21.165 Driving while under the influence of liquor or drug—Minimum penalties. Except as limited by the maximum penalties authorized by law, no city or town may establish a penalty for an act that constitutes the crime of driving while under the influence of intoxicating liquor or any drug, as provided in RCW 46.61.502, or the crime of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, as provided in RCW 46.61.504, that is less than the penalties prescribed for those crimes in RCW 46.61.5055. [1995 c 332 § 8; 1994 c 275 § 36; 1983 c 165 § 40.]

Severability—Effective dates—1995 c 332: See notes following RCW 46.20.308.

(6) "Vehicle" means every device capable of being moved upon a public highway and in, upon, or by which any solid waste is or may be transported or drawn upon a public highway, excepting devices moved by human or animal power or used exclusively upon stationary rail or tracks;

(7) "Solid waste collection company" means every person or his lessees, receivers, or trustees, owning, controlling, operating or managing vehicles used in the business of transporting solid waste for collection and/or disposal for compensation, except septic tank pumpers, over any public highway in this state whether as a "common carrier" thereof or as a "contract carrier" thereof;

(8) Solid waste collection does not include collecting or transporting recyclable materials from a drop-box or recycling buy-back center, nor collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation. Transportation of these materials is regulated under chapter 81.80 RCW; and

(9) "Solid waste" means the same as defined under RCW 70.95.030, except for the purposes of this chapter solid waste does not include recyclable materials except for source separated recyclable materials collected from residences. [1989 c 431 § 17; 1961 c 295 § 2.]

81.77.015 Construction of phrase "garbage and refuse." Whenever in this chapter the phrase "garbage and refuse" is used as a qualifying phrase or otherwise it shall be construed as meaning "garbage and/or refuse." [1965 ex.s. c 105 § 5.]

81.77.020 Compliance with chapter required—Exemption for cities. No person, his lessees, receivers, or trustees, shall engage in the business of operating as a solid waste collection company in this state, except in accordance with the provisions of this chapter: PROVIDED, That the provisions of this chapter shall not apply to the operations of any solid waste collection company under a contract of solid waste disposal with any city or town, nor to any city or town which itself undertakes the disposal of solid waste. [1989 c 431 § 18; 1961 c 295 § 3.]

81.77.0201 Jurisdiction of commission upon discontinuation of jurisdiction by municipality. A city, town, or combined city-county may at any time reverse its decision to exercise its authority under RCW 81.77.020. In such an event, the commission shall issue a certificate to the last holder of a valid commission certificate of public convenience and necessity, or its successors or assigns, for the area reverting to commission jurisdiction. If there was no certificate existing for the area, or the previous holder was compensated for its certificate property right, the commission shall consider applications for authority under RCW 81.77.040. [1997 c 171 § 4.]

Severability—1997 c 171: See note following RCW 35.02.160.

81.77.030 Supervision and regulation by commission. The commission shall supervise and regulate every solid waste collection company in this state,

(1) By fixing and altering its rates, charges, classifications, rules and regulations;

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(2) By regulating the accounts, service, and safety of operations;

(3) By requiring the filing of annual and other reports and data;

(4) By supervising and regulating such persons or companies in all other matters affecting the relationship between them and the public which they serve;

(5) By requiring compliance with local solid waste management plans and related implementation ordinances;

(6) By requiring certificate holders under chapter 81.77 RCW to use rate structures and billing systems consistent with the solid waste management priorities set forth under RCW 70.95.010 and the minimum levels of solid waste collection and recycling services pursuant to local comprehensive solid waste management plans. The commission may order consolidated billing and provide for reasonable and necessary expenses to be paid to the administering company if more than one certificate is granted in an area.

The commission, on complaint made on its own motion or by an aggrieved party, at any time, after the holding of a hearing of which the holder of any certificate has had notice and an opportunity to be heard, and at which it shall be proven that the holder has wilfully violated or refused to observe any of the commission's orders, rules, or regulations, or has failed to operate as a solid waste collection company for a period of at least one year preceding the filing of the complaint, may suspend, revoke, alter, or amend any certificate issued under the provisions of this chapter. [1989 c 431 § 20; 1987 c 239 § 1; 1965 ex.s. c 105 § 1; 1961 c 295 § 4.]

81.77.040 Certificate of convenience and necessity required—Procedure when applicant requests certificate for existing service area. No solid waste collection company shall hereafter operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. A condition of operating a solid waste company in the unincorporated areas of a county shall be complying with the solid waste management plan prepared under chapter 70.95 RCW applicable in the company's franchise area.

Issuance of the certificate of necessity shall be determined upon, but not limited to, the following factors: The present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal, sworn to before a notary public; a statement of the assets on hand of the person, firm, association or corporation which will be expended on the purported plant for solid waste collection and disposal, sworn to before a notary public; a statement of prior experience, if any, in such field by the petitioner, sworn to before a notary public; and sentiment in the community contemplated to be served as to the necessity for such a service.

Except as provided in *RCW 81.77.150, when an applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, the commission may, after hearing, issue the certificate only if the existing solid waste collection company or companies

servicing the territory will not provide service to the satisfaction of the commission.

In all other cases, the commission may, with or without hearing, issue certificates, or for good cause shown refuse to issue them, or issue them for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted such terms and conditions as, in its judgment, the public convenience and necessity may require.

Any right, privilege, certificate held, owned, or obtained by a solid waste collection company may be sold, assigned, leased, transferred, or inherited as other property, but only upon authorization by the commission.

Any solid waste collection company which upon July 1, 1961 is operating under authority of a common carrier or contract carrier permit issued under the provisions of chapter 81.80 RCW shall be granted a certificate of necessity without hearing upon compliance with the provisions of this chapter. Such solid waste collection company which has paid the plate fee and gross weight fees required by chapter 81.80 RCW for the year 1961 shall not be required to pay additional like fees under the provisions of this chapter for the remainder of such year.

For purposes of issuing certificates under this chapter, the commission may adopt categories of solid wastes as follows: Garbage, refuse, recyclable materials, and demolition debris. A certificate may be issued for one or more categories of solid waste. Certificates issued on or before July 23, 1989, shall not be expanded or restricted by operation of this chapter. [1989 c 431 § 21; 1987 c 239 § 2; 1961 c 295 § 5.]

*Reviser's note: RCW 81.77.150 expired June 30, 1991.

81.77.050 Filing fees. Any application for a certificate issued under this chapter or amendment thereof, or application to sell, lease, mortgage, or transfer a certificate issued under this chapter or any interest therein, shall be accompanied by such filing fee as the commission may prescribe by rule: PROVIDED, That such fee shall not exceed two hundred dollars. [1989 c 431 § 22; 1973 c 115 § 9; 1961 c 295 § 6.]

81.77.060 Liability and property damage insurance—Surety bond. The commission, in granting certificates to operate a solid waste collection company, shall require the owner or operator to first procure liability and property damage insurance from a company licensed to make liability insurance in the state or a surety bond of a company licensed to write surety bonds in the state, on each motor propelled vehicle used or to be used in transporting solid waste for compensation in the amount of not less than twenty-five thousand dollars for any recovery for personal injury by one person, and not less than ten thousand dollars and in such additional amount as the commission shall determine, for all persons receiving personal injury by reason of one act of negligence, and not less than ten thousand dollars for damage to property of any person other than the assured, and to maintain such liability and property damage insurance or surety bond in force on each motor propelled vehicle while so used. Each policy for liability or property damage insurance or surety bond required herein shall be filed with the commission and kept in full force and effect

and failure so to do shall be cause for revocation of the delinquent's certificate. [1989 c 431 § 23; 1961 c 295 § 7.]

81.77.070 Public service company law invoked. In all respects in which the commission has power and authority under this chapter, applications and complaints may be made and filed with it, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review, to the superior court filed therewith, appeals or mandate filed with the supreme court of this state, considered and disposed of by said courts in the manner, under the conditions, and subject to the limitations, and with the effect specified in this title for public service companies generally. [1961 c 295 § 8.]

81.77.080 Companies to file reports of gross operating revenue and pay fees—Legislative intent—Disposition of revenue. Every solid waste collection company shall, on or before the 1st day of April of each year, file with the commission a statement on oath showing its gross operating revenue from intrastate operations for the preceding calendar year, or portion thereof, and pay to the commission a fee equal to one percent of the amount of gross operating revenue: PROVIDED, That the fee shall in no case be less than one dollar.

It is the intent of the legislature that the fees collected under the provisions of this chapter shall reasonably approximate the cost of supervising and regulating motor carriers subject thereto, and to that end the utilities and transportation commission is authorized to decrease the schedule of fees provided in this section by general order entered before March 1st of any year in which it determines that the moneys then in the solid waste collection companies account of the public service revolving fund and the fees currently to be paid will exceed the reasonable cost of supervising and regulating such carriers.

All fees collected under this section or under any other provision of this chapter shall be paid to the commission and shall be by it transmitted to the state treasurer within thirty days to be deposited to the credit of the public service revolving fund. [1989 c 431 § 24; 1971 ex.s. c 143 § 3; 1969 ex.s. c 210 § 11; 1963 c 59 § 12; 1961 c 295 § 9.]

81.77.090 Penalty. Every person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provisions of this chapter, or who fails to obey, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or any part or provision thereof, is guilty of a gross misdemeanor. [1961 c 295 § 10.]

81.77.100 Scope of chapter with respect to foreign or interstate commerce—Regulation of solid waste collection companies. Neither this chapter nor any provision thereof shall apply, or be construed to apply, to commerce with foreign nations or commerce among the several states except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of congress.

DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On June 28, 2004, a true copy of the foregoing Appellant's Brief was hand-delivered via legal messenger to the following persons:

Polly McNeill
Summit Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682

Andrew Kenefick
Waste Management of Washington, Inc.
801 Second Avenue, Suite 614
Seattle, WA 98104-1599

James K. Sells
Ryan Sells Uptegraft, Inc. PS
9657 Levin Rd. NW, Ste. 240
Silverdale, WA 98383

David W. Wiley
Dana A. Ferestein
Williams, Kastner & Gibbs, PLLC
Two Union Square, Suite 4100
Seattle, WA 98111-3926

Will Patton
Assistant City Attorney
The City of Seattle
600 – 4th Ave., 4th Floor
P.O Box 94769
Seattle, WA 98124-4769

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 28th day of June 2004 at Seattle, Washington.


Yvonne Maletic