

No. 53920-5

8  
RECEIVED  
2007 11 14

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

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

76954-1

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.

---

**APPELLANTS' REPLY TO WASTE MANAGEMENT**

---

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

**ORIGINAL**

**TABLE OF CONTENTS**

	<b><u>Page(s)</u></b>
<b>TABLE OF AUTHORITIES .....</b>	ii
<b>INTRODUCTION.....</b>	1
<b>RESTATEMENT OF THE CASE .....</b>	2
<b>ARGUMENT .....</b>	2
<b>A. Appellants Sued to Vindicate Their Fundamental         Constitutional Rights .....</b>	3
<b>B. The City’s Ordinances Do Not Address Illegal Dumping         or Inexperienced Handling.....</b>	5
<b>C. The State Constitution Was Designed to Protect People         Like Joe Ventenbergs .....</b>	7
<b>D. This Case Is Not About Contracting with Rabanco and         Waste Management .....</b>	9
<b>CONCLUSION .....</b>	10

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*City of Tukwila v. City of Seattle*, 68 Wn.2d 611, 414 P.2d 597 (1966).. 5,6

*Duranceau v. City of Tacoma*, 27 Wn. App. 777, 620 P.2d 533 (1980)..... 4

*Puget Sound Gillnetters Ass’n v. Moos*, 92 Wn.2d 939, 603 P.2d 819  
(1979) ..... 4

*State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P.2d 1101 (1936) ..... 4

**Constitutional Provisions**

Wash. Const. art. I, § 12..... 1

**Other Publications**

Jonathan 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 (1996) ..... 7,8

## INTRODUCTION

Waste Management of Washington, Inc. (“Waste Management”), like Rabanco, Ltd. (“Rabanco”), seeks to preserve its market share and eliminate competition in the construction, demolition, and landclearing waste (“CDL”) hauling market by force of law. However, Waste Management does not present any reason why the mandates of the Washington Constitution should be disregarded and the challenged restrictions permitted to stand.

Like Rabanco and the City of Seattle (the “City”), Waste Management would have this Court decide this case solely on the issue of which companies possessed a certificate of convenience and necessity from the Washington Utilities and Transportation Commission (“WUTC”) prior to April 2001. But Joe Ventenbergs never had the opportunity to receive such a certificate because he was not even alive when they were handed out. CP 554. Only those companies operating in 1961 (or their predecessors) had the opportunity to receive certificates from the WUTC and the City considered only those companies for CDL hauling contracts. CP 571-72, 811-12, 926, 929. It is this type of irrational grant of special privileges that the framers of our state constitution sought to prevent by enacting article I, section 12 of our state constitution. The Washington Constitution is specifically designed to protect those who are excluded

from the dealings between the government and large corporations – people like Joe Ventenbergs, who merely wish to pursue their chosen occupation and earn an honest living.

### **RESTATEMENT OF THE CASE**

Waste Management joins the City’s statement of the case and Appellants reply to such statement in their Reply to the City. However, Waste Management makes a serious factual error in its joinder when it states that Waste Management and Rabanco “serve as the City’s agents” in hauling CDL in the City. Waste Management Brief at 1. The contracts between Waste Management and the City and Rabanco and the City each expressly provide that the companies are independent contractors and not the City’s agents in their performance of the contracts:

Neither the Contractor nor any of Contractor’s subcontractors, employees or agents are or shall be considered employees, agents, or servants of the City for any purposes under this Contract, or otherwise.

CP 251, 348 (emphasis added).<sup>1</sup> The evidence therefore contradicts the assertions that Waste Management and Rabanco are merely acting as agents of the City in performing “city services.”

### **ARGUMENT**

---

<sup>1</sup> In contrast, the contracts specifically provide that Rabanco and Waste Management are the City’s agents for the collection of taxes. See CP 220, 318.

**A. Appellants Sued to Vindicate Their Fundamental Constitutional Rights**

Waste Management suggests that Appellants, rather than suing to vindicate their fundamental rights protected by the Washington Constitution, should have asked “forgiveness or even permission” to exercise their right to specific employment and to earn an honest living in their profession of choice. Waste Management Brief at 1. It is not clear how, in the monopolistic environment constructed by the City, Appellants could have asked forgiveness for having the misfortune of being shut out of an entire professional industry in Seattle. Regardless, the City’s regulatory structure makes asking “permission” impossible. Even more critically, our constitution makes it unnecessary.

The contracts the City signed with Waste Management and Rabanco provide that these companies are the exclusive providers of CDL service in the City. CP 596, 680. Moreover, Mr. Hoffman indicated that the City would have denied a request for permission from any hauler seeking to operate within the City – any hauler, that is, except Rabanco or Waste Management. CP 928. Any attempt by Kendall Trucking to secure a certificate of convenience and necessity from the WUTC would be futile as the WUTC does not exercise jurisdiction over solid waste hauling in the City. CP 1599-1601. The trial court correctly characterized this situation

as a “catch 22.” CP 1331. It left Joe Ventenbergs with only two choices: capitulate and lose his livelihood, profession, and means of providing for himself and his family, or sue to vindicate his fundamental constitutional rights.

Under our constitutional structure, Washington residents may only be denied their basic fundamental rights to specific employment and to follow their chosen profession if the government has a sufficiently strong justification related to a public purpose to deny that right. *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); *State ex rel. Bacich v. Huse*, 187 Wash. 75, 84, 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) (regulatory statutes 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”). The City has no such justification here – it merely wished to avoid a lawsuit from Waste Management and Rabanco. CP 903-04. As a result, Joe Ventenbergs is not required to seek “permission” to exercise fundamental rights guaranteed by the Washington Constitution.

**B. The City's Ordinances Do Not Address Illegal Dumping or Inexperienced Handling**

Waste Management suggests that the City was justified in restricting the market to two companies because “[t]he environmental implications of illegal dumping and inexperienced handling are obvious.” Waste Management Brief at 3. This is difficult to dispute – particularly because it is utterly irrelevant to this Court’s decision. In this case, the City ordinances have nothing to do with illegal dumping or handling requirements.

Joe Ventenbergs is not seeking to avoid environmental restrictions or dumping requirements. CP 555. Indeed, if the City ordinances simply concerned restrictions on illegal dumping and handling standards, Ventenbergs would not be before this Court – instead, he would be out providing a useful and needed service to Seattle consumers in an environmentally responsible manner. But the City’s ordinances are about restricting the market, not protecting the public.

As discussed in Appellants’ Reply to Rabanco, the Washington Supreme Court differentiates between municipal ordinances that simply prohibit activity and those that actually protect the public. In *City of Tukwila v. City of Seattle*, 68 Wn.2d 611, 614-15, 414 P.2d 597 (1966), the court held that a Tukwila ordinance that restricted an electrical

franchise possessed by the City of Seattle went beyond Tukwila's legitimate safety goals and was not to be "countenanced as an exercise of the police power to protect the citizenry from the dangers of electrical transmission and distribution." The court concluded that a generalized concern with public health and safety permitted the city to regulate safety, but did not warrant Tukwila's restriction of the market:

If the city believes that Puget Sound Power & Light Company and Seattle City Light pursue practices increasing the hazards of electrical distribution, it may, by adoption of the uniform rules applicable to all public utilities within its boundaries, legislate directly against the hazards feared.

This case, however, does not involve legislation designed to increase the safety factors or limit the dangers. It does not involve an electrical safety code, nor prescribe minimal standards for equipment, construction and safety devices but, instead, prohibits the exercise of the franchise in a substantial area of the franchised territory. It prohibits rather than protects.

*Id.* at 617.

The City ordinances here do not actually protect anyone – except Rabanco and Waste Management and their shareholders. The City has repeatedly indicated that it could have achieved its public health and safety goals with more than two haulers. CP 903-04, 923-24, 932. Waste Management's public health and safety justifications for these ordinances are therefore not consistent with the record.

**C. The State Constitution Was Designed to Protect People Like Joe Ventenbergs**

Like Rabanco and the City, Waste Management repeatedly asserts that because Kendall Trucking did not possess a certificate of convenience and necessity prior to 2001, Appellants are forever barred from even challenging the City's illegal and unconstitutional grant of special privileges to these two companies.

By its very terms, the privileges or immunities clause of the Washington Constitution contemplates that those who seek its protections will have been deprived of certain "privileges or immunities" the government has wrongfully provided only to favored corporations or individuals. As discussed in Appellants' Opening Brief and Appellants' Reply to Rabanco, the privileges or immunities clause of our constitution was specifically designed to protect those who are frozen out of the dominant power structure. As one commentator described it:

[A] dominant theme of the Washington Constitution, and other state constitutions adopted around the same time [is] that laws should be general in application and special interests should not be permitted to obtain privileges or carve out unjustified immunities. All of these provisions reflect a concern about the ability of powerful minorities to obtain benefits at the expense of underrepresented majority interests.

Jonathan 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, 1255-56 (1996).

Kendall Trucking is not a large corporation and Joe Ventenbergs does not have an industry trade association with full-time staff to protect his interests like Amicus Curiae Washington Refuse and Recycling Association (“WRRR”). He – and the Seattle consumers he serves, like Ron Haider – do not have the influence of companies like Rabanco or Waste Management or the staff, lobbyists, and attorneys solely devoted to influencing the government to eliminate his competition, as do the members of WRRR. *See* CP 845-46 (Rabanco pressures City to pass an ordinance restricting CDL hauling because of loss of its market share); CP 573 (ordinance was passed at the “bequest [*sic*] of the commercial haulers”); WRRR Brief at 1 (describing monopolists’ trade association members, staff, lobbyists, and lawyer). Because the founders of this state understood that people like Joe Ventenbergs would always be at a disadvantage against the influence of large corporations, they created a specific, mandatory, and powerful prohibition on government grants of special privileges or immunities. Ultimately, this case presents the question of whether our state constitution still protects those without influence who wish to pursue their chosen occupations or whether the framers drafted the privileges or immunities clause in vain. Waste

Management's suggestion that Ventenbergs must possess the very privileges he seeks before he can sue to protect his constitutional rights is inconsistent with our framers' intent and constitutes illogical, circular reasoning.

**D. This Case Is Not About Contracting with Rabanco and Waste Management**

Like Rabanco and the City, Waste Management provides a number of justifications to explain why the City contracted with Rabanco and Waste Management. Waste Management Brief at 6-8. As Appellants' discussed in its Reply to the City, these "reasons" were developed after the fact, and no contemporaneous documentation mentions the belated justifications Respondents advanced after Appellants sued.

Ultimately, however, Appellants are not concerned with whether the City contracts with Rabanco or Waste Management. Unlike those companies and members of the WRRRA, Joe Ventenbergs has no interest in using the coercive power of the government to protect him from competition. Rather, he simply wants a chance to legally practice his trade.

At its core, this case is about the City's decision to restrict the market to only Rabanco and Waste Management. The evidence is clear that the only reason the City restricted the CDL hauling market was to

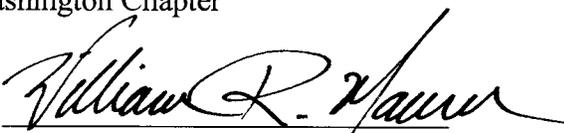
avoid a meritless lawsuit. CP 903-04. Consequently, any discussion of the benefits these two companies allegedly provide is both inconsistent with the record and ultimately irrelevant.

### CONCLUSION

The City restricted the CDL hauling market to Rabanco and Waste Management for no other reason than to avoid a meritless lawsuit. Like Rabanco, Waste Management seeks to protect its government-granted monopoly that harms, rather than protects, the interests of Seattle consumers and hard-working entrepreneurs like Joe Ventenbergs. Appellants ask that this Court reverse the trial court and hold that such unjust and unconstitutional regulations cannot stand.

RESPECTFULLY submitted this 27th day of August 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 Plaintiffs/Appellants

**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 August 27, 2004, a true copy of the foregoing Reply was placed in envelopes addressed to the following persons:

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

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

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

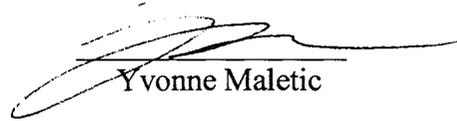
James K. Sells  
Ryan Sells Uptegraft, Inc. PS  
9657 Levin Rd. NW, Ste. 240  
Silverdale, WA 98383

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

which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

2004 AUG 27 11:49:19  
FBI - SEATTLE

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 27th day of August 2004 at Seattle, Washington.

  
Yvonne Maletic