

No. 84483-6

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

ROBERT M. MCKENNA, Attorney General, State of Washington,

Respondent.

RECEIVED
COURT OF APPEALS
DIVISION ONE

OCT 11 2010

PETITIONER'S REPLY BRIEF (*Redacted*)

PETER S. HOLMES, WSBA #15787
Seattle City Attorney

LAURA WISHIK, WSBA #16682
Assistant City Attorney

Seattle City Attorney's Office
600 - 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

Wish
OCT 11 2010
See

TABLE OF CONTENTS

Page(s)

A. Being a constitutional officer does not give the Attorney General extra-statutory powers.....	1
B. No statute confers the authority asserted by the Attorney General.	4
C. This Court has never held that the Attorney General has authority to initiate litigation whenever he wishes.....	7
D. The Attorney General needs a client.	13
E. This Court should resolve the fundamental questions in this case.	13
F. The City has standing as a taxpayer.	14
G. Asking the Attorney General to withdraw would have been futile.	17
H. Representational standing is also appropriate in this case.....	18
I. This Court regularly construes statutes in mandamus actions.....	21
CONCLUSION.....	23

TABLE OF AUTHORITIES

Page(s)

CASES

Arborwood Idaho, LLC v. City of Kennewick,
151 Wn.2d 359, 89 P.3d 217 (2004) 4, 5

Berge v. Gorton,
88 Wn.2d 756, 567 P.2d 187 (1977) 11

Boe v. Gorton,
88 Wn.2d 773, 567 P.2d 197 (1977) 11, 21

City of Tacoma v. O'Brien,
85 Wn.2d 266, 982 P.2d 611 (1999)..... 15, 16

Grant County Fire Protection District No. 5 v. Moses Lake,
150 Wn.2d 791, 83 P.2d 419 (2004)..... 16, 17, 18, 19

Hoppe v. King County,
95 Wn.2d 332, 622 P.2d 845 (1980)..... 16

Hughes v. Kramer,
82 Wn.2d 537 (1973) 7

Kightlinger v. Public Utility District No. 1 of Clark County,
119 Wn.App. 501, 81 P.3d 876 (2003), *rev. granted*, 152 Wash.2d 1001 (2004)..... 19

King County v. Port of Seattle,
37 Wn.2d 338, 223 P.2d 834 (1950)..... 16, 17

Massachusetts v. Mellon,
262 U.S. 447, 43 S.Ct. 597 (1923)..... 8

Perdue v. Baker,
277 Ga. 1, 586 SE2d 606 (2003) 4

Reh'g den.,
28 Wash. 511 (1902)..... 1

<i>Reiter v. Walgren,</i>	
28 Wn.2d 872, 184 P.2d 571 (1947).....	4, 18
<i>Sec. of Administration and Finance v. Attorney General,</i>	
367 Mass. 154, 326 N.E. 2d 334 (1975).....	3
<i>State ex rel. Boyles v. Whatcom County,</i>	
103 Wn.2d 610, 694 P.2d 27 (1985).....	19, 20
<i>State ex rel. Burlington Northern v. Utilities & Transportation Commission,</i>	
93 Wn.2d 398, 609 P.2d 1375 (1980).....	22
<i>State ex rel. Craven v. City of Tacoma,</i>	
63 Wn.2d 23, 385 P.2d 372 (1963).....	21
<i>State Ex Rel. Distilled Spirits Institute v. Kinnear,</i>	
80 Wn.2d 175, 492 P.2d 1012 (1972).....	14
<i>State ex rel. Dunbar v. Board of Equalization,</i>	
140 Wash. 433, 249 P. 996 (1926).....	11
<i>State ex rel. La Follette v. Hinkle,</i>	
131 Wash. 86, 229 P. 317 (1924)	21
<i>State ex rel. O'Connell v. Yelle,</i>	
51 Wn.2d 620, 320 P.2d 1086 (1958).....	21
<i>State ex rel. Winston v. Seattle Gas & Electric Co.,</i>	
28 Wash. 488, 68 P. 946 (1902), <i>Reh'g den.</i> , 28 Wash. 511 (1902).....	1, 2, 3, 5, 8
<i>State v. Gattavara,</i>	
182 Wash. 325, 47 P.2d 18 (1935).....	3, 4, 9, 10
<i>State v. Mitchell,</i>	
237 P.3d 282 (2010)	4
<i>State v. O'Connell,</i>	
83 Wn.2d 797, 523 P.2d 872 (1974).....	2
<i>State v. Taylor,</i>	
58 Wn.2d 252, 362 P.2d 247 (1961)	7, 8, 9

<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	22, 23
<i>Yelle v. Bishop</i> , 55 Wn.2d 286, 347 P.2d 1081 (1959)	1, 2
<i>Young Americans for freedom v. Gorton</i> , 91 Wn.2d 204, 588 P.2d 195 (1978)	11, 12, 13

STATUTES

Laws of 1941, Ch. 50.....	5, 6
RCW 28B.10.50	11
RCW 28B.10.510	11
RCW 4.04.010.....	3
RCW 43.01.020	4
RCW 43.10.030(1).....	5, 6, 4, 7, 9, 14
RCW 43.10.030(2).....	4,5, 10, 11, 21
RCW 43.10.03(8).....	21
RCW 43.10.040	4, 5, 6, 14
RCW 7.24.....	17

CONSTITUTIONS

Const. art. III, § 21	2
Const. art. III, §1.....	1

ORDINANCES

Ordinance 123177.....	14
-----------------------	----

MISCELLANEOUS

WAC 458-20-189.....	14
---------------------	----

According to Attorney General McKenna, he and he alone decides what is in the public interest. Resp. Brf. at 46. He may initiate litigation, in any court, without a client. He can even take positions adverse to State Officers authorized to make policy decisions regarding the subject matter of a case. His stunning pronouncement would overturn one hundred and ten years of this Court's jurisprudence.

A. Being a constitutional officer does not give the Attorney General extra-statutory powers.

Respondent begins by announcing, "The Attorney General is a constitutional officer." Yes, he is a constitutional officer, and, under our constitution, his authority is "prescribed by law." Const. art. III, §1. Twice this Court has ruled that "prescribed by law" means the officer has only the authority expressly delegated by statute. *Yelle v. Bishop*, 55 Wn.2d 286, 295-96, 347 P.2d 1081 (1959); *State ex rel. Winston v. Seattle Gas & Electric Co.*, 28 Wash. 488, 497, 68 P. 946 (1902), *reh'g den.*, 28 Wash. 511 (1902).

Respondent discounts this Court's thorough analysis in *State ex rel. Winston* by citing its denial of rehearing. Resp. Brf. at 33, n.6. In denying rehearing, this Court began, "We are satisfied with the views expressed in the original opinion as to the common-law powers of the attorney general." Satisfied, that is, that the Attorney General has no common-law powers. The Justices did not retract, modify or withdraw any part of their

decision on the merits. Seventy years later, this Court reiterated its conclusion that the attorney general has no common-law powers:

The powers of the Attorney General are created and limited not by the common law but by the law enacted by the people, either in their constitutional declarations or through legislative declarations in pursuance of constitutional provisions.

State v. O'Connell, 83 Wn.2d 797, 812, 523 P.2d 872 (1974) (citing *Winston*).

Respondent's brief does not even address the *Yelle* decision. In *Yelle* this Court held that the State Auditor has no implied or common-law powers, although, like the Attorney General, the Auditor is an independently elected constitutional officer: "[I]t is only when the constitution is silent as to [the officer's] duties that constitutional duties may be implied." 55 Wn.2d at 295. When the constitution is not silent, then, under the "well-established rule of constitutional construction," *expressio unius est exclusio alterius*, the officer has only those powers expressly included in the constitution or later authorized by statute. *Id.* Since the constitution expressly authorizes the Attorney General to be "the legal adviser of the state officers," Const. art. III, § 21, he has no implied authority.

The historical context confirms that the authors of our state's constitution intended the Office of Attorney General to have only those powers expressly delegated by statute. In some states the Attorney General

was a common-law officer prior to enactment of the state constitution. *E.g.*, *Sec. of Administration and Finance v. Attorney General*, 367 Mass. 154, 326 N.E. 2d 334, 337 (1975). Here, the office of Attorney General was created by statute. *Winston*, 28 Wash. 496-97. The Territorial Laws spelled out the Attorney General’s powers in detail and, unlike some other states, included no common-law authority.¹ *Id.*

Respondent contends, “The independent constitutional role of the Attorney General reflects a conscious decision by the authors of our state constitution to create an additional check within state government.” Resp. Brf. at 37-38. “Additional check” does not mean unbridled authority. The constitution itself only authorizes the Attorney General to advise state officers. It says nothing about representing the sovereign state, or acting in the public interest, or even about appearing in court. And, as this Court noted in *Gattavara*, the constitutional grant of authority to advise state officers is “not self-executing.” *State v. Gattavara*, 182 Wash. 325, 329, 47 P.2d 18 (1935). The Legislature, not the Attorney General, determines how and when

¹ Respondent cites RCW 4.04.010 (common law shall be the rule of decision in all the courts of this state). Resp. Brf. at 34, n.6. This statute simply adopts substantive common law precepts to guide our courts in deciding cases in the absence of pertinent legislation. It does not cloak the Attorney General with common law power—especially where, as here, the Legislature has denied it to him.

he may exercise the “additional check” on state government.²

B. No statute confers the authority asserted by the Attorney General.

Respondent contends several statutes provide him broad authority. This table summarizes why they do not.

Statute	Summary of why it does not support broad authority
RCW 43.10.030(1)	Expressly limited to appellate courts. Also limited to state courts under <i>expressio unius est exclusio alterius</i> because only section (3) mentions federal courts. ³
RCW 43.10.030(2)	Limited to state courts (see above).
RCW 43.10.040	Statute consolidated legal representation of state entities; did not convey broad authority.
RCW 43.01.020	Oath requirement is not a grant of authority.

A court’s “fundamental objective in construing a statute is to ascertain and carry out the legislature’s intent.” *State v. Mitchell*, 237 P.3d 282, 284 (2010) (quoting *Arborwood Idaho, LLC v. City of Kennewick*, 151

² Respondent quotes at length from an amicus brief filed by a group of Attorneys General in *Perdue v. Baker*, 277 Ga. 1, 586 SE2d 606 (2003). Resp. Brf. at 47-48. That brief cites just two Washington cases, *Gattavara* and *Reiter*, both of which are addressed in this brief. Respondent fails to mention that the Georgia Supreme Court rejected the arguments in the amicus brief that Attorneys General have broad implied powers, just as this Court has rejected them.

³ Respondent did not address the arguments in Petitioner’s Opening Brief regarding the limitation of RCW 43.10.030(1) to appellate courts and the limitation of both sections (1) and (2) to state courts. Opening Brf. at 11-13.

Wn.2d 359, 367, 89 P.3d 217 (2004)). The court looks first to the plain language of a statute. *Id.*

Perhaps in recognition that RCW 43.10.030(1) and (2) only authorize him to appear in state courts, Respondent relies almost exclusively on RCW 43.10.040. Resp. Brf. at 34-37. What is now RCW 43.10.040 was enacted as the first section of Chapter 50 of the 1941 Session Laws, entitled:

An Act relating to the powers and duties of the Attorney General; providing for the legal representation of the State of Washington and departments, commissions, boards, agencies and administrative tribunals thereof and providing for the appointment of certain personnel therein, excepting certain state agencies; repealing all acts or parts of acts in conflict herewith; and declaring an emergency.

Attachment 3 (Laws of 1941, Ch. 50). The second section barred state agencies and officers from hiring their own attorneys. The third section authorized the Attorney General to hire litigation experts. The fourth section exempted certain entities from the prohibition on hiring their own legal counsel. Viewed as a whole, the plain meaning of this statute is to consolidate legal representation of most state entities in the Attorney General's Office—nothing more.

The Court need look no further to find the statute's meaning. But even historical evidence confirms that the legislative intent was to consolidate legal representation, not broaden the Attorney General's

substantive authority. Smith Troy,⁴ Attorney General when the statute was enacted, explains:

By the time I became the attorney general in the spring of 1940 . . . the staff of the attorney general's office consisted of only about twelve lawyers out of, as I recall, some 102 lawyers employed by all state agencies. . . As a consequence, I had virtually no control over state litigation, conflicting interpretation of state statutes were being given to the various state agencies and, in general, the situation was, simply stated, a mess.

. . . Therefore, I caused to be introduced in the legislature a bill which was enacted by the 1941 session as chapter 50, Laws of 1941 . . . By that act the legislature expressly prohibited state officers or agencies, other than the attorney general, from employing any attorney in a legal or quasi-legal capacity either to represent that agency in the courts or to conduct any other legal business on behalf of the agency.

[REDACTED]

If the Legislature wanted to expand the Attorney General's authority across the board to appear in trial courts, it could have done so by changing a few words in RCW 43.10.030(1). Instead, in 1971, thirty years after RCW 43.10.040 supposedly already authorized the Attorney General to appear in

[REDACTED]

any and all courts, the Legislature amended RCW 43.10.030(1) to add the newly created court of appeals. That would have been a convenient time to change the wording to include trial courts, but the Legislature did not do so. Likewise, a change of a few words in RCW 43.10.030(1) would have sufficed if the Legislature wanted to authorize the Attorney General to appear in federal courts under all circumstances, instead of only when defending state officers. This Court should decline the Attorney General's invitation to read words into these provisions.

Respondent seems to argue that his required oath of office somehow authorizes his actions in this case. Resp. Brf. at 35. It should go without saying that the oath is not self-executing. Moreover, the purpose of the oath is to condition employment on a promise not to seek to overthrow the government, *Hughes v. Kramer*, 82 Wn.2d 537 (1973), not to bestow Attorneys General with roving commissions to challenge the constitutionality of legislation whenever they see fit. The Attorney General must fulfill his duty to support the state and federal constitutions using the means the Legislature has granted him.

C. This Court has never held that the Attorney General has authority to initiate litigation whenever he wishes.

Respondent relies heavily on the decision in *State v. Taylor*, 58 Wn.2d 252, 362 P.2d 247 (1961). Resp. Brf. at 42-43. *Taylor* addressed

whether the Attorney General could compel a comprehensive financial accounting from the trustees of a private trust. This Court affirmed the trial court's dismissal of the Attorney General's complaint, holding:

[W]e must conclude that in the absence of statutory authorization he cannot require of the charitable trustees the continuing communication of information and unreasonable duplication of records and information instanced by the letter of demand.

58 Wn.2d at 264 (emphasis added). The holding is hardly an endorsement of common law or implied authority for the attorney general.

An assumption was made in *Taylor*, without any analysis, that the Attorney General of Washington was like the Attorney General in England, and therefore has the common law power known as *parens patriae*. *Id.* at 255. Missing from *Taylor* is any discussion of the constitutional phrase "prescribed by law." *Winston* is not even cited. There is no analysis of the historical context in our state--that the Office of Attorney General was created by statute, unlike states where it was a creature of common law.

In any event, the United States Supreme Court has ruled that *parens patriae* does not allow states to challenge the constitutionality of federal laws. *Massachusetts v. Mellon*, 262 U.S. 447, 485-86, 43 S.Ct. 597 (1923). Therefore, even if this state recognized *parens patriae* as a basis for the Attorney General to act, it would avail him nothing in the Florida case.

Although the *Taylor* opinion assumed that our Attorney General has common-law powers, the Court nonetheless turned to statutes to seek authority over charitable trusts. 58 Wn.2d at 256. The published version of RCW 43.10.030(1) appeared to authorize the Attorney General to appear before “the courts” in “all cases in which the state is interested.” But, unbeknownst to the Court, that is not what the statute said. The statute actually limited the Attorney General to appearing in the supreme court. See Opening Brief, at 21-22. The *Taylor* decision indicates what the Court thought the erroneous language meant, not what it would have said had the correct language been available.

Respondent contends that the error in the published version of RCW 43.10.030(1) “is of little practical consequence.” Resp. Brf. at 43. He is correct – the *Taylor* court’s analysis of RCW 43.10.030(1) is not important in light of the holding that the Attorney General lacked statutory authority to compel an accounting. But Respondent cannot have it both ways, relying on *Taylor* as support for the proposition that RCW 43.10.030(1) vests the Attorney General with authority to appear in any court whenever he deems the state to be interested and, at the same time, acknowledging the *Taylor* court was construing an erroneous version of the statute.

Respondent next turns this Court’s *Gattavara* opinion on its head,

citing it as authority for the Attorney General to initiate litigation whenever he sees fit. Resp. Brf. at 38-39. *Gattavara* held that the Department of Labor and Industries could not initiate litigation on its own. *State v. Gattavara*, 182 Wash. 325, 332, 47 P.2d 18 (1935). The decision requires L&I to collaborate with the Attorney General; it does not permit the Attorney General to initiate litigation without a client.

Further, the holding in *Gattavara* was based upon RCW 43.10.030(2), not on some implied power:

[W]hen the duties of the Attorney General are prescribed by statute and the statute has for its purpose the authorization of proper state officers to bring actions, that authority is exclusive. As such officer, the Attorney General might, in the absence of express legislative restriction to the contrary, exercise all such power and authority as the public interest may, from time to time require.

Id. at 329 (emphasis added). Respondent focuses exclusively on the last sentence, as if it means the Attorney General has authority to act in the public interest under any and all circumstances. Resp. Brf. at 39. But the opinion actually provides that (1) when a statute authorizes the Attorney General to act (2) without express legislative restriction on that authority then (3) the Attorney General may exercise “such” statutory authority (4) in the public interest. Since no statute grants the Attorney General unilateral authority to make Washington State a plaintiff in a federal trial court, *Gattavara* is inapposite.

Respondent cites other cases to support his assertion of broad authority to initiate litigation whenever he sees fit. Resp. Brf. at 39, 45-6 (citing *State ex rel. Dunbar v. Board of Equalization*, 140 Wash. 433, 249 P. 996 (1926); *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977); *Boe v. Gorton*, 88 Wn.2d 773, 567 P.2d 197 (1977)). In *Dunbar* this Court ruled that RCW 43.10.030(2) authorized the Attorney General to prosecute state officers who acted unlawfully. In *Berge* and *Boe* there was no question that the Attorney General had statutory authority to recover the funds at issue, the question was whether he must do so. In each of these cases, unlike the present case, the Attorney General had statutory authority to act.

The many distinguishing factors between the *Young Americans* case and this one are discussed in the City's Opening Brief at pages 23-24. In spite of these distinctions, Respondent argues that *Young Americans* supports his ability to unilaterally decide what is in the public interest and to join the sovereign state in federal litigation without any agency or officer as a client. The broadest possible reading of the opinion does not stretch that far. This Court concluded in *Young Americans* that:

In our opinion this compendium⁵ of constitutional and statutory provisions relating to the Attorney General and

⁵ The "compendium" included RCW 28B.10.50 and RCW 28B.10.510, which authorized the Regents to determine admission requirements and made the Attorney General their legal advisor.

his status as attorney for the state and its departments and agencies is broad and inclusive enough to confer upon that office authority to appear as amicus curiae before the United States Supreme Court in cases which may directly or indirectly impact upon state functions or administrative procedures and operations.

91 Wn.2d 204, 207 (emphasis added). The conclusion that the Attorney General had authority to “appear as amicus curiae” does not equate to authority to join the state as a plaintiff, which has far greater legal ramifications. See Opening Brf. at 23-24. The opinion continued:

[T]he overall concern of the state in its higher educational institutions combined with the particular concern of the graduate departments of the University of Washington in minority admissions programs was sufficiently vital to justify official action by the Attorney General in his status as “legal adviser” to state officials and agencies.

Id. at 207. The “concern of the state” had been expressed by its authorized policy makers and this Court had held in the *DeFunis* case that the state policy was justified by a compelling interest. *Id.* at 212. The “particular concern” was that of the Attorney General’s client, the University. In contrast, here the Attorney General is deciding on his own what the state’s policy concerns should be. Moreover he has no client.

Respondent points to a footnote in *Young Americans*, which says:

We conceive the phrase “legal adviser” in the context of the Attorney General’s status in state government contemplates something more than a mere passive role in the formulation and implementation of state governmental policies and practices.

Id. Apparently the Attorney General considers having “something more than a mere passive role” enables him to unilaterally set policy for the state, in effect becoming the state’s supreme policy maker.

D. The Attorney General needs a client.

Respondent misunderstands the significance of the Governor’s objections, and those of the Insurance Commissioner and others, to his joining the State as a plaintiff in the Florida case. Resp. Brf. at 47-50. If he possessed statutory authority to join the State as a plaintiff in the Florida case and the Governor objected, that would be a different case for resolution another day. If he lacked statutory authority, but the Governor or another officer or agency with authority over the subject matter asked him to file the complaint that too would be a different case. Here he lacks statutory authority and he lacks a client.

E. This Court should resolve the fundamental questions in this case.

Respondent contends “traditional” standing criteria should be required, because, if the writ is issued, other plaintiffs will keep the Florida case going, therefore this case is not important. Resp. Brf. at 22-23. What could be more fundamental than the question whether our state’s Attorney General has broad authority to initiate litigation when he alone deems it to be in the public interest? And to do so without a client? And

even to take positions opposed by the State Officers charged with setting policy and implementing programs in the subject matter of the case?

Respondent says this case is not like *Distilled Spirits*⁶, which involved “a question of constitutional interpretation having immediate and far-reaching consequences for the validity of numerous state laws.” Resp. Brf. at 25. This case requires resolution of significant questions, such as: Does RCW 43.10.040 really give the Attorney General carte blanche to appear in any court anywhere whenever he sees fit? If so, how is that construction reconciled with the numerous statutes that authorize the Attorney General to appear in very specific circumstances? And why did the Legislature add the court of appeals to RCW 43.10.030(1) thirty years after enacting RCW 43.10.040 if the latter granted the Attorney General authority to appear in all types of courts? Only this Court can resolve these questions.

F. The City has standing as a taxpayer.

Respondent contends that the City cannot assert standing as a taxpayer without proving it is one. Resp. Brf. at 12. This Court can take judicial notice that the City is a taxpayer under WAC 458-20-189.

⁶ *State Ex rel. Distilled Spirits Institute v. Kinnear*, 80 Wn.2d 175, 492 P.2d 1012 (1972).

Attachment 1, hereto. ~~Under Ordinance 123177, adopting the City's~~

~~budget for 2010, all taxes and fees payable to the City.~~

Respondent argues that taxpayer standing is for “citizens,” not municipal corporations. Resp. Brf. at 10. The only time this Court has considered whether municipal corporations may assert standing as taxpayers, the Court ruled “we perceive no justifiable reason to apply a different standard where a county or municipality brings the action.” *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 269, 982 P.2d 611 (1999). Respondent contends this was merely dicta and should, therefore, be disregarded. Resp. Brf. at 17. However, taxpayer standing was the only basis for standing that the municipalities asserted in *City of Tacoma*.⁷ 85 Wn.2d. at 268. They sought a writ of mandamus against the State Treasurer, who moved to dismiss them for lack of standing. In order to decide whether they should be dismissed, this Court had to determine whether municipal corporations could assert taxpayer standing. Respondent argues that the presence of an individual plaintiff who had taxpayer standing made the ruling regarding the standing of the municipal corporations unnecessary. Perhaps this Court could have avoided ruling on the standing of the municipal plaintiffs, but it chose instead to deny the

⁷ Respondent argues that the municipal corporations could have asserted a “traditional” basis for standing instead. Resp. Brf. at 17. But they did not do so.

motion to dismiss them. Therefore the ruling that municipal corporations may assert taxpayer standing is not dicta.

The *City of Tacoma* decision was issued in 1975. In the thirty-five years since, municipal corporations have not turned into “itinerant litigants” using taxpayer standing to “second-guess the actions of other government entities or officials” as Respondent fears. Resp. Brf. at 18.

Respondent argues that three cases are “instructive” regarding his contention that municipal corporations cannot assert taxpayer standing. Resp. Brf. at 11 (citing *Hoppe v. King County*, 95 Wn.2d 332, 622 P.2d 845 (1980); *King County v. Port of Seattle*, 37 Wn.2d 338, 223 P.2d 834 (1950); *Grant County Fire Protection District No. 5 v. Moses Lake*, 150 Wn.2d 791, 83 P.2d 419 (2004)). Taxpayer standing, however, was not considered in any of these decisions.

In *Hoppe*, the King County tax assessor asserted standing in his official capacity and as a taxpayer, 95 Wn. 2d at 333, but the decision did not address taxpayer standing: “We hold Hoppe has no standing to bring this action in his capacity as King County Assessor.” *Id.* at 340. Hoppe lacked standing in his official capacity because his duties under the relevant statute were ministerial. *Id.* at 337-39. The decision in *Hoppe* is limited to its facts – it sheds no light on the present case.

In the *King County* case, the county did not assert taxpayer

standing and was seeking declaratory and injunctive relief, therefore it too is not helpful.⁸ Likewise, the Fire District in the *Grant County* case did not assert taxpayer standing—it asserted personal standing to bring a claim under the Uniform Declaratory Judgment Act, RCW 7.24. 150 Wn.2d 802. To do so the plaintiff must meet justiciability criteria of personal injury that is substantial. *Id.* This is not a declaratory judgment case, therefore *Grant County* is inapposite.

G. Asking the Attorney General to withdraw would have been futile.

The Attorney General has had ample opportunity to withdraw the State of Washington from the Florida case, but he has not done so. When the Governor sought a compromise, asking the Attorney General to alter the case caption to indicate he was participating in his role as a State Officer, not on behalf of the sovereign state, he refused. [REDACTED] [REDACTED]. He opined that he has the authority and the duty to act as he did. *Id.* This exchange of letters is evidence of his firm conviction that his action was authorized and was the right thing to do, a conviction he apparently held at the time he joined the State as a plaintiff.

⁸ King County sought to stop the Port's issuance of exclusive franchises to the Yellow Cab Company. 37 Wn.2d 339.

All the evidence indicates that if the City had asked him to withdraw the State of Washington from the Florida case, he would have refused.

This case thus differs from *Reiter v. Walgren*, 28 Wn.2d 872, 184 P.2d 571 (1947). Resp. Brf. at 12-14. In *Reiter*, the plaintiff sought to enjoin an allegedly illegal sale of timber. The Attorney General was “merely performing a duty imposed on him by statute” when he defended the State Officers who authorized the sale. 28 Wn.2d at 877. This Court noted there was no indication that the alleged irregularities in the transaction were known by the Attorney General before the complaint was filed. In such circumstances it makes sense to require the plaintiff to bring the allegedly illegal acts to the attention of the Attorney General before filing suit.

Unlike *Reiter*, in this case the Attorney General’s own actions are disputed. He was not performing a duty imposed on him, nor was he unaware of any facts. There is nothing the City could have brought to his attention that he did not already know. This Court does not require parties to engage in pointless exercises.

H. Representational standing is also appropriate in this case.

The City has standing in its own right as a taxpayer. It also has representational standing on behalf of its residents. Respondent contends

this Court ruled in *Grant County* that the Fire District lacked representational standing because the district would not suffer injury. Resp. Brf. at 11. The first reason this Court actually gave for ruling the Fire District lacked representational standing was that there were individual plaintiffs in the case who had standing, *id.* at 803-04; therefore, standing requirements did not need to be relaxed. The flexible approach to standing would be appropriate “where the plaintiff whose standing was challenged was the *only* plaintiff in the case and the liberal approach was necessary to ensure that the important public issues raised did not escape review.” *Id.* at 803. In this case there are no individual plaintiffs. If this Court rules that the City lacks standing, then the important question of the Attorney General’s authority will not be resolved.

The second reason this Court gave for denying representational standing in *Grant County* was that there was no evidence of harm to the residents of the Fire District. *Id.* at 804. One of the criteria for representational standing is that the people who are being represented could bring the claim themselves. That criteria is met in this case: Individuals residing in Seattle could assert standing as taxpayers to bring this petition and would not have to show any personal injury. *State ex rel. Boyles v. Whatcom County*, 103 Wn.2d 610, 614-15, 694 P.2d 27 (1985). Injury is presumed when a public entity or officer acts illegally.

Kightlinger v. Public Utility District No. 1 of Clark County, 119 Wn.App. 501, 506, 81 P.3d 876 (2003), *rev. granted*, 152 Wash.2d 1001 (2004). Most individuals, however, lack the resources to research the law in a case like this and petition for a writ.

Respondent argues “it is unlikely that all residents share the goals or interests of the municipal corporation.” Resp. Brf. at 20. True, but beside the point. In *City of Seattle v. State*, this Court ruled that the City had representational standing to raise the equal protection claims of people who wanted the area where they lived to be annexed by the City. 103 Wn.2d 663, 668-69, 694 P.2d 641 (1985). Other potential residents filed a petition with the Boundary Review Board opposing the annexation. *Id.* at 667. This Court did not require consensus among all those who would become City residents if annexation occurred.

Respondent depicts the *City of Seattle v. State* case inaccurately, saying this Court “applied the traditional two-part standing test” and based on that test held the City could raise the equal protection claims of its potential residents. Resp. Brf. at 15. Actually, this Court held the City also had standing in a representational capacity. 103 Wn.2d at 669. In circumstances like the present case, involving an issue of great importance to the public and to future guidance of State Officers, and given the

rapidity with which the petition had to be brought, representational standing should be allowed.

I. This Court regularly construes statutes in mandamus actions.

Respondent argues, in essence, that mandamus is inappropriate absent a statute that says, “The Attorney General shall not make a unilateral decision to join the sovereign State of Washington as a plaintiff in a federal lawsuit.” Resp. Brf. at 27-32. Thus, the Attorney General is arguing the Legislature must expressly prohibit State Officers from doing everything that exceeds their authority, or mandamus is ineffective to stop them. The constitution limits the Attorney General’s authority to what is prescribed by law, this Court has ruled that means he only has the authority expressed in statutes, and no statute authorizes him to do what he did in this case. The outside boundary of his authority is clear and the Attorney General has crossed it.

This Court frequently examines the law before deciding whether to issue a writ of mandamus. For example, in *Boe v. Gorton*, this Court had to decide whether the Attorney General had discretion to sue or whether

RCW 43.10.030(2) and (8) imposed a mandatory duty on him.⁹ 88 Wn.2d 773, 775-776, 567 P.2d 197 (1977).

Similarly, in *State ex rel. Burlington Northern v. Utilities & Transportation Commission*, 93 Wn.2d 398, 609 P.2d 1375 (1980), this Court had to determine whether a fee that was authorized “to pay the reasonable cost of supervising and regulating” the railroad industry could be used to reimburse the State for money paid to resolve tort claims arising from accidents at railroad crossings. *Id.* at 402. Making that determination involved construing statutes, regulations and a United States Supreme Court case. Like this case, no statute expressly barred the act alleged to be unlawful. This Court issued a writ of mandamus nonetheless.

In each of these cases this Court determined what the law meant in order to decide whether the writ should be issued. Respondent is simply wrong when he contends that traditional justiciability criteria apply in such circumstances. Resp. Brf. at 32 (citing *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994)). In *Walker* the plaintiffs sought a writ barring state

⁹ See also, *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 385 P.2d 372 (1963) (Court had to decide whether City of Tacoma had discretion to withhold a building permit); *State ex rel. O'Connell v. Yelle*, 51 Wn.2d 620, 320 P.2d 1086 (1958) (Court had to decide whether warrants approved by one house of the Legislature were invalid under the constitution); *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 P. 317 (1924) (Court had to decide whether statutes allowed a new political party with allegedly suspect motives to be on the ballot and also whether it could use an individual's name without his permission).

officials from implementing initiative 601, and also sought a declaratory judgment that the initiative was unconstitutional, together with a permanent injunction barring its operation. *Id.* at 406. This Court dismissed the writ because it addressed a general course of conduct and was premature, given that most of initiative 601 was not yet in effect. *Id.* at 409. The writ sought in this case is very specific and the actions in dispute are ongoing.

This Court dismissed the declaratory judgment claim in *Walker* because the supreme court does not have original jurisdiction over a claim for declaratory judgment. *Id.* at 411. The plaintiffs sought to avoid this problem by asserting their claim for declaratory judgment was “incidental” to their petition for a writ, but, since the court had already decided to dismiss the petition, that argument was unsuccessful. The discussion of justiciability in *Walker* related to claims for declaratory judgment, not petitions for writs, and it was dicta, since the Court had already decided to dismiss both the petition for a writ and the claim for declaratory judgment.

CONCLUSION

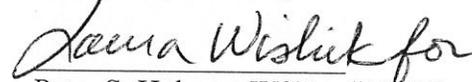
Respondent apparently believes the Attorney General has unfettered authority unless it has been expressly limited by statute. Agreed Statement of Facts, Attachment 6, p.2. Our constitution says the opposite—

the Attorney General has only the authority expressly conferred by statute.
It is up to this Court to confirm that the constitution means what it says.
Petitioner respectfully asks this Court to issue the writ.

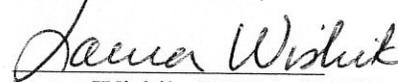
RESPECTFULLY SUBMITTED this 11th day of October, 2010.

Peter S. Holmes
Seattle City Attorney

By:



Peter S. Holmes, WSBA #15787
Seattle City Attorney



Laura Wishik, WSBA #16682
Seattle City Attorney's Office
600 - 4th Ave., 4th Floor
PO Box 94769
Seattle, WA 98124-4769
(206)684-8200
Attorneys for Petitioner

No. 84483-6

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

ROBERT M. MCKENNA, Attorney General, State of Washington,

Respondent.

ATTACHMENTS TO PETITIONER'S REPLY BRIEF

PETER S. HOLMES, WSBA #15787
Seattle City Attorney

LAURA WISHIK, WSBA #16682
Assistant City Attorney

Seattle City Attorney's Office
600 – 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

THE CITY OF SEATTLE,)
a municipal corporation,)
)DECLARATION OF LAURA
Petitioner,)WISHIK RE AUTHENTICITY
)OF ATTACHMENTS
v.)
)
ROBERT M. MCKENNA, Attorney)
General, Washington State,)
)
Respondent.)

-
1. I am an Assistant City Attorney for the City of Seattle, and represent the Petitioner in this matter.
 2. The documents attached to Petitioner’s Reply Brief are true and correct copies of the originals. They are:
 1. WAC 458-20-189
 2. Ordinance 123177 (excerpts)
 3. Laws of 1941, Ch. 50
 4. January 31, 1977 Letter from Smith Troy to Rasmussen
 5. Seattle Post Intelligencer, 2/26/1941, p.5

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and of my own knowledge, and that I executed this declaration at Seattle, Washington, in the County of King, this 11th day of October, 2010.


 Laura Wishik

ATTACHMENT 1

WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts. (1) **Introduction.** This section discusses the business and occupation (B&O), retail sales, use, and public utility tax applications to sales made to and by the state of Washington, counties, cities, towns, school districts, and fire districts. Hospitals or similar institutions operated by the state of Washington, or a municipal corporation thereof, should refer to WAC 458-20-168 (Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities). School districts should also refer to WAC 458-20-167 (Educational institutions, school districts, student organizations, and private schools). Persons providing physical fitness activities and amusement and recreation activities should also refer to WAC 458-20-183 (Amusement, recreation, and physical fitness services).

Persons providing public utility services may also want to refer to the following sections:

- (a) WAC 458-20-179 (Public utility tax);
- (b) WAC 458-20-180 (Motor transportation, urban transportation);
- (c) WAC 458-20-250 (Solid waste collection tax); and
- (d) WAC 458-20-251 (Sewerage collection and other related activities).

(2) **Definitions.** For the purposes of this section, the following definitions apply:

(a) "Municipal corporations" means counties, cities, towns, school districts, and fire districts of the state of Washington.

(b) "Public service business" means any business subject to control by the state, or having the powers of eminent domain, or any business declared by the legislature to be of a public service nature, irrespective of whether the business has the powers of eminent domain or the state exercises its control over the business. It includes, among others and without limiting the scope hereof, water distribution, light and power, public transportation, and sewer collection.

(c) "Subject to control by the state," as used in (b) of this subsection, means control by the utilities and transportation commission or any other state department required by law to exercise control of a business of a public service nature as to rates charged or services rendered.

(d) "Enterprise activity" means an activity financed and operated in a manner similar to a private business enterprise. The term includes those activities which are generally in competition with private business enterprises and which are over fifty percent funded by user fees. The term does not include activities which are exclusively governmental.

(3) **Persons taxable under the business and occupation tax.**

(a) Sellers are subject to the B&O tax upon sales to the state of Washington, its departments and institutions, or to municipal corporations of the state.

(b) The state of Washington, its departments and institutions, as distinct from its corporate agencies or instrumentalities, are not subject to the provisions of the B&O tax. RCW 82.04.030.

(c) Municipal corporations are not subject to the B&O tax upon amounts derived from activities which are exclusively governmental. RCW 82.04.419. Thus, the B&O tax does not apply to license and permit fees, inspection fees, fees for copies of public records, reports, and studies, pet adoption and license fees, processing fees involving fingerprinting and environmental impact statements, and taxes, fines, or penalties, and interest thereon. Also exempt are fees for on-street metered parking and on-street parking permits.

Municipal corporations are also exempt from the B&O tax on grants received from the state of Washington, or the United States government. RCW 82.04.418.

(d) Municipal corporations deriving income, however designated, from any enterprise or public service business activity for which a specific charge is made are subject to the provisions of the B&O or public utility tax. Charges between departments of a particular municipal corporation are interdepartmental charges and not subject to tax. (See also WAC 458-20-201 on interdepartmental charges.)

(i) When determining whether an activity is an enterprise activity, user fees derived from the activity must be measured against total costs attributable to providing the activity, including direct and indirect overhead. This review should be performed on the fiscal or calendar year basis used by the entity in maintaining its books of account.

For example, a city operating an athletic and recreational facility determines that the facility generated two hundred fifty thousand dollars in user fees for the fiscal year. The total costs for operating the facility were four hundred thousand dollars. This figure includes direct operating costs and direct and indirect overhead, including asset depreciation and interest payments for the retirement of bonds issued to fund the facility's construction. The principal payments for the retirement of the bonds are not included because these costs are a part of the asset depreciation costs. The facility's operation is an enterprise activity because it is more than fifty percent funded by user fees.

(ii) An enterprise activity which is operated as a part of a governmental or nonenterprise activity is subject to the B&O tax. For example, City operates Community Center, a large athletic and recreational facility, and three smaller neighborhood centers. Community Center operates with its own budget, and the three neighborhood centers are lumped together and operated under a single separate budget. Community Center and the neighborhood centers are operated as a part of an overall parks and recreation system, which is not more than fifty percent funded by user fees.

Each budget must be independently reviewed to determine whether these facilities are operated as enterprise activities. The operation of Community Center would be an enterprise activity only if the user fees account for more than fifty percent of Community Center's operating budget. The total user fees generated by the three neighborhood centers would be compared to the total costs of operating the three centers to determine whether they, as a whole, were operated as enterprise activity. Had each neighborhood center operated under an individual budget, the user fees generated by each neighborhood center would have been compared to the costs of operating that center.

(4) Business and occupation tax.

(a) Municipal corporations engaging in public service business activities should refer to the sections of chapter 458-20 WAC mentioned in subsection (1)(a) through (d) of this section to determine their B&O tax liability. Municipal corporations engaging in enterprise activities are subject to the B&O tax as follows:

(i) **Service and other business activities tax.** Amounts derived from, but not limited to, special event admission fees for concerts and exhibits, user fees for lockers and checkrooms, charges for moorage (less than thirty days), and the granting of a license to use real property are subject to the service and other business activities tax if these activities are considered enterprise activities. (See also WAC 458-20-118 on the sale or rental of real estate.) The service tax applies to fees charged for instruction in amusement and recreation activities, such as tennis or swimming lessons.

Physical fitness activities are retail sales. These activities include weight lifting, exercise facilities, aerobic classes, etc. (See also WAC 458-20-183 on amusement and recreation activities, etc.)

(ii) **Extracting tax.** The extracting of natural products for sale or for commercial use is subject to the extracting B&O tax. The measure of tax is the value of products. (See WAC 458-20-135 on extracting.) Counties and cities are not, however, subject to the extracting tax upon the cost of labor and services performed in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, or rock taken from a pit or quarry owned by or leased to the county or city when these products are either stockpiled for placement or are placed on a street, road, place, or highway of the county or city by the county or city itself. Nor does the extracting tax apply to the cost of or charges for such labor and services if the sand, gravel, or rock is sold by the county or city to another county or city at actual cost for placement on a publicly owned street, road, place, or highway. RCW 82.04.415.

(iii) **Manufacturing tax.** The manufacturing of products for sale or for commercial use is subject to the manufacturing B&O tax. The measure of tax is the value of products. (See WAC 458-20-136 on manufacturing.) The manufacturing tax does not apply to the value of materials printed by counties, cities, towns, or school districts solely for their own use. RCW 82.04.397.

(iv) **Wholesaling tax.** The wholesaling tax applies to the gross proceeds derived from sales or rentals of tangible personal property to persons who resell the same without intervening use. The wholesaling tax does not, however, apply to casual sales. (See WAC 458-20-106 on casual sales.) Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(v) **Retailing tax.** User fees for off-street parking and garages, and charges for the sale or rental of tangible personal property to consumers are taxable under the retailing B&O tax. The retailing tax does not, however, apply to casual sales. (See WAC 458-20-106.) Fees for amusement and recreation activities, such as golf, swimming, racquetball, and tennis, are retail sales and subject to the retailing tax if the activities are considered enterprise activities. Charges for instruction in amusement and recreation activities are subject to the service tax. (See also WAC 458-20-183 and (a)(i) of this subsection.)

Charges for physical fitness and sauna services are classified as retail sales and subject to the retailing tax. While a retail sales tax exemption for physical fitness classes provided by local governments is available (see subsection (6)(h) of this section), the retailing B&O tax continues to apply.

(b) Persons selling products which they have extracted or manufactured must report, unless exempt by law, under both the "production" (extracting and/or manufacturing) and "selling" (wholesaling or retailing) classifications of the B&O tax, and claim a tax credit under the multiple activities tax credit system. (See WAC 458-20-19301 on multiple activities tax credits.)

(5) **Retail sales tax.**

(a) The retail sales tax generally applies to all retail sales made to the state of Washington, its departments and institutions, and to municipal corporations of the state.

(b) The state of Washington, its departments and institutions, and all municipal corporations are required to collect retail sales tax on all retail sales of tangible personal property or services classified as retail services unless specific exemptions apply. Retail sales tax must be collected and remitted even though the sale may be exempt from the retailing B&O tax. For example, a city police department must collect retail sales tax on casual sales of unclaimed property to consumers, even though this activity is not subject to the B&O tax because these sales are considered casual sales. (See also WAC 458-20-106.)

(c) Sales between a department or institution of the state and a municipal corporation, or between municipal corporations are retail sales. For example, State Agency sells office

supplies to County. State Agency is making a retail sale. State Agency must collect and remit retail sales tax upon the amount charged, even though the B&O tax does not apply to this sale. The amount of retail sales tax must be separately itemized on the sales invoice. RCW 82.08.050. State Agency may claim a tax paid at source deduction for any retail sales or use tax previously paid on the acquisition of the office supplies.

(d) Departments or institutions of the state of Washington are not considered sellers when making sales to other departments or institutions of the state because the state is considered to be a single entity. RCW 82.08.010(2). Therefore, the "selling" department or institution is not required by statute to collect the retail sales tax on these sales.

All departments or institutions of the state of Washington are, however, considered "consumers." RCW 82.08.010(3). A department or institution of the state purchasing tangible personal property from another department or institution is required to remit to the department of revenue the retail sales or use tax upon that purchase, unless it can document that the "selling" institution previously paid the appropriate retail sales or use tax on that item.

(6) **Retail sales tax exemptions.** The retail sales tax does not apply to the following:

(a) Sales to city or county housing authorities which were created under the provisions of the Washington housing authorities law, chapter 35.82 RCW. However, prime contractors and subcontractors for city or county housing authorities should refer to WAC 458-20-17001 (Government contracting -- Construction, installations, or improvements to government real property) to determine their tax liability.

(b) Charges to municipal corporations and the state of Washington for that portion of the selling price of contracts for watershed protection or flood control which is reimbursed by the United States government according to the provisions of the Watershed Protection and Flood Prevention Act, Public Law 566, as amended. RCW 82.08.0271.

(c) Sales of the entire operating property of a publicly or privately owned public utility, or of a complete operating integral section thereof, to the state or a municipal corporation thereof for use in conducting any public service business except a tugboat business. RCW 82.08.0256.

(d) Sales of or charges made for labor and services in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, or rock taken from a pit or quarry owned or leased to a county or city, when the materials are either stockpiled in the pit or quarry, placed on the public road by the county or city itself, or sold at cost to another county or city for use on public roads. RCW 82.08.0275.

(e) Sales to one municipal corporation by another municipal corporation directly or indirectly arising out of, or resulting from, the annexation or incorporation of any part of the territory of one municipal corporation by another. RCW 82.08.0278.

(f) Sales to the state of Washington, or a municipal corporation in the state, of ferry vessels and component parts thereof, and charges for labor and services in respect to construction or improvement of such vessels. RCW 82.08.0285.

(g) Sales to the United States. However, sales to federal employees are subject to the retail sales tax, even if the federal employee will be reimbursed for the cost by the federal government. (See WAC 458-20-190 on sales to the United States.)

(h) Charges for physical fitness classes, such as aerobics classes, provided by local governments. RCW 82.08.0291. Local governments must collect retail sales tax on charges for other physical fitness activities such as weight lifting, exercise equipment, and running tracks.

This exemption does not apply if a person other than a local government provides the physical fitness class, even if the class is conducted at a local government facility.

(7) Deferred sales or use tax.

(a) If the seller fails to collect the appropriate retail sales tax, the state of Washington, its departments and institutions, and all municipal corporations are required to pay the deferred sales or use tax directly to the department.

(b) Purchases of cigarette stamps, vehicle license plates, license plate tabs, disability decals, or other items to evidence payment of a license, tax, or fee are purchases for consumption by the state or municipal corporation, and subject to the retail sales or use tax.

(c) Where tangible personal property or taxable services are purchased by the state of Washington, its departments and institutions, for the purpose of resale to any other department or institution of the state of Washington, or for the purpose of consuming the property purchased in manufacturing or producing for use or for resale to any other department or institution of the state of Washington a new article of which such property is an ingredient or component part, the transaction is deemed a purchase at retail and the retail sales tax applies.

(d) Persons producing or manufacturing products for commercial or industrial use are required to remit use tax upon the value of those products, unless a specific use tax exemption applies. RCW 82.12.020. This value must correspond as nearly as possible to the gross proceeds from retail sales of similar products. (See WAC 458-20-112 and 458-20-134 on value of products and commercial or industrial use, respectively.)

For example, a municipal corporation operating a print shop and producing forms or other documents for its own use must remit use tax upon the value of those products, even though a B&O tax exemption is provided by RCW 82.04.397. The municipal corporation may claim a credit for retail sales tax previously paid on materials, such as

paper or ink, which are incorporated into the manufactured product. The process of putting an internal communication, such as a memorandum to employees, on a blank form or document is not considered a manufacturing activity, even when multiple copies of the resulting internal communication are reproduced for wide distribution to employees.

(i) Counties and cities are not subject to use tax upon the cost of labor and services in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, and rock taken from a pit or quarry owned or leased to a county or city when the materials are for use on public roads. RCW 82.12.0269.

(ii) If a department or institution of the state of Washington manufactures or produces tangible personal property for use or resale to any other department or institution of the state, use tax must be remitted upon the value of that article even though the state is not subject to the B&O tax.

For example, State Agency manufactures office furniture for resale to other departments or institutions of the state of Washington. State Agency will also on occasion use office furniture it has manufactured for its own offices. Use tax is due on the office furniture sold to the other departments or institutions of this state, and on the office furniture State Agency puts to its own use. The taxable value of the office furniture sold to the other departments or institutions of this state is the selling price. The taxable value for the office furniture State Agency puts to its own use is the selling price at which State Agency sells comparable furniture to other departments or institutions of the state. When computing and remitting use tax upon the value of manufactured furniture, State Agency may claim a credit for retail sales or use taxes previously remitted on materials incorporated into that furniture. A department or institution of this state purchasing office furniture from State Agency must remit use tax upon the value of that furniture, unless it can document that State Agency paid use tax upon the appropriate value of the furniture. (See also subsection (5)(d) of this section.)

(e) A use tax exemption is available to state or local governmental entities using tangible personal property donated to them. RCW 82.12.02595. The donor, however, remains liable for the retail sales or use tax on the donated property, even though the state or local governmental entity's use of the property is exempt of tax.

(8) Persons subject to the public utility tax.

(a) Persons deriving income subject to the provisions of the public utility tax may not claim a deduction for amounts received as compensation for services rendered to the state of Washington, its departments and institutions, or to municipal corporations thereof.

(b) The public utility tax does not apply to income received by the state of Washington, or its departments and institutions from providing public utility services.

(c) Municipal corporations operating public service businesses should refer to WAC

458-20-179 (Public utility tax), WAC 458-20-180 (Motor transportation, urban transportation), WAC 458-20-250 (Solid waste collection tax) and WAC 458-20-251 (Sewerage collection and other related activities) to determine their public utility tax liability.

(9) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

(a) City operates a community center which provides a number of activities and services. The center charges fees for court activities including tennis and racquetball, general admission to the swimming pool, swimming lessons, aerobics classes, and the use of weight equipment. The community center also provides programs targeted at youth and senior populations. These programs include arts and craft classes, dance instruction classes, and day camps providing a wide variety of activities such as picnics, nature walks, volleyball, and other games. The center provides banquet and meeting rooms to civic groups for a fee, but does not provide a meal service with the banquet facilities. The community center's operation is an enterprise activity, because it is more than fifty percent funded by user fees.

City's tax liability for the fees charged by the community center are as follows:

(i) Retailing B&O and retail sales taxes apply to all charges for the court activities, general admission to the swimming pool, and the use of weight equipment;

(ii) The retailing B&O tax applies to fees charged for aerobics classes. Retail sales tax does not apply because of the sales tax exemption for physical fitness classes provided by local governments;

(iii) Service and other business activities B&O tax applies to all fees for swimming lessons, the arts and crafts classes, dance instruction classes, day camps, and the rental of the banquet and meeting rooms. Retail sales tax does not apply to any part of the charge for the day camp because the portion of the day camp activities considered to be retail is minimal.

(b) City operates a swimming pool located at a high school. This swimming pool is open to the public in the evenings. City charges user fees for swimming lessons, water exercise classes, and general admission to the pool. City will occasionally "rent" the pool to a private organization for the organization's own use. In these cases, the private organization controls the overall operation and admission to the facility. City has no authority to control access and/or use when "renting" the pool to these organizations. City compares the user fees generated by the swimming pool to the total costs associated with the operation of the pool on an annual basis. The user fees never total "more than fifty percent" of the cost of pool operation, therefore the operation of the pool is not an enterprise activity.

City must collect and remit retail sales tax on all retail sales for which a retail sales tax exemption is not available, even though the B&O tax does not apply. Retail sales tax must be charged and collected on all general admission charges. Retail sales tax does not apply to the water exercise classes because of the retail sales tax exemption provided for physical fitness classes provided by local governments. City would not collect retail sales tax on the charges for the swimming lessons or the "rental" of the pool to private businesses (license to use real estate) because these charges are not retail sales.

(c) City sponsors various baseball leagues as a part of City's efforts to provide recreational activities to its citizens. Teams joining a league are charged a "league fee." Individual participants are charged a "participation fee." The league fee entitles a team to join the league, and reserve the use of the ball fields for league games. The participation fee entitles an individual team member to participate in the baseball activity. City does not account for the operation of the ball fields under a single specific budget. The user fees generated from the baseball fields, as well as the costs of operating and maintaining these fields, are accounted for in City's overall parks and recreation system budget, which is not an enterprise activity.

The participation fees are retail sales and subject to the retail sales tax, because the team members pay these fees for the right to actually engage in an amusement and recreation activity. The league fees are not retail sales, because they simply entitle the teams to join an association of baseball teams that compete amongst themselves. (Refer also to WAC 458-20-183 on amusement and recreational activities.) The participation fees and league fees are not subject to the B&O tax, because these baseball fields are not operated as an enterprise activity. Had these fields been operated as an enterprise activity, the participation fees and league fees would also have been subject to the retailing and service and other business activities B&O tax classifications, respectively.

(d) Jane Doe enters into a contract with City to provide an aerobics class at City's community center. Jane is responsible for providing the aerobics class. City merely "rents" a room to Jane under a license to use agreement.

Jane Doe must collect and remit retail sales tax upon the charges for the aerobics classes. The charges for the aerobics classes do not qualify for the retail sales tax exemption provided by RCW 82.08.0291 merely because the classes are held at a local government facility. Jane Doe is not entitled to the retail sales tax exemption available to local governments.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), chapters 82.04, 82.08, 82.12 and 82.32 RCW. 10-06-070, § 458-20-189, filed 2/25/10, effective 3/28/10. Statutory Authority: RCW 82.32.300. 95-24-104, § 458-20-189, filed 12/6/95, effective 1/6/96; 86-18-069 (Order 86-16), § 458-20-189, filed 9/3/86; 85-22-041 (Order 85-6), § 458-20-189, filed 11/1/85; 85-04-016 (Order 85-1), § 458-20-189, filed 1/29/85; 83-07-033 (Order ET 83-16), § 458-20-189, filed 3/15/83; Order ET 70-3, § 458-20-189 (Rule 189), filed 5/29/70, effective 7/1/70.]

ATTACHMENT 2

*This attachment
was stricken.*

ATTACHMENT 3

Senate Bill No. 102

STATE OF WASHINGTON, TWENTY-SEVENTH REGULAR SESSION.

January 29, 1941, read first and second time, ordered printed and referred to
Judiciary Committee.

AN ACT

Relating to the powers and duties of the attorney general; providing for the legal representation of the state of Washington and all departments, commissions, boards, agencies, and administrative tribunals thereof and providing for the appointment of certain personnel therein; repealing all acts or parts of acts in conflict herewith; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington

1 SECTION 1. In addition to the powers and duties now given the attorney general of the
2 State of Washington by law, he shall also have the power, and it shall be his duty, to rep-
3 resent the State of Washington and all officials, departments, boards, commissions or
4 agencies of the State of Washington in the courts and before all administrative tribunals
5 or bodies of any nature in all legal or quasi legal matters, hearings or proceedings, and
6 to advise all officials, departments, boards, commissions or agencies of the State of Wash-
7 ington in all matters involving legal or quasi legal questions, except where it is otherwise
8 provided by law to be the duty of the prosecuting attorney of any county; and it shall be
9 the duty of the attorney general of the State of Washington, and he shall have the power,
10 to employ or discharge sufficient attorneys and clerks to transact for the State of Wash-
11 ington, its departments, officials and agencies, all business of a legal or quasi legal na-
12 ture, except where it is provided by law to be the duty of the judge of any court, or the
13 prosecuting attorney of any county, and the attorney general shall fix the salary and
14 compensation for all such attorneys and employees, and in the event such attorneys or
15 employees are assigned to any department, board or commission, such department, board
16 or commission shall pay the salary or compensation of such persons, as fixed by the
17 attorney general.

18 SEC. 2. The attorney general shall have the exclusive power and duty to appoint or dis-
19 charge or retain in employment all examiners acting for any department, commission,
20 board, agency, or administrative tribunal in conducting hearings and taking testimony, ex-
21 cept where it is provided by law to be the duty of the judge of any court, and the at-
22 torney general shall fix the salary and compensation for all such examiners.

23 SEC. 3. No officer, official, director, administrative agency, board or commission of
24 the State of Washington, other than the attorney general, shall employ, appoint, or re-

1 tain in employment any attorney for any administrative body, department, commission,
2 agency, or tribunal or any other person to act as attorney in any legal or quasi legal ca-
3 pacity in the exercise of any of the powers or performance of any of the duties set forth
4 in this act, except where it is provided by law to be the duty of the judge of any court
5 or the prosecuting attorney of any county to employ or appoint such persons.

6 SEC. 4. The attorney general shall have the power to employ from time to time such
7 skilled experts, scientists, technicians or other specially qualified persons as he may deem
8 necessary to aid him in preparing for the trial of actions.

9 SEC. 5. All acts or parts of acts in conflict herewith are hereby repealed.

10 SEC. 6. If any section, clause, sentence or phrase of this act is for any reason held to
11 be unconstitutional or invalid, such decision shall not affect the validity of the remaining
12 portions of this act, and the legislature hereby declares it would have enacted this act
13 if such section, clause, sentence or phrase were omitted.

14 SEC. 7. This act is necessary for the immediate support of the state government and its
15 existing public institutions, and shall take effect immediately.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

1 tain in employment any attorney for any administrative body, department, commission,
2 agency, or tribunal or any other person to act as attorney in any legal or quasi legal ca-
3 pacity in the exercise of any of the powers or performance of any of the duties set forth
4 in this act, except where it is provided by law to be the duty of the judge of any court
5 or the prosecuting attorney of any county to employ or appoint such persons.

6 SEC. 4. The attorney general shall have the power to employ from time to time such
7 skilled experts, scientists, technicians or other specially qualified persons as he may deem
8 necessary to aid him in preparing for the trial of actions.

SENATE COMMITTEE AMENDMENT TO SENATE BILL NO. 102
(By a Majority of Judiciary Committee)

Amend renumbered Sec. 4, page 2 of the original bill, the same being renumbered Sec. 4, page 2 of the printed bill, by striking the whole thereof and inserting the following: "Sec. 4. This act shall not apply to the administration of the Judicial Council, the state law library, the law school of the University of Washington, or the administration of the state bar act by the Washington State Bar Association, as provided in Chapter 126, Laws of 1921 and Chapter 94, Laws of 1933."

ADOPTED

Senate Bill No. 102

STATE OF WASHINGTON, TWENTY-SEVENTH REGULAR SESSION.

January 29, 1941, read first and second time, ordered printed and referred to
Judiciary Committee.

AN ACT

Relating to the powers and duties of the attorney general; providing for the legal representation of the state of Washington and all departments, commissions, boards, agencies, and administrative tribunals thereof and providing for the appointment of certain personnel

SENATE COMMITTEE AMENDMENTS TO SENATE BILL NO. 102
(By a Majority of Judiciary Committee)

Amend the title, line 3 of the original bill, the same being line 2 of the title of the printed bill, by striking the word "all"

Amend the title, line 5 of the original bill, the same being line 4 of the printed bill, after the word "therein" and before the semi-colon (;) insert the following: ", excepting certain state agencies"

Amend Section 1, line 11 of the original bill, the same being Section 1, line 3 of the printed bill, by striking the word "or" and inserting in lieu thereof the word "and"

Amend Section 1, line 21 of the original bill, the same being Section 1, line 11 of the printed bill, by inserting after the word "officials" and before the word "and" the following: ", boards, commissions"

Amend Section 1, line 29 of the original bill, the same being Section 1, line 17 of the printed bill, by striking the period (.) and inserting in lieu thereof the following: ", not exceeding the funds made available to the department by law for legal services."

Amend Sec. 2, page 1 of the original bill, the same being Sec. 2, page 1 of the printed bill, by striking the whole thereof and renumbering subsequent sections consecutively.

cy.

the

ep-

or

als

nd

sh-

ise

be

er,

h-

a-

he

id

or

rd

ae

is-

n,

x-

t-

of

e-

ADOPTED

ATTACHMENT 4

*This attachment
was stricken*

ATTACHMENT 5

*This attachment
was stricken.*

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

THE CITY OF SEATTLE,)
a municipal corporation,)
) Certificate of Service
Petitioner,)
)
v.)
)
ROBERT M. MCKENNA, Attorney)
General, Washington State,)
)
Respondent.)

I, Michele Worthy, do hereby certify and declare under penalty of perjury under the laws of the State of Washington as follows:

That I am an employee of The City of Seattle, City Attorney's Office, City Hall, 600 – 4th Ave., 4th floor, P.O. Box 94769, Seattle, Washington, 98124-4769, and that on October 11, 2010, I caused a copy of the following documents:

1. Petitioner's Reply Brief
2. Attachments to Petitioner's Reply Brief
2. Certificate of Service

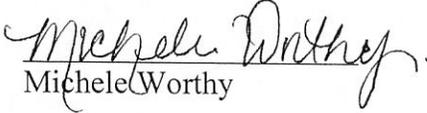
to be served on counsel of record at the addresses and in the manners described below.

RECEIVED
COURT OF APPEALS
DIVISION ONE
OCT 11 2010

Office of the Attorney General
Maureen Hart
Jeffrey T. Even
PO Box 40100
Olympia, WA 98504-0100
Jeffe@atg.wa.gov
marnieh@atg.wa.gov

- ABC Legal Messenger
- Federal Express
- Electronic Mail
- Facsimile
- U.S. Mail

Dated this 11th day of October, 2010 at Seattle, Washington


Michele Worthy