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NO. 86293-1

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SUPREME COURT OF THE STATE OF WASHINGTON

CEDAR RIVER WATER AND SEWER DISTRICT;
and SOOS CREEK WATER AND SEWER DISTRICT,

Appellants,

v.

KING COUNTY, et al.,

Respondent/Cross Appellant.

**BRIEF OF AMICUS CURIAE WASHINGTON STATE AUDITOR
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I. INTRODUCTION

Washington State Auditor Brian Sonntag submits this Amicus Brief to address three issues related to the interpretation of RCW 43.09.210 (also referred to by the parties as “the Accountancy Act”). The State Auditor’s purpose is to present his view as to the proper interpretation of RCW 43.09.210. Under this interpretation, the State Auditor need not and does not take a position in support of either party.

First, the State Auditor suggests that this case should be analyzed similarly to a case recently decided by this Court, *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P. 3d 1017 (2012). Under such an analysis, the Court should interpret and apply the sewage disposal contracts between King County and the Districts to determine what charges the County may impose. RCW 43.09.210 is of limited relevance to that analysis.

Second, the State Auditor disagrees with the County’s argument that RCW 43.09.210 *requires* the County to charge the Districts a credit enhancement fee related to limited tax general obligation bonds, or services provided by from the County’s general government cost pool; or that RCW 43.09.210 requires recoupment or offset under the County’s counterclaim. Rather, case law establishes that local governments have

some discretion regarding whether or how much to charge or pay for benefits and services that have an imprecise value.

Finally, the State Auditor has concerns with some of the trial court's rationale related to the County's credit enhancement fee, and suggests that this rationale is too broad to the extent it purports to be an interpretation of RCW 43.09.210.

II. IDENTITY AND INTEREST OF AMICUS

As the state government official charged with the application of RCW 43.09, the State Auditor is interested in the proper interpretation of RCW 43.09.210. RCW 43.09 details the State Auditor's authority and duties with respect to the financial affairs of state and local government agencies in Washington State. Sections .200 and .205 set forth the authority and duties of the State Auditor with regard to prescribing accounting and reporting systems for local governments. Sections .210 through .240 set forth the responsibilities of local governments to adhere to accounting and reporting requirements prescribed by law and the State Auditor. Sections .245 through .265 authorize the State Auditor to "examine" – i.e., audit - the financial affairs of local governments. Specifically, RCW 43.09.260 instructs the State Auditor to determine whether local governments are complying with the laws of the state, their ordinances, and the State Auditor's accounting requirements.

Section .210 of RCW 43.09 is the subject of some of the parties' arguments in this case. It provides in relevant part:

[S]eparate accounts shall be kept for each department, public improvement, undertaking, institution, and public service industry under the jurisdiction of every taxing body. All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another ...

Because the State Auditor is charged with auditing for compliance with this statute, he is very familiar with how RCW 43.09.210 has been interpreted and applied by local governments across the State. This audit experience provides the State Auditor's Office with knowledge of and a broad perspective on the laws that govern the transfer of funds and services between local governments, or between funds in the custody of one government entity. In addition, the State Auditor's Office staff has experience auditing transfers between funds to determine whether they are in compliance with the law.

The Supreme Court's decision in this case will provide guidance to the State Auditor's Office, local government officials, and lower courts regarding the proper interpretation of RCW 43.09.210. The appellate

courts have already recognized that local governments are tempted to find ways to fund their “general government” functions with utility rates, when general government functions should by law be funded by taxes.¹ Citizens are the ultimate payers of utility rates, and in *Okeson* and other cases the Court has required cities and counties to limit utility rates to utility functions, and to fund non- utility functions through taxes.

The interpretation of RCW 43.09.210 proposed by King County in its briefs is too sweeping, and was not accepted by the trial court. The County’s incorrect interpretation of RCW 43.09.210 could provide a means for local governments to fund general government services through charges to utility ratepayers, undermining the Court’s precedent.

III. STATEMENT OF THE CASE

Because the State Auditor will address a small portion of this case, the State Auditor recites the following limited facts.

King County operates a Wastewater Treatment Division (“WTD”) which collects, treats, and disposes of wastewater and sewage. King County has contracts with the two plaintiff Water and Sewer Districts (“Districts”) and other government and non-government entities to provide

¹ *Okeson v. Seattle*, 159 Wn.2d 436, 447-50, 150 P.3d 556 (2007) (greenhouse gas mitigation program may not be funded by utility ratepayers); *Okeson v. Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) (streetlights may not be funded by electrical utility); *Okeson v. Seattle*, 130 Wn. App. 814, 820-23, 125 P. 3d 172 (2005) (some 1% for the arts program expenditures did not have sufficient nexus to utility).

wastewater treatment services. The sewage disposal contracts provide that the Districts will collect sewage and industrial wastewater and deliver it to the County. Brief of Appellants at 2.

Section 5 of the Districts' the contracts provides how the County will calculate the charge for these services:

Prior to July 1st of each year [the County] shall determine its total monetary requirements for the disposal of sewage during the next succeeding calendar year. Such Requirements shall include the cost of administration, operation, maintenance, repair and replacement of the Metropolitan Sewerage System, establishment and maintenance of necessary working capital and reserve, the requirements of any resolution providing for the issuance of revenue bonds of Metro to finance the acquisition, construction or use of sewerage facilities, plus not to exceed 1% of the foregoing requirements for general administrative overhead costs.

Findings of Fact, Conclusions of Law ¶ 9 (CP 18661).

The Districts alleged in this lawsuit that King County includes certain unallowable charges in the yearly rate calculations it performs under the sewage disposal contracts. One of the Districts' claims was based on RCW 43.09.210. The County asserted a counterclaim based on RCW 43.09.210. The trial court dismissed both of these claims, ruling that the Accountancy Act does not provide a private cause of action to local governments. CP 8420-21, 17879-81. Nevertheless, when the remaining claims proceeded to a bench trial, the parties made arguments to

the trial court related to RCW 43.09.210. The trial court issued conclusions of law citing and interpreting RCW 43.09.210. Findings of Fact, Conclusions of Law 154, 155 (CP 18692).

In the briefs filed with this Court, King County makes arguments relating to RCW 43.09.210 with respect to three issues. First, with respect to cost allocation, the County argues that RCW 43.09.210 requires it to allocate and charge the cost of centralized government services provided to WTD. Brief of Respondent and Cross-Appellant King County at 63-64. Second, the County argues that RCW 43.09.210 requires the County to charge a credit enhancement fee with respect to limited tax general obligation (LTGO) bonds. *Id.* at 70-71. Finally, the County argues that RCW 43.09.210 requires the Court to grant its counterclaim alleging that any recovery by the Districts in this case must be reduced or offset by the value of benefits the County conferred on the WTD and its ratepayers. *Id.* at 3, 73-74; Respondent and Cross-Appellant King County's Reply Brief in Support of Cross-Appeal at 23.

In the State Auditor's view, RCW 43.09.210 at most permits, but does not require, the County to impose a charge for a service or benefit with an imprecise value. Although the parties address a number of other issues and theories in this case, this Amicus Brief addresses only the

interpretation of RCW 43.09.210, and not other arguments related to the parties' claims and defenses.

IV. ARGUMENT

A. The Court should interpret and apply the sewage disposal contracts to determine the allowable charges that King County may impose.

Under this Court's precedent, the proper analysis to determine whether King County may charge the Districts for the credit enhancement fee, services provided by the County's general government cost pool, and other benefits or services, is to interpret the parties' sewage disposal contracts. This analytical approach is consistent with how the Court has interpreted RCW 43.09.210 in similar circumstances.

The Districts and the County are separate government agencies. RCW 43.09.210 requires the Districts to pay the County for sewage disposal services. The Districts acknowledge that they must pay the county for the services, but dispute the amount of such payment and what factors may be included in it.

In *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 592-93, the Court ruled that when a local government provides services to another local government and there is an exchange of services and benefits that cannot be precisely valued, the Court will defer to the compensation

established by the parties in their contract. This case is factually similar to *City of Tacoma*, which provides the correct analysis here.

The *City of Tacoma* case pertained to Tacoma's franchise agreements with Pierce County and several cities, under which Tacoma supplied the municipalities and their citizens with water. Under the contracts, Tacoma had supplied fire hydrants and water supply to the fire hydrants for many years, and had funded hydrant costs through charging a fee to ratepayers in those municipalities. *City of Tacoma*, 173 Wn.2d at 587. After this Court's decision in *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008), Tacoma stopped charging the ratepayers a hydrant fee. *City of Tacoma*, 173 Wn.2d at 588. This was because *Lane* had held that fire hydrants are a general governmental function that should be funded by taxes, and therefore should not be part of Seattle's water utility fees. Seeking a different funding source for the hydrant costs, Tacoma billed the other municipalities directly, but the municipalities refused to pay. *Id.*

Tacoma then brought an action, asserting that RCW 43.09.210 required the municipalities to separately pay Tacoma for fire hydrants. *City of Tacoma*, 173 Wn.2d at 588. This claim was also based on one part of the *Lane* decision, in which the Court analyzed the fact that Seattle was providing a fire hydrant service to the City of Lake Forest Park pursuant to

a Lake Forest Park ordinance. The Court concluded that under RCW 43.09.210, Lake Forest Park was required to pay Seattle for that service. *Lane*, 164 Wn.2d at 889.

However, the Court in *City of Tacoma* rejected the argument that RCW 43.09.210 required Tacoma to separately charge the municipalities for fire hydrants. The Court reasoned that in *Lane*, Seattle was providing the service pursuant to a Lake Forest Park ordinance rather than as the result of any formal contract between the parties. *City of Tacoma*, 173 Wn.2d at 592. Unlike Seattle, Tacoma had franchise agreements with the municipalities, and the Court concluded the existence of the franchise agreements “changes the analysis” from that contained in *Lane*. *Id.* The Court recognized that RCW 43.09.210’s phrase “true and full value” has a flexible meaning, and that it is applied “flexibly and practically”. *Id.* (citing Op. Att’y Gen. 5 (1997), at 3). The Court concluded that in entering into the agreements, Tacoma had obtained long term rights to supply water, and in exchange the municipalities received the benefit of a water system for their citizens. The Court held that it was not practicable to give precise values to the respective benefits each party received, and RCW 43.09.210 was satisfied under these circumstances. *Id.* at 592-93.

The Court specifically rejected Tacoma’s argument that despite the language and course of conduct under its franchise agreements,

RCW 43.09.210 required Tacoma to charge the municipalities for fire hydrants. The Court reasoned that “[h]ad Tacoma wished to exclude hydrants from the franchise agreements, it could have done so when it negotiated the agreements. It cannot now ask this court to amend the contract because it is unhappy with the bargain it struck.” *City of Tacoma*, 173 Wn.2d at 593. The Court refused Tacoma’s attempt to inject RCW 43.09.210 as a means to “dispute the value of the franchise agreements.” *City of Tacoma*, 173 Wn.2d at 592.

Thus, in a context similar to this case, the Court ruled that when a local government contracts to provide services to another local government and there is an exchange of services and benefits that cannot be precisely valued, the Court will defer to the parties’ contract. Stated differently, a contractual agreement that establishes reasonable compensation for the exchange of services and benefits will satisfy RCW 43.09.210.

Although King County’s opening brief cites *City of Tacoma*², the County does not fully address the import of that decision. The County argues that RCW 43.09.210 provides a basis, independent of the terms of the sewage disposal contracts, to require that the Districts pay for certain “services,” “benefits,” or “risks” related to the County’s operation of

² Brief of Respondent and Cross-Appellant King County at 42, 64, and 70.

WTD. This is similar to the argument made and rejected in *Tacoma*, that despite the language and course of conduct under its franchise agreements, RCW 43.09.210 required Tacoma to charge the municipalities for fire hydrants. *City of Tacoma*, 173 Wn. 2d at 592-93.

Based on *City of Tacoma's* conclusion, RCW 43.09.210 sets the parameters for two government entities to negotiate a contract. For example, when there is an actual expenditure of money, or actual "cost," it is clear what the true and full value is and what one local government must charge another. However, when property is transferred, or services are provided, or benefits conferred, the way to measure value may be a matter of debate. When value cannot be precisely measured, RCW 43.09.210 is flexible, and the Court will hold the government entities to the bargain they have struck in their contracts. RCW 43.09.210 does not provide an independent basis to claim a right to compensation that is different from or additional to the compensation provided for in the contract.

Of course, there could be circumstances in which two government entities stray beyond the reasonable parameters of RCW 43.09.210. For example, RCW 43.09.210 could be violated if the contract consideration received by one government entity is grossly insufficient to address the actual cost of providing the service, or if the charge to the entity receiving the service is grossly overstated. However, in *City of Tacoma* the Court

concluded the franchise agreement was a fair exchange of services and benefits; it seems unlikely the issues raised by the County here would dictate a different outcome.

In order to ensure a consistent and workable interpretation of RCW 43.09.210, the Court should reject the argument that RCW 43.09.210 is an additional source of authority for the County to charge the Districts for all “services,” “benefits,” and “risks” related to LTGO bonds, centralized government services, or other matters. Instead, the Court should interpret and apply the terms of the sewage disposal contracts.

B. RCW 43.09.210 permits, but does not require, that a general fund charge another fund for “services” and “benefits” with imprecise values.

If the Court nevertheless reaches an analysis of RCW 43.09.210 as an independent basis for charging the Districts, the State Auditor’s interpretation of RCW 43.09.210 is that this statute *permits*, but does not *require*, the County to charge the Districts for allocated centralized services, the credit enhancement fee, or other items the County may argue it is entitled to recoup. The State Auditor’s interpretation is consistent with the trial court’s rulings. Nothing in the trial court’s conclusions of law suggests a *requirement* under RCW 43.09.210 to charge for these services or benefits, only that such charges are “lawful.” Conclusion of

Law 157 (CP 18693). Further, the trial court correctly rejected the County's argument that RCW 43.09.210 *requires* the County to recoup the value of services the County argues it has provided, but for which the Districts have not paid. *See* Brief of Respondent and Cross-Appellant at 73 and footnote 210.

When government agencies exchange property, services, or benefits, precise measurement of the value of that exchange often is not possible. In such a situation, RCW 43.09.210's phrase "true and full value" has a flexible meaning depending on the nature of the item transferred or exchanged. *Op. Att'y Gen. 5 (1997)*, at 3 ("Full value' has a flexible meaning, depending on the nature of the property transferred and the other circumstances of the transaction, and 'value' could take forms other than monetary consideration"). *In City of Tacoma*, this Court adopted AGO 1997 No. 5's analysis, and concluded that RCW 43.09.210 is flexible in this way. *City of Tacoma*, 173 Wn.2d at 592.

In addition, where RCW 43.09.210 is applied to a service or benefit provided by a county or city general fund, additional interpretive questions are present. A county's general fund consists of property taxes and other revenues which have not been specifically allocated to any other purpose. RCW 36.33.010. A general fund may support a utility, in the absence of a statute or local charter or ordinance that provides that the

utility must be self-supporting. *Berglund v. Tacoma*, 70 Wn.2d 475, 478, 423 P.2d 922 (1967); *State ex rel. Adams v. Irwin*, 74 Wash. 589, 593, 134 P. 484 (1913). This has been the long-standing rule, even after the enactment of RCW 43.09.210's predecessor statute in 1913. For example, the Auditor has found based on its experience auditing local governments that some cities do not attempt to allocate the costs of their centralized services to city utility or special funds. Because a general fund could directly support such activities in the appropriate circumstances, the Court should not rule broadly that RCW 43.09.210 requires a special fund to compensate a general fund for the imprecise value of each and every conceivable "benefit" and "service."

The court and attorney general's opinions cited by the County³ are inapposite to the issues discussed in this Amicus Brief, and do not support the County's argument that RCW 43.09.210 requires the County to charge for a specific "benefit" or "service", in the context of this case. First, *Uhler v. Olympia*, 87 Wash. 1, 151 P. 117 (1915) and *Griffin v. Tacoma*, 49 Wash. 524, 95 P. 1107 (1908), do not interpret RCW 43.09.210. Rather, they turn on the specific language of a city ordinance and a different state statute (*Uhler*) or charter provision (*Griffin*), and are not relevant to an interpretation of RCW 43.09.210. *Uhler*, 87 Wash. at 3, 12-

³ Brief of Respondent and Cross-Appellant King County at 71, n. 205; 74.

13; *Griffin*, 49 Wash. at 528. Second, these court and attorney general opinions do not pertain to a “benefit” or “service” that has an imprecise value; rather, these opinions involve actual expenditures or transfers of funds in a definite amount. Finally, these opinions do not concern an individual “benefit” or “service” – like allocated centralized costs or the credit enhancement fee - that are just two isolated items in a large and complex exchange of funds, benefits and services.

The Court has recognized several instances when cities or counties have attempted to support general governmental activities through fees rather than taxes. *Supra* at 3-4. The Court has repeatedly adhered to the principal that cities and counties must support their general government activities through taxes, not fees or utilities rates. *Id.* Cities and counties could circumvent this principal if this Court concludes – for the first time - that RCW 43.09.210 *requires* their general funds to receive compensation for all possible but unquantifiable benefits and services.

Therefore, even if the Court considers RCW 43.09.210 as an independent basis for analyzing the facts of this case, this Court should recognize that the Districts are paying the County for sewage disposal “costs”, as required by RCW 43.09.210; and that this statute does not require the County to identify and include in its charge the imprecise value of each and every conceivable “service” and “benefit.”

C. RCW 43.09.210 does not require the county to charge the credit enhancement fee.

The Districts argue that the credit enhancement fee is an illegal tax. The State Auditor does not take a position on whether this charge is an allowable fee or an unallowable tax. However, if the Court rejects the Districts' argument that the fee is an unallowable tax, the State Auditor has concerns that any analysis of RCW 43.09.210 be sufficiently narrow and adhere to the actual language of that statute.

In its Findings and Conclusions 135 through 158, the trial court analyzed the credit enhancement fee under two separate legal criteria: RCW 43.09.210 and the sewage disposal contracts, CP 18688-93. For the reasons described above, the best analysis is to interpret the sewage disposal contracts, and to decline to conduct a separate analysis of RCW 43.09.210. If the Court reaches an analysis of RCW 43.09.210, some of the trial court's findings would take the Court's ruling beyond what are allowable charges under RCW 43.09.210, and would be an incorrect interpretation of that statute.

For example, in assessing whether a service or benefit was provided to the Districts, the trial court found that there is a "cost" to the County when the total County debt increases and the County potentially pays a higher interest rate on bonds issued in the future. Finding of Fact

147, CP 18691. This analysis speculates about future events, and is insufficient to establish a “cost” to the County within the meaning of RCW 43.09.210. On the other hand, if at some future time the County’s borrowing costs increase as a result of the prior debt issued for WTD, the County could charge the WTD for a “cost” consistent with RCW 43.09.210.

Similarly, some of the findings describe “burdens” to the County (the “burdens” of an increased probability of a credit rating downgrade, the use of debt limit capacity, and the limits of the additional bonds test). Findings of Fact 149 and 150 (CP 18691). RCW 43.09.210 does not contain the word or the concept of “burden”. Rather, RCW 43.09.210 addresses “services” provided by the County, “property” transferred by the County, and “benefits” to the Districts. “Burdens” on the County are not equivalent to “services” or “benefits” to the District. Therefore, RCW 43.09.210 would not allow the County to charge WTD for a “burden”.

For these reasons, Findings 147, 149, and 150 would not support a conclusion that the County is permitted to charge the Districts under RCW 43.09.210.

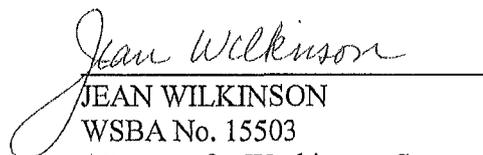
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V. CONCLUSION

The State Auditor respectfully requests that the Court decide this case based on the terms of the sewage disposal contracts themselves. If the Court does rely on RCW 43.09.210 to guide its decision, the State Auditor requests that it adhere to the consistent and flexible interpretation it has previously announced.

RESPECTFULLY SUBMITTED this 20th day of December, 2012.

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CEDAR RIVER WATER AND SEWER
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CERTIFICATE OF
SERVICE

I, Candace Vervair, make the following declaration:

1. I am over the age of 18, a resident of Thurston County, and not a party to the above action.

2. On December 20, 2012, I caused to be served a true and correct copy of the Motion to File Brief of Amicus Curiae Washington State Auditor Brian Sonntag, Brief of Amicus Washington State Auditor Brian Sonntag and this Certificate of Service via U.S. Mail and to:

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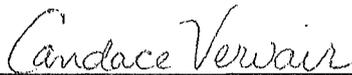
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I declare under penalty of perjury under the laws of the State of
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RESPECTFULLY SUBMITTED this 20th day of December,
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Candace Vervair, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Vervair, Candace (ATG)
Subject: RE: 86293-1, Cedar River Water and Soos Creek Water District v. King County et al; Motion to File Amicus for WA State Auditor and Brief of Amicus

Rec'd 12-20-12

From: Vervair, Candace (ATG) [<mailto:CandaceV@ATG.WA.GOV>]
Sent: Thursday, December 20, 2012 2:59 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: 86293-1, Cedar River Water and Soos Creek Water District v. King County et al; Motion to File Amicus for WA State Auditor and Brief of Amicus

Good afternoon:

Please find attached a Motion to File Brief of Amicus Curiae Washington State Auditor Brian Sonntag; Brief of Amicus Curiae Washington State Auditor Brian Sonntag, and Certificate of Service in the above referenced case (Supreme Court No. 86293-1)

<<Motion_Brief-20121220-AmicusAuditor.pdf>>

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