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STATE OF WASHINGTON

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NO. 78449-3

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SUPREME COURT OF THE STATE OF WASHINGTON

DORIS BURNS, RUD OKESON, ARTHUR T. LANE, KENNETH
GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of
the class of persons similarly situated,

Appellants,

v.

THE CITY OF SEATTLE, THE CITY OF SHORELINE, THE CITY OF
BURIEN, THE CITY OF LAKE FOREST PARK, THE CITY OF
SEATAC, and THE CITY OF TUKWILA,

Respondents.

**AMICI CURIAE BRIEF OF THE CITIES OF
UNIVERSITY PLACE AND LAKEWOOD**

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The City of University Place is a non-charter code city of nearly 32,000 people located southwest of Tacoma, bordering along Puget Sound. In November 1994, the voters of the area approved an incorporation proposal which established a 7.86 square mile area as University Place. (CP 1679) The City was officially incorporated August 31, 1995, and is organized under the Council-Manager form of government as authorized by RCW 35A.13. The seven-member elected City Council acts as the policy-making body. The Council, in turn, appoints a City Manager who has responsibility for the day-to-day operations of the City and acts to implement City policy. The City Manager supervises all City employees and the Council is prohibited from interfering in this administrative function.¹

The City of Lakewood has nearly 60,000 people and encompasses approximately 20 square miles southwest of Tacoma. The City incorporated in 1996 under the Council-Manager form of government. (See Affidavit of Claudia Thomas, CP 1922-1924)

Title 35A RCW is known as the Optional Municipal Code. All Washington cities may choose to operate under RCW 35A. The Optional

¹ RCW 35A.13.120

Municipal Code grants to code cities “the broadest powers of local self-government consistent with the Constitution of this state All grants of municipal power under the provisions of this title, ... shall be liberally construed in favor of the municipality.”² This language was intended to overrule the so-called “Dillon’s Rule” of municipal powers which holds that a municipality only had those powers specifically delegated, necessarily implied or that were essential to the declared purpose of a city.³

Title 35A RCW contains many specific delegations of power to code cities. In addition, RCW 35A.11.020 provides in part that a code city “shall have all powers possible for a city or town to have under the Constitution... . In addition and not in limitation, the legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state... “ (Emphasis added)

The statutory provisions referenced above demonstrate that a code city’s authority is limited only by the Constitution and any state law that prohibits or limits some particular power.

² RCW 35A.01.010

³ *McQuillin*, Municipal Corporation, § 10.09

During the 1990s, due in part to the passage of the Growth Management Act in 1990, many urban areas in the Puget Sound region began to incorporate. In King County, the cities of Federal Way, Burien, SeaTac, Shoreline, Sammamish, Maple Valley, Newcastle, Kenmore and Covington all incorporated. In Pierce County, Lakewood, University Place and Edgewood were all incorporated by the mid 1990s. All these cities have chosen the council-manager form of government.

In each case the initial city council had to consider how each of the municipal services such as fire, police, water, sewer, garbage, library, street maintenance, stormwater management and electricity was going to be provided. There were two basic choices -- either provide the service directly through city employees or by contract or other arrangement with outside providers. These outside providers were, in many cases, other governmental agencies. In some cases, the outside providers were private companies. (See Declaration of Robert Jean, CP 1678-1704) Typically, the Council and Manager would address the most important services first. Like University Place, most newly-incorporated cities chose to contract for police services. All choose to provide planning and zoning services directly, since land use matters were of major importance in the reason for incorporation. Eventually, the city worked its way down to services that

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were of less immediate concern. However, a conscious decision was reached as to how all municipal services should be provided.

A municipal franchise is a contract between the city and the franchisee which allows the franchisee to conduct its business in the city right-of-way.⁴ Code cities are given specific authority to grant franchises for, among other things, the right to place poles, wires and other appurtenances for the transmission and distribution of electrical energy.⁵

Since franchises are contracts, it is necessary for the parties to reach agreement on the terms. Also, the parties are free to contract for additional considerations. In the case of contracts with other municipalities, the city providing the service has an interest in a long-term contract so that it can rely on a stream of income to justify capital and operational expenses. The city receiving the services, on the other hand, frequently wants to retain flexibility as well as have some assurance that costs do not become prohibitive. Typically the parties reach some compromise where a long-term commitment is exchanged for some control over the cost. In the City of University Place, for example, the

⁴ *Issaquah Teleprompter*, 93 Wn.2d 567, 611 P.2d 741 (1980)

⁵ RCW 35A.47.040

police contract is for six years, the jail contract is for ten years and the refuse franchise is for twelve years. (CP 1679)

Upon incorporation, the City of University Place went through the process of evaluating service levels and service mix for all municipal services. The City looked at the projected revenues and expenses, as well as carefully evaluated citizen satisfaction surveys to determine the services most needing improvement. The areas of highest citizen satisfaction were refuse, water, and electric service. Prior to incorporation electrical and water service was provided to the University Place area by Tacoma Public Utilities ("TPU"). TPU is a department of the City of Tacoma. In 1996 the City of University Place began to examine these utility services to determine how to provide the services on a long-range basis. As with other services, the choices came down to providing the service in-house or by contract. The City Manager had experience in owning a municipal electric utility, in purchasing electricity separately, and in contracting with both public and private electric providers. (CP 1680) A code city is specifically authorized to form an electric utility and can purchase electrical energy for resale.⁶ It is important to bear in mind that a code

⁶ RCW 35A.80.010 and RCW 35A.80.020

city could decide to enter into agreements with a company to use existing transmission facilities but purchase the energy separately from another source. The city could, of course, determine to own its own transmission facilities as well. For University Place, the City Manager determined that the most likely options were to contract with the City of Tacoma or the City of Fircrest or contract with Puget Power, a private electric utility.

The City initially began negotiations with TPU. As the current provider, and given the citizen satisfaction survey data, this was a logical starting point. The City understood that TPU had the legal authority to impose a tax on non-resident customers.⁷ Both local governments recognized the express prohibition on imposing franchise fees greater than administrative costs. However, the broader authority of jurisdictions to contract with one another for the benefit of their respective jurisdictions is not curtailed. Under this authority, the cities exchanged considerations that were jointly beneficial to both communities. (See Declarations of Robert Jean CP 1678-1681) and Steven Klein (CP 1877-1921) During the course of negotiations, the parties discussed many issues, including TPU's need for long-term stability in its customer base, as well as the City's need

⁷ *Burba v. Vancouver*, 113 Wn. 2d 800, 783 P.2d 1056 (1989)

to control costs and assure quality service. The City of Tacoma received the benefit of a larger long-term rate base with which they could negotiate better prices on its purchase of electricity resulting in lower rates for all, while the City of University Place received the benefit of lower rates and a level playing field commensurate with other jurisdictions. The final agreement is reflected in Ordinance No. 165, passed on September 15, 1997. The franchise covers many topics of concern to the parties. Section 18 covers the payment by TPU of certain sums in consideration of the City not forming its own utility by contracting with another entity for electrical power or otherwise.

The City will not reiterate the legal basis for the validity of such a portion of a franchise and agrees with the arguments set forth by Seattle and the suburban cities. However, the City asks the Court to understand the complete context of how such decisions were reached. The City and TPU recognized that franchise fees cannot be imposed on an electrical utility. However, this does not mean that other legal considerations cannot be agreed to in the course of negotiations.

Appellants assume that because one form of consideration is illegal, any attempt to gain additional consideration is also illegal. Appellants do not explain why it is illegal for two public entities to agree

that, in exchange for consideration, the other will not exercise a power or option available to it. The wisdom or adequacy of such consideration is not the province of this court. Therefore, in the absence of Appellants' showing that a code city is precluded from providing electricity through alternate means and that a public utility is precluded from providing consideration if a code city agrees not to exercise such authority, the court should find the franchise provisions valid.

It would be disingenuous to suggest that the inability to tax TPU or to impose a franchise fee played no part in the Cities' consideration of the franchise. One of the primary reasons for the citizens' vote to incorporate was "local control." This means that the citizens of University Place and Lakewood wanted to directly elect those officials who would decide local issues that directly affected them. Land use is the primary example. Land use decisions were formally decided by a seven-person County Council elected by district. Thus, the citizens of Lakewood and University Place could typically only vote for one, or possibly two, County Council members. After incorporation, they could vote for all seven City Council members.

The case of TPU and the 6 percent tax was even more extreme. There, the City Council of Tacoma decided on imposing the 6 percent

utility tax paid by citizens of University Place and Lakewood. Expenditure of those funds was also made by TPU, whose governing board was not accountable in any way to the ratepayers in the Cities.

The amici cities acknowledge and concede that Seattle and TPU have the legal authority to impose a tax on non-resident customers. *Burba v. Vancouver, supra*. The issue is, however, whether cities can legally obtain a measure of control over how the money is spent. For the reasons set forth above, the cities argue that separate consideration was given for the payments required by §18 of the franchises (See University Place Ordinance 165, CP 1682-1704). These amounts, which are limited to 6% of gross revenues from city customers, are intended to maintain “a level playing field with other jurisdictions with respect to revenues.” (CP 1680, line 14) Another consequence is to give the ratepayers of University Place and Lakewood the ability to hold elected officials accountable for the expenditure of those funds.

As important as the concept of "local control" is, the concept of "No Taxation Without Representation" may be of more fundamental importance to Americans. It is not melodramatic to note that wars have been fought and people have died to resist this form of tyranny. Yet, that is precisely the situation that Appellants would have this Court approve;

namely, that Seattle ratepayers have the exclusive ability to decide how the tax money levied on their neighbors is to be spent. Instead, the duly elected representatives of the people living in University Place, Lakewood and the Suburban Cities determined that, in exchange for certain payments that would be spent in accordance with the wishes of those cities, Seattle and Tacoma could continue to tax their citizens and continue to furnish electric power as before. The duly elected representatives of Tacoma and Seattle determined that in exchange for a promise not to erode the rate base and to provide a steady flow of income to TPU and Seattle City Light, the cities of Tacoma and Seattle would make certain payments to the suburban cities. Had the citizens of any party determined that these agreements were unfair or not desirable, they had and have the option to hold their leaders accountable. This is the essence of a representative democracy.

In conclusion, the cities of University Place and Lakewood respectfully request this Court to affirm the Superior Court's judgment in this case.

DATED this 10th day of October, 2006.

Respectfully submitted,

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