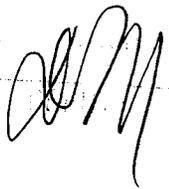


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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

COST MANAGEMENT SERVICES,

Respondent,

Vs.

CITY OF LAKEWOOD and CHOI HALLADAY,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Cost Management Services (CMS) sued the City of Lakewood (City) in Pierce County Superior Court seeking a refund of taxes allegedly paid in error, without acknowledging, much less exhausting, administrative remedies established in the Lakewood Municipal Code. It was only when the Pierce County Superior Court dismissed a portion of CMS's claims that CMS filed a second action against the City seeking a writ of mandamus to pursue the administrative process which CMS had previously disavowed. Because CMS failed to timely pursue applicable administrative remedies, the Pierce County Superior Court should have dismissed this litigation. The Judgment in favor of CMS should be reversed and the Findings of Fact and Conclusions of Law associated with the Judgment vacated.

Setting aside for the moment the doctrine of exhaustion of remedies, the judgment should still be reversed due to three mistakes by the Superior Court. First, styled as a run-of-the-mill civil cause of action, the City was entitled under the Washington Constitution to have a jury decide this matter. But the Superior Court, on its own initiative, struck the City's jury demand. Second, the Superior Court incorrectly determined that CMS was not subject to the tax at issue. Third, in the event of a remand following a decision on the merits in favor of the City, the Superior Court incorrectly calculated the amount of "gross income" which was subject to the tax. Thus, at a minimum, this matter should be reversed and remanded for further proceedings.

II. ASSIGNMENTS OF ERROR & ISSUES RELATING THERETO

Pursuant to RAP 10.3(a)(4), the City of Lakewood assigns error to the following decisions of the Pierce County Superior Court:

Assignment of Error No. 1: The Superior Court incorrectly denied the City of Lakewood's Motion to Dismiss when it determined that (a) CMS was not required to exhaust administrative remedies; and (b) determined that it had jurisdiction to adjudicate this dispute. (CP 250).

Issue Relating to Assignment of Error No. 1. The Lakewood Municipal Code establishes a process governing tax refund claims. Despite being advised of this process, CMS disavowed any notion that it was required to utilize this process. Was CMS required to engage in this administrative process before resorting to litigation?

Assignment of Error No. 2: The Superior Court erred by issuing a Writ of Mandamus compelling the City to "take action ... on CMS's claim for refund of taxes ..." (CP 628).

Issue Relating to Assignment of Error No. 2. CMS filed a second action seeking a writ of mandamus against the City directing it to "take action," on its claim for refund. But, the City did take action on CMS's refund claim by requesting that CMS tender to the City back taxes. CMS sought the writ (1) over a year after the City demanded CMS tender back taxes; and (2) the Superior Court determined that those portions of CMS's

claim were barred by the three-year statute of limitations. Was CMS entitled to a writ?

Assignment of Error No. 3: Assuming that the Superior Court had the authority to entertain this dispute, the Superior Court erred by striking the City's jury demand. (CP 707).

Issue Pertaining to Assignment of Error No. 3. CMS self-styled the sole claim which went to trial as a cause for monies had and received. This is a cause of action to which a jury trial right attaches. Although the City maintains that this controversy should have been decided in the first instance by a hearing examiner, once the Superior Court determined it had jurisdiction over this dispute, was the City entitled to have a jury determine the disputed factual issues in this case?

Assignment of Error No. 4: Further, assuming that the Superior Court had authority to entertain this dispute, the Superior Court erred in determining that CMS was not subject to this tax;

Assignment of Error No. 5: The Superior Court incorrectly granted CMS partial summary judgment and determined the calculation of "gross income." (CP 524).

Assignment of Error No. 6: The City further assigns error to Findings of Fact Nos. 3, 7-16 and Conclusions of Law 26-30, which provide as follows:

Finding of Fact (FF) 3. CMS sold no gas to its Lakewood customers.

FF 7. [Puget Sound Energy (PSE)] collected and paid a tax under LMC 3.52.050(D) to Lakewood for the transportation and delivery of each customer's gas from the North Tacoma City Gate to each customer's business location within Lakewood.

FF 8. PSE furnished to CMS' Lakewood customers the gas CMS arranged for its Lakewood customers to purchase from Shell Energy, Occidental and/or Avista at the North Tacoma City Gate.

FF 9. CMS did not furnish gas to its Lakewood customers.

FF 10. CMS neither delivered the gas nor ever owned the gas purchased by and delivered to CMS' Lakewood customers.

FF 11. CMS conducts its agency business, which consists of not only the arranging of the purchase of gas by its clients but also the nomination for such gas, the balancing of gas usage by its clients and single payer invoicing for the gas and transportation services provided by PSE, at its Mercer Island offices.

FF 12. CMS did not engage in selling, furnishing or brokering gas in Lakewood.

FF 13. CMS' only activities in Lakewood were annual holiday visits and very occasional meetings.

FF 14. CMS did not derive any revenue from its minimal Lakewood activities. CMS' revenues were derived from the services it performs at its Mercer Island offices of arranging for its customers to purchase gas at the interconnection point between PSE and NW Pipeline Co., coordinating with PSE for the transportation of the gas by PSE, for nominating and balancing its customers' gas, for advancing funds to pay for its customers' costs for gas and preparing single invoices for its services and the gas costs advanced by CMS.

FF 15. The administration of the contracts between CMS and its Lakewood customers were handled entirely outside Lakewood.

FF 16. CMS ceased engaging in any and all activities within Lakewood in April, 2010.

FF 17. The lack of any Lakewood activity by CMS, since April 2010, has not altered or affected the agency relationships CMS has with its Lakewood customers nor the administration of the contracts between CMS and its Lakewood customers.

Conclusion of Law (CL) 26. CMS has not engaged in the activity of selling, brokering or furnishing of natural gas in the City of Lakewood.

CL 27. CMS activities in Lakewood are too minimal to satisfy the requisite nexus.

CL 28. CMS is entitled to a refund of the entire \$424,803.36 it paid to the City as tax between June 24, 2006 and October 1, 2008.

CL 29. CMS is entitled to pre and post judgment interest on the amounts to be refunded calculated at the judgment rate from the date the amounts were paid until the date of the refund.

CL 30. CMS owes Lakewood no tax for periods after October 1, 2008 to the present date.

(CP 713-14).

Issue Relating To Assignment of Error No. 4-6. CMS contracts with two Lakewood-based clients, who obtain all of their natural gas supplies from CMS. By contract, these customers pay CMS a rate for their services on a “per therm,” basis. CMS self-calculated their taxes and remitted these taxes to the City of Lakewood based on this same “per therm,” billing. The Superior Court determined (a) that CMS did not conduct business activities subjecting them to the Lakewood tax; and (b) even if they did perform such activities,

their billings to their customers did not qualify as “gross income,” within the meaning of the code.

III. STATEMENT OF FACTS

CMS provides energy consulting services and natural gas supplies to a wide variety of customers in the Pacific Northwest. (CP 7, 11). Among the services which CMS provides to its customers is the collection, reporting and remitting of natural gas taxes to municipalities and to the Department of Revenue. (Id). CMS assists in negotiating contracts for obtaining gas, as well as arranging for the transportation of natural gas for its customers. (I VRP 30-31)¹.

Two of CMS’s customers do business in the City of Lakewood, Pierce Transit and St. Clare Hospital. (I VRP 24). Pierce Transit maintains a “fast fill station,” in the City of Lakewood. (III VRP 196). At this facility, natural gas is delivered to Pierce Transit via pipeline, then the natural gas is used to fuel buses. (III VRP 195). St. Clare Hospital uses the natural gas supplied by CMS for heating the hospital. (III VRP 297). By contract, CMS “arranges for the purchase or procurement of all natural gas delivered to the hospital[,]” and under the same agreement, St. Clare “is required to purchase all of its natural gas through Cost Management Services.” (III VRP 296). Both of these entities are long-standing customers of CMS. CMS, on behalf of these

¹ To distinguish between those portions of the Verbatim Report of Proceedings which spanned the trial, and those portions which covered pretrial motion hearings, the City identifies the former by Volume Number (in roman numerals), “VRP” and page (i.e., II VRP ____), and the latter by date, “VRP,” and page number (i.e., 2/14/2010 VRP ____).

customers, has remitted natural gas utility taxes, as required under LMC Chapter 3.52, to the City of Lakewood since 2002, if not earlier.

In September of 1999, the City adopted Ordinance No. 215. (CP 30). This Ordinance, codified in Chapter 3.52 of the Lakewood Municipal Code (LMC), although styled as a “utility tax,” is the City’s Business & Occupation tax. Since at least January 2004 (and potentially as far back as 2002) until Fall 2008, CMS remitted to the City’s taxes under LMC 3.52.050(D). (CP 2, 289). As allowed by RCW 35A.82.020 and RCW 35.21.870, the City imposes a tax “[u]pon everyone engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption.” LMC 3.52.050(D). CMS would invoice its customers for this tax, and then remit these taxes as a “use tax,” to the City. (CP 473). But, for the time period in question, the City did not have a “use tax.” (III VRP 264). Instead, the City treats this tax as its Business & Occupation tax. (III VRP 265). CMS claims in mid-to-late 2008 it discovered that it was potentially being overtaxed when it learned of a similar challenge to local natural gas taxes, culminating with the Supreme Court’s decision in *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 237 P.3d 256 (2010). (II VRP 115).

In November 2008, CMS wrote to the City requesting a refund of these taxes which it paid under LMC 3.52.050(D). (CP 91, 93). The City responded by issuing a Notice and Order, dated May 13, 2009. (CP 95-96).

In the Notice and Order, Choi Halladay, the City's finance manager advised CMS that (1) CMS was "delinquent in payment of utility taxes to the City of Lakewood"; (2) demanded payment on "all past due taxes, including interest and penalties"; and (3) determined that "Cost Management Services is engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption." (Id). The City also directed CMS to seek a business license. (Id). CMS was further informed that if it elected to appeal the City's determination, it could do so within ten (10) days by appealing these determinations to the City's hearing examiner. Although CMS did submit a business license application, it did not otherwise appeal this determination. (CP 88).

Instead, in June 2009, CMS filed the first of two lawsuits against the City with the Pierce County Superior Court asserting two causes of action (CP 1). The City counterclaimed asserting that CMS was responsible for the taxes from October 2008 to the present. (CP 4).

At three different times, before three different judges, both parties sought summary judgment on various parts of their claims.

On February 12, 2010, Judge Lisa Worswick, then of the Pierce County Superior Court, denied the City's motion to dismiss for lack of jurisdiction. The City requested that the Superior Court dismiss CMS's

claims, arguing, that CMS had failed to exhaust its administrative remedies as required before it could commence instant litigation. (CP 16).

CMS separately sought summary judgment that it was not subject to the tax at all, and should be entitled to a refund of nearly three-quarters of a million dollars. (CP 113). This matter was argued before Judge Linda Lee in May 14, 2010, taken under advisement, and the motion was denied by written order. (CP 459).

Thereafter, CMS and the City filed additional motions for (partial) summary judgment. The City requested that those claims which accrued outside of the three years before the commencement of the litigation be barred by the statute of limitations. (CP 487). CMS, conceding for the purpose of argument that it was responsible for the tax, claimed that it was improperly taxed on its net revenues and not its gross revenues. (CP 461). On September 3, 2010, Judge Elizabeth Martin granted, in part, both parties' motions, holding that CMS was improperly taxed and directing the repayment of nearly \$400,000.00 (CP 524), but also held that CMS's claims accruing prior to June 24, 2006, were time-barred. (CP 522-23). Judge Martin also dismissed, without prejudice, CMS's cause of action arising under LMC 3.52. (CP 523).

The next month, CMS filed a second lawsuit against the City and included its finance manager, Choi Halladay. (CP 731). In this second suit, CMS sought a writ of mandamus requesting that the City "take action on [CMS's] claim pending since November 6, 2008 for the refund of erroneously

paid taxes” (CP 735). The City opposed this writ. On November 5, 2010, the superior court granted the writ. (CP 628).

In response to the Court’s February 2010 summary judgment decision, the City requested that this matter proceed to a jury trial. (CP 252). On its own initiative, the superior court struck the jury demand, reasoning, in part, that this case “arise[s] in the context of a taxpayer dispute for refund of taxes allegedly paid by mistake, arise in equity and are not legal issues.” (CP 704-06). This decision was memorialized by written order. (CP 707).

This matter proceeded to a two-day bench trial in December 2010. Following trial, the superior court issued a letter decision reflecting that CMS’s business activities – if any – in the City of Lakewood were sufficiently minimal to preclude application of this tax, and directed the entry of a judgment in favor of CMS and against the City for the full amount claimed by CMS. This decision was memorialized by a final judgment and written findings and conclusions. (CP 712 (Findings), 716 (Judgment)).

The City timely appeals both the final judgment following trial and the order directing the issuance of a writ of mandamus.

IV. ARGUMENT

A. CMS’s Failure to Exhaust Administrative Remedies Bars CMS From Obtaining Any Form of Judicial Relief.

Despite being advised that there was an administrative process available for CMS to seek the redress which it sought by litigation, CMS did not appeal the City’s May 2009 administrative determinations. CMS’s failure

to timely invoke the applicable administrative process has two consequences. First, it merits dismissal of this action based on CMS's failure to exhaust its administrative remedies. Second, it precludes CMS from litigating the issue of whether it was subject to this tax at all.

1. The Failure to Exhaust Administrative Remedies Deprived the Superior Court of Jurisdiction To Entertain This Dispute.

Where a regulatory scheme “establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties ... Exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.” *See, Retail Store Employees Union v. Wash. Surveying & Rating Bureau*, 87 Wn.2d 887, 907, 558 P.2d 215 (1976)(citing, *Bennett v. Borden, Inc.*, 56 Cal. App. 3d 706, 128 Cal. Rptr. 627, 628 (1976)(ellipsis by the Court)). “The court will not intervene and administrative remedies need to be exhausted when the ‘relief sought . . . can be obtained by resort to an exclusive or adequate administrative remedy.’” *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997)(citing, *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984)). The failure to employ, much less exhaust available administrative remedies merits dismissal of the lawsuit as premature and inappropriate. *Wright v. Woodard*, 83 Wn.2d 378, 381, 518 P.2d 718 (1974); *Sator v. State Dep't of Revenue*, 89 Wn.2d 338, 348, 572 P.2d 1094 (1977).

Washington Courts require that “administrative remedies must be exhausted before the courts will intervene: (1) ‘when a claim is cognizable in the first instance by an agency alone’; (2) when the agency’s authority ‘establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties; and (3) when the ‘relief sought ... can be obtained by resort to an exclusive or adequate administrative remedy.’” *State v. Tacoma-Pierce County Multiple Listing Serv.*, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980)(citing, *Retail Store Employees*, 87 Wn.2d at 906-908). Whether exhaustion is required is a question of law. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 19 fn. 10, 829 P.2d 765 (1992). As such, this Court reviews the superior court’s determination *de novo*. *Smith v. Orthopedics Int’l, Ltd.*, 170 Wn.2d 659, 664, 244 P.3d 939 (2010)

Applying these factors, the superior court should have required CMS to exhaust its remedies.

CMS’s claims were cognizable in the first instance by the administrative hearing process. At its crux, CMS’s first lawsuit sought a refund of back taxes. The issue of whether CMS was entitled to relief under the City’s tax code, is governed by the same tax code. *See* LMC 3.52.160. The Superior Court recognized as much when, on September 3, 2010, it sua sponte dismissed CMS’s self-styled cause of action for relief under the municipal code as “not properly before the court.” (CP 523). The trial court’s oral decision reflects that it viewed the claim as not yet ripe because CMS had

not yet undergone the administrative process. (9/3/2010 VRP 18-19). CMS does not cross-appeal this determination.

In order to avoid the limitation that it even had to invoke administrative remedies, CMS self-styled one of its remaining causes of action as one for monies had and received. (CP 2). How the cause of action is styled is irrelevant; “[t]he true nature of a cause of action stated in a complaint must be determined by its allegations and the evidence offered in support of its prayer for relief, and not by the pleader's conclusions as to its nature nor the label he places upon it.” *Hein v. Chrysler Corp.*, 45 Wn.2d 586, 595, 277 P.2d 708 (1954), *citations omitted*. The issue for an exhaustion analysis is whether there are “administrative mechanisms available [which] can alleviate the harmful consequences of the governmental activity at issue....” *Orion Corp. v. State*, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985)(citing, *Lange v. Woodway*, 79 Wn.2d 45, 48, 483 P.2d 116 (1971))(emphasis added). But the City had a clearly defined administrative mechanism which it expressly advised CMS to employ resolve this dispute. CMS simply failed to avail itself of this administrative mechanism.

The City has a clearly defined hearing examiner system to review the administrative determination made by Mr. Halladay. LMC 1.36. The City’s administrative process provides for a two step review process. In the first step of this process, CMS would be entitled to apply for relief by resort to an appeal of Mr. Halladay’s decision to the hearing examiner. Mr. Halladay’s

May 13, 2009 letter specifically informed CMS that it had ten days within which to appeal to the hearing examiner. *See e.g.*, LMC 5.2.180, .190. The hearing examiner is empowered to “receive and examine available information, conduct public hearings, prepare records and reports thereof, and make decisions, which shall be final and conclusive.” LMC 3.52.160. The second step of this process is also guided by the Lakewood Municipal Code which further provides that appeals from adverse decisions of the hearing examiner must be done within fourteen days “of the entering of the Hearing Examiner’ recommendation.” LMC 01.36.091.² Any review of the hearing examiner’s decision can, in turn, be subject to court review. *See e.g.*, *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 70 P.3d 144 (2003)(observing that complaint or writ of review are proper mechanisms to obtain judicial review of hearing examiner decisions on application of municipal tax code).

Finally, CMS could have obtained full relief by the hearing examiner process. LMC 3.52.150 specifically proscribes the available relief available for those who overpay the tax,

Any money paid to the City through error, or otherwise not in payment of the tax imposed by this Chapter, or in excess of such tax, shall, upon the request of the taxpayer, be credited against any tax due or to become due from such taxpayer hereunder, or, upon the taxpayer ceasing to do business in the City, be refunded to the taxpayer.

² Under the LMC, a few matters are subject to a third tier of review by the City Council. This is not one of them.

Consequently, if CMS overpaid, but was nevertheless subject to the tax, it would have been entitled to a tax credit. If CMS was not subject to the tax at all because, as it maintained, it did not do business in the City, it would have been entitled to a tax refund. There is simply no showing that the relief afforded by the hearing examiner system would have been inadequate.

CMS made no attempt to identify any flaws with the administrative process. Instead, CMS claimed, and the superior court agreed, that it was not required to engage in, much less exhaust its administrative remedies because the superior court had jurisdiction over this matter under Wash. Const. Art. IV, sec. 6. But, claims accruing under Article IV, Section 6 of the Washington Constitution are not self-executing; there must ordinarily be another basis by which the superior court can enjoy jurisdiction. *Mary Kay*, 117 Wn. App. at 114. The grounds raised by CMS do not rise to this level.

In the case at bar, the Superior Court reasoned that it had jurisdiction under Article IV, Section 6,

With regard to the jurisdiction issue, it appears as though the City is claiming, almost, that the jurisdiction of the Court hinges on whether or not the other party is saying that the taxing statute is unconstitutional or void. And I think that if the statutes meant that, if the constitution meant that, it would have said that. It doesn't say that. It says, "The legality of any tax."

In its simplest form, I'm imagining that the Plaintiff in this action believes they are a party separate from the city of Lakewood, outside of the city of Lakewood, not doing business in the city of Lakewood, and that the City of Lakewood has reached out into their pocket and taken money that they have no jurisdiction over, doesn't have the ability to

take. In its simplest form, that's what I'm seeing. In that regard, they're saying the tax is illegal because they're not subject to City of Lakewood's laws or taxes. Because of that, I believe, this Court, has original jurisdiction. They're claiming that the tax itself is illegal as it pertains to them.

(2/12/2010 VRP 18).

But the Superior Court's analysis is not the applicable test to determine whether a tax is illegal or not, and thus, within the ambit of Article IV, Section 6.

An illegal tax is one which the governmental authority may not impose at all. This challenges whether the taxing authority had the ability to enact the tax, and whether it did so within proper statutory and/or constitutional limits, and examines issue of whether the taxing authority had authority to impose the tax, whether the authority followed proper procedures in imposing the taxing regime or whether the tax was in conflict with other provisions of either state or federal law. *See e.g., Okeson v. City of Seattle*, 150 Wn.2d 540, 556, 78 P.3d 1279 (2003). In the same vein, Article IV, Section 6 will also allow jurisdiction for those challenges when the taxing authority failed to give statutory notice of applicable proceedings, or when tax was not for a proper purpose. *Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 235, 119 P.3d 325 (2005)(collecting cases).

By contrast, in the case at bar, CMS's complaint does not claim that the tax at issue was improperly enacted, that the City lacked the authority to impose the tax or asserted some similar challenge. Rather, CMS's challenges

are more fact-specific as it relates to the application of the tax to CMS's activities: is CMS subject to the tax, and from that first determination, what is the amount of any refund or offset? Challenges directed toward the amount of a specific tax or the methodology employed to determine a tax are not within the ambit of Article IV, Section 6, and must be brought within the context of any existing administrative, regulatory or other statutory framework. *Tiffany Family Trust*, 155 Wn.2d at 236 (citing, *City of Longview v. Longview Co.*, 21 Wn.2d 248, 252, 150 P.2d 395 (1944)). Here, was such a framework to afford CMS the remedy for monies which it claims it paid by mistake: the hearing examiner system to adjudicate any claims under the Lakewood Municipal Code. Here the LMC hearing examiner system employs the remedy CMS sought.

The sole case identified below by both CMS and the superior court supporting its claim that the superior court had jurisdiction and exhaustion was not required is the Supreme Court's decision in *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007). *Qwest* is inapposite.

In *Qwest*, the City of Bellevue imposed a utility operations tax for certain telecommunications activities. *Qwest* claimed that the City was prohibited from taxing certain access line charges which were imposed under federal law. *Qwest* pursued two courses of action. The City issued a tax assessment to *Qwest*, which *Qwest* challenged before the City's hearing examiner. *Qwest* also filed a lawsuit challenging the imposition of the City's

utility tax on these federally-imposed access charges. The City sought dismissal of the lawsuit, claiming that Qwest failed to exhaust its administrative remedies. The trial court denied this motion, and the Supreme Court affirmed. Importantly, for the case at bar, the Court distinguished between the forms of jurisdiction which Qwest could have invoked:

But Qwest explains it did not invoke the Superior Court's *appellate* jurisdiction over a decision by the City hearing examiner or Department of Finance. Instead, Qwest explains, it “invoked the Superior Court's *original* jurisdiction, pursuant to the Uniform Declaratory Judgments Act, RCW 7.24.010, and the Washington Constitution, Article IV, Section 6 and RCW 2.08.010, which vest the Superior Court with original jurisdiction over all cases involving the ‘legality of any tax, impost, assessment, toll or municipal fine.’”. And Qwest cites *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000) for the proposition that where a court has original jurisdiction over a dispute, the administrative exhaustion requirement does not apply.

Qwest Corp., 161 Wn.2d at 371 (Emphasis in italics by the Court; underlined emphasis added; internal citation and footnote omitted).

By reading *Qwest* to suggest that exhaustion did not apply simply misreads the Supreme Court’s holding. Qwest challenged in court the “legality of [the] tax,” against the backdrop of competing state and federal regulatory schemes. Qwest also administratively challenged the application and the amounts of the taxes assessed. Because Qwest, not only challenged the amount of the tax on the administrative level, but whether the tax was even legal in court, the Supreme Court was correct to determine that the Superior Court’s original jurisdiction was properly invoked under Article IV, Section 6 of the State Constitution.

If CMS's position were to control, a party could thwart the necessity of a local administrative process by simply claiming that the taxing authority lacked the ability to impose the tax against them, thereby converting their case as one cognizable by the court in the first instance. Yet, as this Court continues to recognize, the local administrative processes are available and local hearing examiners are competent to determine the threshold issues of whether the taxpayer is subject to municipal tax regimes. *See e.g., Mary Kay, supra; Vonage Am., Inc. v. City of Seattle*, 152 Wn. App. 12, 18, 216 P.3d 1029 (2009); *General Motors v. Seattle*, 107 Wn. App. 42, 25 P.3d 1022 (2001).

These are matters which, were cognizable by the hearing examiner in the first instance, should have been before the hearing examiner, and the superior court erred by failing to dismiss on exhaustion grounds.

2. CMS's Failure to Appeal Bars it from Contesting the Application of the Tax to its Activities.

CMS's failure to seek an appeal of the City's determination carries with it a second consequence: it bars CMS from challenging whether it was even subject to the tax.

In those circumstances where an agency had made a final determination, absent an appeal, a party is barred from challenging the validity of this determination. *Spokane County Fire Prot. Dist. No. 9 v. Spokane County Boundary Review Bd.*, 97 Wn.2d 922, 929, 652 P.2d 1356 (1982). In this case, in the Notice and Order, the City made two significant

determinations: (1) it demanded that CMS pay all past due taxes, including interest and penalties; and (2) made a determination that CMS was engaged in or carrying on the business of selling, brokering or furnishing gas under LMC 3.52.050(D). (CP 95-96).

Akin to a default in a civil case, in those cases where the agency makes a determination which is subject to appeal, an aggrieved party must appeal or the agency determination becomes final,

If a party to a claim believes the [agency] erred in its decision, that party must appeal the adverse ruling. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.

Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 538, 886 P.2d 189 (1994); *see also, South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wn.2d 68, 77, 677 P.2d 114 (1984) (neighbors' appeal dismissed for failure to timely join landowner, thereby binding them to administrative decision below). CMS did not properly appeal the administrative determination. The failure to appeal should have precluded CMS from contesting the application of this tax to its business activities.

B. The Superior Court Erred by Issuing the Writ of Mandamus.

On September 3, 2010, the Superior Court dismissed without prejudice, CMS's second cause of action as "not properly before the Court". (CP 523). The superior court also dismissed – and CMS does not cross-appeal – those claims accruing before June 26, 2006. (CP 523). Apparently in

response to these orders, CMS filed the second of two lawsuits against the City. (CP 731). This time, CMS petitioned for the issuance of a writ of mandamus under RCW 7.16.160, “commanding Respondents ... to take action on Petitioner’s claim pending since November 6, 2008 for the refund of erroneously paid taxes pursuant to Lakewood Municipal Code § 3.52.150.” (CP 735). Because CMS (1) failed to exhaust its necessary remedies; (2) the City had acted; and (3) CMS belatedly sought the writ, the issuance of the writ was error.

“A statutory writ is an extraordinary remedy, and should issue only when there is no plain, speedy and adequate remedy in the ordinary course of law.” *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996)(citing, RCW 7.16.170). A court may issue a writ of mandamus “to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.” RCW 7.16.160. “The applicant must ‘satisfy three elements before a writ will issue: (1) the party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no ‘plain, speedy and adequate remedy in the ordinary course of law,’ RCW 7.16.170; and (3) the applicant is ‘beneficially interested.’” *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003). Only the first two prongs are at issue.

First, to the extent that the City was under a duty to act on CMS’s request for a refund, it did act. The May 2009 Notice and Order acted as a

denial of CMS's refund request. Below, CMS claimed that the City of Lakewood did not deny its November 2008 refund requests. (CP 541). CMS's approach, however, defies common sense. Although the Notice and Order does not use the explicit language that any refund requests were being denied, the May 2009 correspondence plainly indicates that the City was demanding payment for unpaid taxes. If the City determined, via its May 2009 Notice and Order, that there was a "fee or tax ... to be due," LMC 3.52.160; it necessarily follows that the City's demand that CMS tender past-due taxes is that CMS was subject to the tax and thus, there would be no refund.

CMS also was not entitled to the writ because it had plain and speedy remedies via the administrative process. A party must exhaust available administrative remedies before seeking a writ of mandamus. *Summit-Waller Assn. v. Pierce County*, 77 Wn. App. 384, 397, 895 P.2d 405 (1995); *R/L Assoc. v. Seattle*, 61 Wn. App. 670, 811 P.2d 971 (1991). As discussed at length above, CMS did not even attempt to exhaust its administrative remedies. To the contrary, CMS disavowed that it was under any obligation to participate in any administrative process. (11/5/2010 VRP 5). It was not until a month after the September 3, 2010 decision of the Superior Court which sua sponte dismissed CMS's self-styled cause of action under the Lakewood Municipal Code and instead of appealing this determination, CMS

filed a second lawsuit. By the time CMS filed this second action, it was too late.

Although by its express terms, RCW 7.16.160 does not contain a statute of limitations, the time period for seeking a writ of mandamus for the review of a local government subject to a hearing examiner system mirrors that for seeking review of that decision. *Teed v. King County*, 36 Wn. App. 635, 677 P.2d 179 (1984); *see also, Foss Mar. Co. v. Seattle*, 107 Wn. App. 669, 672, 27 P.3d 1228 (2001)(applying as reasonable 14 day timeframe for seeking review of municipal hearing examiner's tax decision). Compliance with the timeframes for seeking a writ of mandamus are jurisdictional. *Teed*, 36 Wn.App. at 641 (*citing, North St. Ass'n v. Olympia*, 96 Wn.2d 359, 635 P.2d 721 (1981)). In this case, applying any reasonable timeframes, CMS has failed to obtain the writ in a timely manner.

As noted above, CMS had ten days to appeal Mr. Halladay's decision to the hearing examiner. LMC 5.2.180, .190. In turn, the hearing examiner's decision would have become final fourteen days post-decision. LMC 01.36.091. Thus, whether applying the ten day time frame to appeal to the hearing examiner (which the City believes to be the correct time frame), the fourteen day deadline to appeal the hearing examiner decision or applying a twenty four day time frame (i.e., 10 + 14), and giving CMS the benefit of any doubt, it had no later than 24 days post-June 12, 2009, or until July 6, 2009 within which to seek a writ of mandamus to secure review of the City's May

13, 2009, determination. Moreover, even if Mr. Halladay's May 2009 Notice and Order was somehow defective, CMS should have then sought a writ within a reasonable timeframe, instead both suing the City and then waiting until Fall 2010, to compel the City to take some form of action on its refund request. CMS's belated attempts to procure the writ – after it had already sued the City and after the trial court had already dismissed CMS's self-styled municipal code refund claim, comes too little, too late. Whether applying the timeframes in the LMC or a standard of reasonableness, CMS's October 8, 2010 petition is too late.

CMS supported their claim for the writ, in part, on a September 30, 2010 letter authored by the City. (CP 552). But this letter does not alter the result that CMS's petition was time-barred. CMS initially sought in 2008 that the City refund its taxes. The City declined in 2009, and demanded that CMS reimburse it for unpaid taxes. The time limit to recover taxes alleged to have been wrongfully paid is three years. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004)(citing, RCW 4.16.080(3)). Once a statute of limitations has expired, it cannot be revived. *Dolby v. Fisher*, 1 Wn.2d 181, 193, 95 P.2d 369 (1939). The Superior Court already determined that CMS was not entitled to a refund of any taxes predating June 2006. (CP 523). CMS's demand is nothing more than a transparent attempt to revive a missed statute of limitations, and should be rejected.

CMS was not entitled to the writ of mandamus on these facts. The order directing the issuance of the writ was in error and should be reversed.

C. Assuming that the Trial Court Had Authority To Adjudicate CMS's Claims, Its Trial Decisions were Wrong.

1. The Trial Court Impermissibly Struck the City's Jury Demand.

After the superior court determined that it had jurisdiction to adjudicate this matter, the City filed a jury demand. (CP 252). By order dated December 3, 2010, the trial court on its own initiative, and acting pursuant to CR 39(a)(1)(B), struck the City's jury demand. (CP 704, 707). The remedy for a wrongfully denied jury trial is to vacate the judgment and remand the entire matter for a jury trial. *See e.g., Wilson v. Horsley*, 137 Wn.2d 500, 509, 974 P.2d 316 (1999).

Under article 1, section 21 of the Washington State Constitution, “[t]he right of trial by jury shall remain inviolate ...” “In civil cases, a jury is available if a statute so provides or if the matter is one which was triable before a jury when the constitution was adopted.” *State ex rel. Dep't of Ecology v. Anderson*, 94 Wn.2d 727, 728-729, 620 P.2d 76 (1980)(citing, *In re Ellern*, 23 Wn.2d 219, 160 P.2d 639 (1945).

Superior Court Civil Rule 38 reiterates the right to a jury as expressed in the State Constitution. Typically, a trial is not afforded in matters of pure equity. *Peterson v. Philadelphia Mtg. & Trust Co.*, 33 Wash. 464, 74 P. 585

(1903). Whether an action is equitable or legal for the purpose of determining right to jury trial is determined from all the pleadings. *Id.*

“An issue of fact, in an action for the recovery of money only ... *shall be tried by a jury, unless a jury is waived...*” RCW 4.40.060 (emphasis added). CMS’s complaint alleges tort-like causes of action, notably in their cause of action for the return of money had and received. Assuming that CMS’s self-styled cause of action for monies had and received was properly before the court, monies had and received is a cause of action for which the right to a jury trial attaches. *See e.g., Seekamp v. Small*, 39 Wn.2d 578, 584, 237 P.2d 489 (1951).

The trial court based its decision on the fact that it believed that this case was primarily equitable in nature. (CP 707). The City’s research discerns only one case in Washington jurisprudence in which an appellate court has had the opportunity to address the viability of a jury demand in the context of a tax case. *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 116 P.2d 507 (1941).³ Although the Supreme Court determined that the parties were not entitled to a jury in that case, it is important to understand why.

In *Dexter Horton*, the King County Assessor, imposed an assessment upon a Seattle office building. The owners challenged the assessment before the Board of Equalization, and then appealed an adverse decision to the state

³ By contrast, in federal court, the parties enjoy the right to a jury trial on taxes cases, albeit the right is conferred by statute. *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

tax commission. After that appeal was unsuccessful, the owners then paid the taxes under protest, and sued in superior court to obtain a reduction of the assessment.

The County sought to have the matter tried by a jury, and the superior court struck the jury demand. This decision was affirmed on appeal by the Supreme Court. The Supreme Court reasoned that the right of recovery for an excessive evaluation is based upon the concept that the valuation constitutes a constructive fraud, whereby the taxing authority becomes the holder of a constructive trust. Recoveries from a trust are equitable in nature, and thus, not triable by a jury. The Supreme Court further buttressed its determination that claims for tax refunds were dependent upon an authorizing statute, and that the statute did not authorize a jury trial. 10 Wn.2d at 195

As the *Dexter Horton* case illustrates, most tax disputes come before the superior court following an administrative determination or pursuant to an express authorizing statute. As such, the superior court would be acting in its appellate capacity and it would be improper to have a jury to review the administrative determination. In the case at bar, however, there has been no initial factual determination. Nor has there been any statute identified which confers jurisdiction upon the Superior Court.

Although the City maintains that this matter should have been subject to the administrative hearing examiner process, once the trial court denied the

City's motion to dismiss and determined that this case was properly before it, the City was entitled to have the issues of disputed fact determined by a jury.

2. The Trial Court's Decisions are not Supported by Substantial Evidence and the Trial Court Misapplied the Law.

Following the bench trial in this case, the trial court, relying on this Court's decision in *City of Tacoma v. Fiberchem, Inc.*, 44 Wn. App. 538, 722 P.2d 1357, *pet. for review denied*, 107 Wn.2d 1008 (1986), determined that CMS was not liable for this tax. Not only was the trial court's Findings of Fact supporting this determination incorrect, but the trial court misapplied *Fiberchem*.

In *Fiberchem*, the City of Tacoma sought to apply its Business and Occupation tax to Fiberchem. Fiberchem distributed raw plastics. *Id.* at 539-40. Fiberchem had sporadic contacts – at best – with the City of Tacoma, maintaining no office there, and its sole contacts were via telephonic contact, apparently initiated by its customers. *Id.* at 540. The superior court held that Fiberchem's activities in Tacoma were so minimal that it could not be said to be engaging in business there, and thus, it could not be subject to Tacoma's tax. *Id.* at 540-41.

On review, this Court affirmed. Applying *Dravo Corp. v. Tacoma*, 80 Wn.2d 590, 595, 496 P.2d 504 (1972), this Court agreed that Tacoma could not establish a necessary nexus between Fiberchem's activities and the Tacoma. To that end, this Court observed:

However, the undisputed testimony and evidence of record fails to prove that those few activities actually performed in Tacoma bear any fair and reasonable relation to the proceeds of sales to Tacoma customers, because any causal relationship between the two elements is speculative in the extreme. Fiberchem demonstrated to the satisfaction of the trial court, and to our satisfaction, that the sales activity that directly generated proceeds was almost entirely conducted by telephone communication to Tukwila initiated by Tacoma customers. Indeed, the evidence indicates that the major portion of the little time spent by salespeople in Tacoma as they passed through the city was spent with a very small segment of its Tacoma customers, in any case.

Fiberchem, 44 Wn. App. at 545.

By contrast, in this case, the facts in this case amply establish the requisite jurisdictional nexus.

The trial court entered 10 findings of fact to support its conclusion that CMS's activities were so minimal that the necessary jurisdictional nexus could not be satisfied. These findings of fact, Findings Nos. 7 – 16 are not supported by substantial evidence and are error. The evidence, even taken in the light most favorable to CMS paints a vastly different picture than that portrayed by the trial Court's Findings of Fact.

First, CMS's contacts with their customers, as it relates to this case, occurs on a daily basis. Daily, CMS provides monitoring, nominating and balancing services for their Lakewood-based clients, which more than half of all of the work which CMS performs for its customers, spending approximately 10 minutes per day on these customers. (I VRP 25, 49; II VRP 107). The monitoring is performed by checking a number which is located at

each customer's facility. (1 VRP 25, 94-95). Thus, to the extent that the Superior Court found that CMS had no Lakewood-based activities, these findings are clearly erroneous. (Findings of Fact Nos. 11-17).

Second, CMS's own contracts with each of its customers expressly confirms that their customers are to purchase all natural gas supplies from CMS:

1. Services/Rates. The Customer hereby engages the services of CMS as its exclusive and special agent to arrange for their purchase and/or procurement of all of the natural gas required by each business office located at:

[See Exhibit "A" attached hereto]

For the term of this Agreement, the Customer agrees to purchase all of its natural gas supplies from CMS and that these supplies constitute Customer's primary fuel source.

(See e.g., Trial Ex. 45, ¶ 1).

When asked at trial to reconcile the language of the contract and the claim that CMS does not sell gas to customers, CMS's founder and CEO could not explain,

Q. Do you intentionally dumb the language down for your clients? I'm trying to get at why the language of the contract says something different.

A. I can't tell you.

Q. But you don't dispute that the contract says essentially Pierce Transit will purchase all of its gas for its fast fill station from Cost Management Services?

[Objection noted and overruled]

A. That's what it says.

(II VRP 173-174).

CMS supplies natural gas. Its contracts expressly indicate that its customers obtain natural gas from CMS. (Trial Ex. 45). Prior to the enactment of these contracts, Pierce Transit expressly sought a supplier of natural gas. (Trial Ex. 43 p. 3). CMS responded with a proposal to provide the services sought by Pierce Transit. (Trial Ex. 43 p. 7-8; Trial Ex. 44, p. 1-2). The parties own contract defines the relationship that CMS would supply the natural gas to its end-customers. Thus, to the extent that the trial court also determined that CMS was not a furnisher of natural gas is erroneous. (Finding of Fact 9).

Third, CMS's payment is expressly contingent upon how much gas arrives at each of their Lakewood customer's locations. Pierce Transit and St. Clare plainly indicate that how much gas is delivered in Lakewood specifically determines whether CMS gets paid or not. Under the agreements between CMS and its clients, CMS is specifically paid on how much gas arrives at each of these customers' locations. (I VRP 96; Trial Exhibits Nos. 45, ¶ 3). It cannot be fairly or accurately said that "CMS did not derive any revenue from its minimal Lakewood activities ..." (Finding of Fact 14). Rather, CMS's revenue was expressly derived on how much gas was, in fact, supplied in Lakewood.

The correct analysis for application of local B&O taxes is supplied by a series of decisions from the Washington Supreme Court originating with *Dravo Corp. v. City of Tacoma*, 80 Wn.2d 590, 496 P.2d 504 (1972).

In *Dravo*, the City of Tacoma sought to impose upon a company its Business and Occupation (B & O) tax on a contract for a dam that Tacoma had built near Mossyrock, Washington (in Lewis County). The successful bidder, Dravo Corporation had no office in Tacoma. The principal place of business for this project was located at the building site. Dravo had an office in Bellevue. The only nexus between Dravo and the City of Tacoma was that the contract was finalized and signed in Tacoma. For several years, Tacoma assessed, and Dravo paid Tacoma's B & O tax. Ultimately, Dravo sued to obtain a refund of these taxes, believing that the tax was unconstitutional or alternatively, that the tax be pro rated on activities which Dravo actually did within Tacoma city limits.

In determining that Dravo was liable for this tax, the Washington Supreme Court has enunciated a test, which later courts have ascribed to be a three-part *Dravo* test:

First, the relevant taxable event must be identified. ... Second, the taxable event must occur within the municipality's territorial limits.... Third, there must be a minimum connection between the municipality and the transaction it seeks to tax.

KMS Financial Services, Inc. v. City of Seattle, 135 Wn.App. 489, 510, 146 P.3d 1195 (2006)(citing, *Dravo Corp.*, 80 Wn.2d at 595, 594, 589-99).

Correctly applying this three-part test and the relevant provisions of the Lakewood Municipal Code to CMS's activities, CMS is liable for the Lakewood tax. The Superior Court erred by determining otherwise.

LMC 3.52.050(D) imposes a tax "upon everyone engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption." The relevant taxable event is the act of "selling, brokering or furnishing artificial, natural or mixed gas ...". Notwithstanding the trial court's findings to the contrary, CMS engaged in a taxable event.

By any definition, CMS "sell[s], broker[s] or furnish[es] natural gas." A "broker," is undefined in the Lakewood Municipal Code. A court "may look to the dictionary to determine the plain meaning of an undefined statutory term." *Bowie v. Dep't of Revenue*, 171 Wn.2d 1, 11, 248 P.3d 504 (2011). A "broker," is defined as "(1) an agent who buys or sells for a principal on a commission basis without having title to the property. (2) [A] person who functions as an intermediary between two or more parties in negotiating agreements, bargains, or the like." *Define Broker*, <<http://dictionary.reference.com/browse/broker>> (Last Visited: June 1, 2011). CMS clearly fits the definition as CMS performs "broker," duties directed towards the City of Lakewood.

This is also fully consistent with other tribunal's description of CMS's behavior. The Ninth Circuit described CMS's business model thusly:

Cost Management Services, Inc. ("CMS") is a Seattle-based company that purchases natural gas on the open market and sells it to various commercial and industrial consumers. In the trade area in which CMS sells gas, Washington Natural Gas Company ("WNG") owns the only delivery facilities capable of transporting gas from the interstate pipeline to end users. Accordingly, customers who buy gas from CMS must obtain delivery of that gas through WNG's delivery facilities. WNG charges those customers, who are known as "transporters," a "transport charge" for the use of its facilities. Customers who purchase gas from WNG are known as "system sales" customers.

Cost Mgmt. Servs. v. Washington Natural Gas Co., 99 F.3d 937, 940 (9th Cir. 1996).

In proceedings before the Washington Utilities and Transportation Commission (WUTC), which happened to overlap the time period for which CMS sought the instant refund, CMS represented to the WUTC, and acknowledged at trial in this matter as true that,

CMS is a Washington corporation engaged in the sale and supply of natural gas as a competitive gas marketer. CMS markets competitively priced natural gas to industrial and commercial customers, some of which are located within the service area of Cascade [Natural Gas].

(Trial Exhibit 23 at p. 2 (Emphasis Added); *see also* II VRP 176-177).

It is also consistent with CMS's representations to the Washington Department of Revenue (DOR). According to the DOR, CMS's "business activities in Washington during the audit period including operating a business which buys and sells natural gas as an agent for others." (CP 482).

CMS's self-described status as an agent of Pierce Transit and St. Clare serve to reinforce the fact that it is liable for this tax and engages in taxable

conduct that bears a minimum connection to the City of Lakewood. By definition a “broker,” is an agent. Further assuming as true, CMS’s representations that they did not hold title to the natural gas purchased by their customers, they performed broker duties. By its own admission, CMS arranges for the gas purchases of their customers. (I VRP 33). Although CMS claims that its customers take title to the gas at a location outside of Lakewood, they are paid on how much gas is metered at the customer’s Lakewood location. (I VRP 94-95). CMS’s efforts are the direct cause of natural gas being delivered to its Lakewood customers.

Based upon the taxable event being the brokering or furnishing of natural gas, CMS engages in this activity on multiple levels, occurring, in part, within the city limits of the City of Lakewood. For approximately ten (10) years, CMS has had written contracts with both St. Clare and Pierce Transit. Each of these contracts identifies CMS as the entity by which these customers were to purchase their gas. (Trial Exs. 33, 39, 42, 45, 46 & 49).

Both CMS and the trial court appeared to have placed great weight on the fact that CMS claimed that its clients acquired the natural gas outside the city limits. But, as the Supreme Court has recently observed, the location where the title to natural gas passes, is not determinative in analyzing the application of local taxes in the natural gas contract. *G-P Gypsum Corp. v. Dep’t of Revenue, supra*. Nor is the location where title passes determinative in the application of B & O taxes. *Ford Motor Co. v. City of Seattle*, 160

Wn.2d 32, 44, 156 P.3d 185 (2007). In *G-P Gypsum Corp.*, the Court had the opportunity to examine the City of Tacoma's natural gas use tax. The taxpayer placed great weight that title to the gas passed outside Tacoma's city limits. The Supreme Court rejected this approach. Rather, the correct application of local taxing ordinances relies upon the ordinary meaning of the words used in this ordinance. *Id.*, 169 Wn.2d at 312. Applying the ordinary meaning of the LMC 3.52.050(D) to CMS's admitted business activities, CMS should have been subject to this tax. The Superior Court erred by determining otherwise. Assuming that this Court determines that the Superior Court had jurisdiction to adjudicate this matter, this Court should reverse the judgment issued in favor of CMS and remand for a new trial.

3. The Trial Court Misapplied the Municipal Code Definition in Calculating "Gross Income."

If this Court reverses the judgment against the City and directs that a new trial is necessary, because the City is entitled to a judgment against CMS for unpaid taxes from September 2008 to the present, the superior court will require guidance on the proper measure of such tax on remand. In apparent reliance on an audit letter which CMS received from the Washington Department of Revenue, the superior court granted partial summary judgment that CMS was entitled to deduct so-called "pass through," monies, i.e. those monies CMS described as "reimbursements for purchases of natural gas made for principals and city and state use taxes paid on their behalf." (CP 467, 482). This was error inasmuch as it misinterpreted the ordinance.

The tax in this case is measured on the “gross income,” of CMS’s activities directed towards its Lakewood-based clients. LMC 3.52.050.

“Gross income,” is a specifically-defined term within the LMC:

“Gross income” means the value proceeding or accruing from the sale of any tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees, or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses, including the amount of credit losses actually sustained by the taxpayer whose regular books or accounts are kept upon an accrual basis.

LMC 3.52.020(A)(*Emphasis added*).

Language similar to the above was noted by the Washington Supreme Court in *Seattle v. Paschen Contractors*, 111 Wn.2d 54, 64, 758 P.2d 975 (1988) as not meriting any deductions whatsoever for the determination of “gross income.” This view is likewise in accord with a Division I decision in *Sprint Spectrum, L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 127 P.3d 755 (2006), *review denied*, 158 Wn.2d 1015, 149 P.3d 377 (2006) wherein the plain language of Seattle's definition of “gross income,” which is nearly identical to Lakewood’s definition, was unambiguous and clearly included the amount the taxpayer separately charged its customers for utility taxes. *Sprint Spectrum*, 131 Wn. App. 346-47. Applying standard rules of

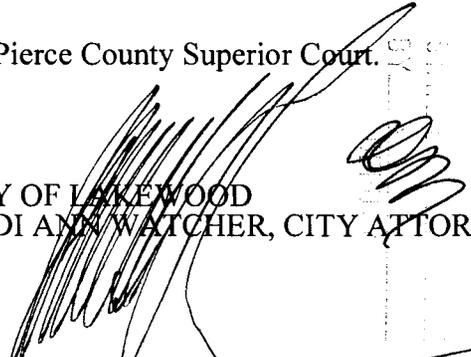
statutory construction, and if the ordinance is unambiguous, the court applies the plain language of the ordinance. *See Ford Motor Co.*, 160 Wn.2d at 41. The ordinance at issue is unambiguous, and there was no need for the trial court to go beyond the ordinance to rely upon in applicable provisions and determinations made by the Department of Revenue in the administration of the state revenue code.

CONCLUSION

For the foregoing reasons, the City of Lakewood requests that this Court reverse the judgment of the Pierce County Superior Court.

DATED: June 2, 2011.

CITY OF LAKEWOOD
HEIDI ANN WATCHER, CITY ATTORNEY

By: 

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Attorneys for City of Lakewood

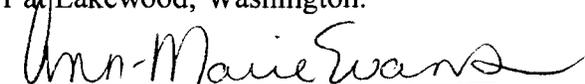
CERTIFICATE OF SERVICE

The undersigned certify under penalty of perjury under the laws of the State of Washington, that on this day I served VIA ABC LEGAL MESSENGER SERVICE and EMAIL, the foregoing document:

The Dinces Law Firm
Attn: Geoffrey P. Knudsen
316 Occidental Ave South, Ste 500
Seattle, WA 98104

The Dinces Law Firm
ATTN: Franklin Dinces
5314 28th Street NW
Gig Harbor WA 98335

Dated this 2nd day of June 2011 at Lakewood, Washington.


Ann-Marie Evans, Paralegal

Appendix 1: Excerpts of the Lakewood Municipal Code (chapters 1.36, 3.52 & Sections 5.2.180 & 5.2.190).

01.36.000 - Hearing Examiner System**Chapter 1.36
Hearing Examiner System****Sections:**

- 1.36.010 Purpose.
- 1.36.020 Office created.
- 1.36.021 Areas of Jurisdiction.
- 1.36.030 Appointment and terms.
- 1.36.040 Removal.
- 1.36.050 Qualifications.
- 1.36.060 Examiner pro tem.
- 1.36.070 Conflict of interest and freedom from improper influence.
- 1.36.080 Functions relating to area zoning.
- 1.36.090 Decisions appealable to the Council.
- 1.36.091 Appeal of Recommendations of the Hearings Examiner.
- 1.36.100 Recommendations to the Council.
- 1.36.110 Decisions of the Examiner which are final.
- 1.36.120 Hearing procedures.
- 1.36.126 Independent and Alternative Hearing Officer Procedures for Local Improvement Districts and Utility Local Improvement Districts.
- 1.36.127 Formation Hearing Officer Procedures and Requirements for Local Improvement Districts and Utility Local Improvement Districts.
- 1.36.128 Final Assessment Roll Hearing Officer Procedures and Requirements.
- 1.36.130 Public hearing.
- 1.36.140 Procedural notice requirements.
- 1.36.150 Community Development Department report.
- 1.36.160 General criteria for Examiner decisions.
- 1.36.170 Additional criteria for pending area zoning - Recommendations.
- 1.36.180 Additional criteria for zoning decisions.
- 1.36.190 Additional criteria for subdivision decisions.
- 1.36.200 Additional criteria for variances.
- 1.36.210 Examiner actions.
- 1.36.220 Appeal to Examiner - Notice and content.
- 1.36.230 Appeal to Council - Notice.
- 1.36.240 Appeal to Council - Content.
- 1.36.250 Appeal to Council - Consideration.
- 1.36.260 Appeal to Council - Council action.
- 1.36.270 Reconsideration of final action.
- 1.36.280 Review of final decisions.
- 1.36.290 Precedence over conflicting provisions.

01.36.010 - Purpose

The purpose of this Chapter is to establish a hearing examiner system under the provisions of Chapter 35A.63 RCW to hear and decide applications for land uses and other matters as specifically assigned by ordinance. (Ord. 264 ? 3, 2001; Ord. 13 ? 1, 1995.)

01.36.020 - Office Created

The office of Hearing Examiner is hereby created to act on behalf of the City Council by considering and applying zoning and regulatory ordinances to the land as provided herein. The Examiner shall also be authorized to act in a decision making role involving administrative matters and such other quasi-judicial matters as may be granted by ordinance or referred to the Hearing Examiner by the City Manager. (Ord. 13 ? 2, 1995.)

01.36.021 - Areas of Jurisdiction

The Examiner shall receive and examine relevant information, conduct public hearings, maintain a record thereof, and enter findings of fact, conclusions of law, and recommendations to the City Council or other order, as appropriate, in the formation of Local Improvement Districts and in the approval of Local Improvement District assessments. (Ord. 298 ? 1, 2003.)

01.36.030 - Appointment and Terms

The Examiner shall be appointed by the City Manager, subject to confirmation by the Council, to serve for a term of two years. (Ord. 13 ? 3, 1995.)

01.36.040 - Removal

The Examiner may be removed from office at any time for just cause by the affirmative vote of a majority of the whole membership of the Council. (Ord. 13 ? 4, 1995.)

01.36.050 - Qualifications

The Examiner shall be appointed solely on the basis of qualifications for the duties of the office with special reference to training, actual experience in, and knowledge of administrative or quasi-judicial hearings on zoning, subdivision and other land use regulatory enactments. (Ord. 13 ? 5, 1995.)

01.36.060 - Examiner Pro Tem

In the event of the absence or the inability of the Examiner to act on an application, a Hearing Examiner pro tem may be appointed, in the manner specified in Section 3 of this Ordinance, for such application or period of absence, and shall have all the duties and powers of the Examiner. (Ord. 13 ? 6, 1995.)

01.36.070 - Conflict of Interest and Freedom from Improper Influence

The Examiner shall not conduct or participate in any hearing or decision in which the Examiner or any of the following persons has a direct or substantial financial interest: The Examiner's spouse, sibling, child, parent, in-laws, partner; any business in which the Examiner is then serving or has served within the previous two (2) years; or any business with which such Examiner is negotiating for, or has had arrangement or understanding concerning, possible partnership or employment. Any actual or potential interest shall be disclosed prior to such hearing.

Participants in the hearing process have the right, insofar as possible, to have the Examiner and the City Council members free from personal interest or pre-hearing contacts on matters considered by them. It is recognized that there is a countervailing public right to free access to public officials on any matter. Therefore, the Examiner and City Council members shall

reveal any substantial interest or pre-hearing contact made with them concerning the proceeding, at the commencement of such proceeding. If such interest or contact impairs the Examiner or Council members' ability to act on the matter, such person shall so state and shall abstain therefrom to the end that the proceeding is fair and has the appearance of fairness.

Individual Councilmembers, City officials or any other persons shall not interfere or attempt to interfere with the performance of the Examiner's designated duties. (Ord. 13 ? 7, 1995.)

01.36.080 - Functions Relating to Area Zoning

(Repealed by Ord. 264 ? 18, 2001.) (Ord. 13 ? 8, 1995.)

01.36.090 - Decisions Appealable to the Council

(Repealed by Ord. 276 ? 1(part), 2002; Ord. 264 ? 4, 2001; Ord. 77 ? 1, (part) 1996; Ord. 13 ? 9, 1995.)

01.36.091 - Appeal of Recommendations of the Hearings Examiner

Appeal of those matters in which the Hearing Examiner enters a recommendation to the City Council as set forth in LMC 1.36.021 shall be made to the City Council within 14 calendar days of the entering of the Hearing Examiner' recommendation and in the manner set forth at Chapter 18.A of the Lakewood Municipal Code. Only those persons or entities having standing under the ordinance governing the application, or as otherwise provided by law, may appeal the Hearing Examiner's recommendation to the City Council. (Ord. 298 ? 2, 2003.)

01.36.100 - Recommendations to the Council

(Repealed by Ord. 264 ? 18, 2001.) (Ord. 77 ? 1, (part) 1996; Ord. 13 ? 10, 1995.)

01.36.110 - Decisions of the Examiner which are Final

For the following cases, the Examiner shall receive and examine available information, conduct public hearings, prepare records and reports thereof, and make decisions, which shall be final and conclusive:

A. Applications for Process III permits, except as identified in LMC 18A.02.502 and LMC 1.36.090;

B. Appeals from Process I and II administrative decisions, except as identified in LMC 18A.02.502 and LMC 1.36.090;

C. Other applications or appeals which the Council may prescribe by ordinance.

D. Business license decisions and appeals;

E. Appeals pursuant to the State Environmental Policy Act;

F. Other applications or appeals which the Council may refer by ordinance, specifically declaring that the Hearing Examiner's decision shall be appealable to the Council;

G. Applications for preliminary plats;

H. Shoreline development permits.

(Ord. 276 ? 1(part), 2002; Ord. 264 ? 5, 2001; Ord. 77 ? 1, (part) 1996; Ord. 13 ? 10, 1995.)

01.36.120 - Hearing Procedures

The Examiner shall have the power to prescribe procedures for the conduct of hearings subject to confirmation of the Council; and also to issue summons and subpoena to compel the appearance of witnesses and production of documents and materials, to order discovery, to administer oaths, and to preserve order. (Ord. 13 ? 12, 1995.)

01.36.126 - Independent and Alternative Hearing Officer Procedures for Local Improvement Districts and Utility Local Improvement Districts

The procedures set forth in Sections 1.36.126, 1.36.127 and 1.36.128 of this chapter are independent of and alternative to any other hearing or review processes heretofore or hereafter established by the City, and shall govern the conduct and review of LID and ULID formation and final assessment roll hearings conducted before Hearing Officers, and related proceedings when authorized and directed by the City Council. (Ord. 414 ? 1, 2006.)

01.36.127 - Formation Hearing Officer Procedures and Requirements for Local Improvement Districts and Utility Local Improvement Districts

- A. As authorized by RCW 35.43.140, the City Council hereby provides for delegating, whenever directed by majority vote of the City Council, the duty of conducting public hearings for the purpose of considering and making recommendations on the formation of LIDs and ULIDs to a Hearing Officer appointed under this section, and the Hearing Officer is directed to conduct such hearings in the manner provided by law and make those recommendations when thus authorized by the City Council.
- B. The Hearing Officer shall conduct the formation hearing to be commenced at the time and place designated by the City Council, cause an adequate record to be made of the proceedings, and make written findings, conclusions and recommendations to the City Council following the completion of such hearing, which may be continued and recontinued as provided by law whenever deemed proper by the Hearing Officer.
- C. The recommendations of the Hearing Officer shall be reported to the City Council and they also shall be filed with the City Clerk and be open to public inspection.
- D. The City Council shall consider, adopt, modify or reject the recommendations of the Hearing Officer in whole or in part, in the discretion of the Council, at a public meeting and shall act by ordinance in forming any LID or ULID. Council consideration and action shall be based on the record made before the Hearing Officer and no further evidence or argument will be permitted.
- E. Any appeal from a decision of the City Council regarding formation of an LID or ULID may be made to the Superior Court within the time and in the manner provided by law.
(Ord. 414 ? 2, 2006.)

01.36.128 - Final Assessment Roll Hearing Officer Procedures and Requirements

- A. As authorized by RCW 35.44.070, the City Council hereby provides for delegating, whenever directed by majority vote of the City Council, the duty of conducting public hearings for the purpose of considering and making recommendations on final

assessment rolls and the individual assessments upon property within LIDs and ULIDs to a Hearing Officer appointed under this section, and the Hearing Officer is directed to conduct such hearings in the manner provided by law and make those recommendations when thus authorized by the City Council.

- B. All objections to the confirmation of the assessment roll shall be in writing and identify the property, be signed by the owners and clearly state the grounds of the objection. Objections not made within the time and in the manner prescribed and as required by law shall be conclusively presumed to have been waived.
- C. The Hearing Officer shall conduct the final assessment roll hearing to be commenced at the time and place designated by the City Council, cause an adequate record to be made of the proceedings, and make written findings, conclusions and recommendations to the City Council following the completion of such hearing, which may be continued and recontinued as provided by law whenever deemed proper by the Hearing Officer.
- D. The recommendations of the Hearing Officer shall be that the City Council correct, revise, lower, change or modify the roll or any part thereof, or set aside the roll in order for the assessment to be made de novo, or that the City Council adopt or correct the roll or take other action on the roll as appropriate, including confirmation of the roll without change. The recommendations of the Hearing Officer shall be filed with the City Clerk and be open to public inspection. All persons whose names appear on the assessment roll who timely filed written objections to their assessments shall receive mailed written notification of their assessments recommended by the Hearing Officer.
- E. All persons who shall have timely filed written objections to their assessments may appeal the recommendations of the Hearing Officer regarding their properties to the City Council by filing written notice of such appeal with the City Clerk within ten (10) calendar days after the date of mailing of the Hearing Officer's recommendations.
- F. Such appeals shall be based exclusively upon the record made before the Hearing Officer and shall be considered by the City Council at a public meeting. No new evidence may be presented. Arguments on appeal shall be either oral or written as the City Council may order.
- G. The City Council shall adopt, modify or reject the recommendations of the Hearing Officer in whole or in part, in the discretion of the Council, at a public meeting and shall act by ordinance in confirming the final assessment roll.
- H. Any appeal from a decision of the City Council regarding any assessment may be made to the Superior Court within the time and in the manner provided by law.
(Ord. 414 ? 3, 2006.)

01.36.130 - Public Hearing

- A. Before rendering a decision on any application or appeal, the Examiner shall hold at least one public hearing thereon.
- B. Whenever a project requires more than one permit or approval, the Examiner may order a consolidation of and conduct the required public hearings to avoid unnecessary costs or delays. Decisions of the Examiner to order and conduct consolidated hearings shall be final

in all cases.
(Ord. 264 ? 6, 2001; Ord. 13 ? 13, 1995.)

01.36.140 - Procedural Notice Requirements

Public hearings may be continued or reopened by the Examiner with written notice to all persons of record at least fourteen (14) calendar days prior to the rescheduled hearing. Public hearings may be continued by the Examiner without additional written notice provided the continuance is made during open session to a specific date, time, and location. (Ord. 264 ? 7, 2001; Ord. 13 ? 14, 1995.)

01.36.150 - Community Development Department Report

When an application or appeal has been set for public hearing, the Community Development Department shall coordinate and assemble the reviews of other departments and governmental agencies having an interest in the subject application or appeal and shall prepare a report summarizing the factors involved and the department findings and recommendation or decision. At least five (5) working days prior to the date of the scheduled hearing, the report, and in the case of appeals any written appeal arguments submitted to the City, shall be filed with the Examiner and copies thereof shall be mailed to all persons of record who have not previously received said materials. (Ord. 264 ? 8, 2001; Ord. 77 ? 1, (part) 1996; Ord. 13 ? 15, 1995.)

01.36.160 - General Criteria for Examiner Decisions

A Each decision of the Examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision.
B. The Examiner's findings and conclusions shall set forth and demonstrate the manner in which the decision is consistent with, carries out and helps implement applicable state laws, the policies, objectives and goals of the comprehensive plan, the approval criteria, development standards and regulations of the land use and development code and the subdivision code, and other official laws, policies and objectives of the City.
C. The Examiner shall accord substantial weight to the recommendation of the Community Development Department. (Ord. 264 ? 9, 2001; Ord. 13 ? 16, 1995.)

01.36.170 - Additional Criteria for Pending Area Zoning - Recommendations

(Repealed by Ord. 264 ? 18, 2001.) (Ord. 13 ? 17, 1995.)

01.36.180 - Additional Criteria for Subdivision Decisions

(Repealed by Ord. 264 ? 18, 2001.) (Ord. 13 ? 18, 1995.)

01.36.190 - Additional Criteria for Subdivision Decisions

(Repealed by Ord. 264 ? 18, 2001.) (Ord. 13 ? 19, 1995.)

01.36.200 - Additional Criteria for Variances

(Repealed by Ord. 264 ? 18, 2001.) (Ord. 77 ? 1, (part) 1996; Ord. 13 ? 20, 1995.)

01.36.210 - Examiner Actions

Within ten (10) days of the conclusion of a hearing or rehearing, the Examiner shall render a written recommendation or decision and shall transmit a copy thereof to the City of Lakewood and to all persons of record.

A. The Examiner's decision may be to grant or deny the application or appeal, or the Examiner may grant the application or appeal with such conditions, modifications and restrictions as the Examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, the policies, objectives and goals of the comprehensive plan, the approval criteria, development standard and regulations of the land use and development code and the subdivision code, and other ordinances, policies and objectives of the City.

B. A cash guarantee, letter of credit or an equivalent measure approved by the City may be required to insure compliance with the conditions, modifications and restrictions.

(Ord. 264 ? 10, 2001; Ord. 77 ? 1, (part) 1996; Ord. 13 ? 21, 1995.)

01.36.220 - Appeal to Examiner - Notice and Content

(Repealed by Ord. 264 ? 18, 2001.) (Ord. 13 ? 22, 1995.)

01.36.230 - Appeal to Council - Notice

(Repealed Ord. 276 ? 1(part), 2002; Ord. 264 ? 11, 2001; Ord. 13 ? 23, 1995.)

01.36.240 - Appeal to Council - Content

(Repealed Ord. 276 ? 1(part), 2002; Ord. 13 ? 24, 1995.)

01.36.250 - Appeal to Council - Consideration

(Repealed Ord. 276 ? 1(part), 2002; Ord. 264 ? 12, 2001; Ord. 13 ? 25, 1995.)

01.36.260 - Appeal to Council - Council Action

(Repealed Ord. 276 ? 1(part), 2002; Ord. 264 ? 13, 2001; Ord. 13 ? 26, 1995.)

01.36.270 - Reconsideration of Final Action

(Repealed Ord. 276 ? 1(part), 2002; Ord. 13 ? 27, 1995.)

01.36.280 - Review of Final Decisions

A. Decisions of the Council shall be final and conclusive unless appealed pursuant to LMC 18A.02.755.

B. Decisions of the Examiner in cases identified in Section 1.36.110 of this Chapter shall be final and conclusive, unless appealed pursuant to LMC 18A.02.755.

C. Notwithstanding the foregoing provisions of this section, final decisions of the Council relating to matters governed by the State Shorelines Management Act may be appealed to the State Shorelines Hearing Board as specified in the said Act.

(Ord. 264 ? 14, 2001; Ord. 13 ? 28, 1995.)

01.36.290 - Precedence Over Conflicting Provisions

- A. If the provisions of this Chapter are in conflict with the provisions of Title 18A of the Lakewood Municipal Code, the provisions of Title 18A shall control.
- B. If the provisions of this Chapter are in conflict with the provisions of any sections of the Lakewood Municipal Code, other than Title 18A, regarding decisions of the Hearing Examiner or review or appeals therefrom, the provisions of this Chapter shall control. (Ord. 264 ? 15; 2001; Ord. 77 ? 1, (part) 1996.)

03.52.000 - Utility Tax

Chapter 3.52
Utility Tax

Sections:

- 3.52.010 Exercise of license revenue power.
- 3.52.020 Definitions.
- 3.52.030 Purpose for utility tax revenues.
- 3.52.040 Utility business license.
- 3.52.050 Utility businesses subject to tax -- Amount.
- 3.52.060 Cellular telephone service -- Income allocation and administration.
- 3.52.070 Tax rate change.
- 3.52.080 Exemption.
- 3.52.090 License tax year.
- 3.52.100 Deductions.
- 3.52.110 Monthly installments.
- 3.52.120 Taxpayer's records.
- 3.52.130 Applications and returns confidential.
- 3.52.140 Failure to make returns or to pay the tax in full.
- 3.52.150 Overpayment of tax.
- 3.52.160 Appeal to hearing examiner.
- 3.52.170 False returns.
- 3.52.180 Tax delinquency - Unlawful acts.
- 3.52.190 Noncompliance -- Penalty.
- 3.52.200 Customer utility tax relief.
- 3.52.210 Customer utility tax relief - Qualifications.
- 3.52.220 Claim filing procedures.
- 3.52.230 Consumer Price Index changes.
- 3.52.240 Designated official to administer, make rules.
- 3.52.250 Severability.

03.52.010 - Exercise of License Revenue Power

The provisions of this Chapter shall be deemed an exercise of the power of the City of Lakewood to tax for revenue. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.020 - Definitions

In construing the provisions of this Chapter, the following definitions shall be applied:

A. "Gross income" means the value proceeding or accruing from the sale of any tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees, or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses, including the amount of credit losses actually sustained by the

taxpayer whose regular books or accounts are kept upon an accrual basis.

B. "Cable service" means:

1. a system providing service pursuant to a franchise issued by the City under the Cable Communications Policy Act of 1984 Public Law No. 98-549, 47 U.S.C. ? 521, as it may be amended or superseded; or
2. any system that competes directly with such franchised system by employing antennae, microwave, wires, wave guides, coaxial cables, or other conductors, equipment or facilities designed, construed or used for the purpose of:
 - (a) collecting and amplifying local and distant broadcast television signals and distributing and transmitting them;
 - (b) transmitting original cable-cast programming not received through television broadcast signals; or
 - (c) transmitting television pictures, film and videotape programs not received through broadcast television signals, whether or not encoded or processed to permit reception by only selected receivers; provided, however, that "cable television service" shall not include entities that are subject to charges as "Commercial TV Stations" under 47 U.S.C. ? 158.

C. "Cellular telephone service" means two-way voice and data telephone/telecommunications system based in whole or substantially in part on wireless radio communications and which is not subject to regulation by the Washington Utilities and Transportation Commission (WUTC). This includes cellular mobile service. The definition of cellular mobile service includes other wireless radio communications services such as specialized mobile radio (SMR), personal communications services (PCS) and any other evolving wireless radio communications technology which accomplishes the same purpose as cellular mobile service.

D. "Competitive telecommunication service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.

E. "Designated official" means such City employee or agent as the City Manager of the City shall designate.

F. "Network telecommunication service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, pagers, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telecommunication service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telecommunication service" does not include the providing of competitive telecommunication service, the providing of cable television service, nor the providing of broadcast services by radio or television stations.

G. "Telecommunications company" includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public within this state.

H. "Telecommunication business" means the business of providing network telecommunication service, as defined in this section. It includes cooperative or farmer line

telephone companies or associations operating an exchange.

I. "Telecommunication service" means competitive telecommunication service or network telecommunication service, or both, as defined in this section (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.030 - Purpose for Utility Tax Revenues

The revenue generated by the tax established pursuant to the provisions of this Chapter shall be used solely for public safety and transportation needs of the City. (Ord. 253 ? 1 (part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.040 - Utility Business License

No person, firm or corporation shall engage in or carry on any business, occupation or act or privilege for which a tax is imposed by Section 3.52.050 of this Chapter without first having obtained, and being the holder of a business license as provided in Title 5 of the Lakewood Municipal Code. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.050 - Utility Businesses Subject to Tax - Amount

There are levied upon, and shall be collected from everyone, including the City, on account of certain business activities engaged in or carried on in the City, utility business occupation taxes in the amounts to be determined by the application of rates given against gross income as follows:

- A. Upon everyone engaged in and carrying on a telegraph business, a tax equal to 6.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due;
- B. Upon everyone engaged in or carrying on a competitive telecommunication service or network telecommunication service, a tax equal to 6.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due. In determining gross income from such business, including intrastate toll service, the taxpayer shall include 100 percent of the gross income received from such business in the City;
- C. Upon everyone engaged in or carrying on the business of cellular telephone service, a tax equal to 6.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due;
- D. Upon everyone engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption, a tax equal to 5.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due;
- E. Upon everyone engaged in or carrying on the business of selling or furnishing electric energy, a tax equal to 5.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due, PROVIDED, this tax shall not apply to any entity engaged in or carrying on the business of selling or furnishing electric energy on which there is already imposed a tax on the business of selling or furnishing electric energy levied by and paid to any other municipality of the State of Washington organized under the provisions of Title 35 RCW or Title 35A RCW;
- F. Upon everyone engaged in or carrying on the business of cable communications, a fee or tax equal to 6.0 percent of the total gross income, not including the amount of the tax, from gross subscriber revenues in the City during the period for which the fee or tax is due. For purposes of this Chapter, "gross subscriber revenues" means and includes those revenues

derived from the supplying of subscription services, that is, installation fees, disconnect and reconnect fees, fees for regular cable benefits including the transmission of broadcast signals and access and origination channels and per-program or per-channel charges; it does not include leased channel revenue, advertising revenue, or any other income derived from the system:

G. Upon the City with respect to its conducting, maintaining and/or operating any municipal storm water management program or utility that it operates, or may operate in the future, as a public utility a tax of 6.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due.

H. Upon the City with respect to its conducting, maintaining and/or operating any municipal garbage collection service or utility that it operates, or may operate in the future as a public utility, a tax of 6.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due.

(Ord. 290 ? 1, 2002; Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.060 - Cellular Telephone Service - Income Allocation and Administration

A. Allocation of income.

1. Service address. Payments by a customer for cellular telephone service from telephones without a fixed location shall be allocated among taxing jurisdictions to the location of the customer's principal service address during the period for which the tax applies.

2. Presumption. There is a presumption that the service address a customer supplies to the taxpayer is current and accurate, unless the taxpayer has actual knowledge to the contrary.

3. Roaming. When the cellular telephone service is provided while a subscriber is roaming outside the subscriber's normal cellular network area, the gross income shall be assigned consistent with the taxpayer's accounting system to the location of the originating cell site of the call, or to the location of the main cellular switching office that switched the call.

B. Authority of administrator. The City Manager or his or her designee is authorized to represent the City in negotiations with other cities for the proper allocation of cellular telephone service taxes imposed pursuant to this Chapter.

(Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.070 - Tax Rate Change

No change in the rate of tax imposed by Section 3.52.050 shall apply to business activities occurring before the effective date of the change and, except for a change in the tax rate authorized by RCW 35.21.870, no change in the rate of the tax may take effect sooner than 60 days following the enactment of the ordinance establishing the change. The designated official shall send to each affected business at the address of record a copy of any ordinance changing the rate of tax promptly upon its enactment. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.080 - Exemption

The tax herein levied is in lieu of any excise, privilege or occupational tax under any Chapters of this Title with respect to activities specifically within the provisions of this Chapter. Nothing herein shall be construed to exempt persons taxable under the provisions of this Chapter from tax under any other Chapters of this Title with respect to activities other than those specifically within the provisions of this Chapter. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.090 - License Tax Year

All utility occupation licenses and the fee for the tax therefor shall be for the tax year for which issued and shall expire at the end of the tax year. The tax year shall commence January 1 and shall end on December 31. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999)

03.52.100 - Deductions

In computing the tax imposed by this Chapter, the following items may be deducted from the measure of the tax:

A. The amount of credit losses actually sustained by taxpayers whose regular books are kept upon an accrual basis.

B. Charges by a taxpayer engaging in a telephone business to a telecommunications company for telephone service that the purchaser buys for the purpose of resale.

C. That portion of the gross income derived from charges to another telecommunications company for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate services.

D. Adjustments made to a billing or to a customer account or to an accrual account in order to reverse a billing or charge that had been made as a result of third-party fraud or other crime and was not properly a debt of the customer.

E. Amounts derived from a business which the City is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

F. Grants from governmental agencies.

(Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999)

03.52.110 - Monthly Installments

The tax imposed by Section 3.52.050 of this Chapter shall be due and payable in monthly installments, and remittance therefor shall be made on or before the last day of the month following the end of the monthly period in which the tax is accrued. On or before said due date, the taxpayer shall file with the designated official a written return upon such form and setting forth such information as the designated official shall reasonably require, together with the payment of the amount. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.120 - Taxpayer's Records

Each taxpayer shall keep records for up to six years reflecting the amount of his or her gross operating revenues on services within the City, and such records shall be open at all reasonable times to inspection by the designated official, or his or her duly authorized subordinates, for verification of said tax returns or for the filing of the tax of a taxpayer who fails to make such return, or for other appropriate uses. Where necessary, and in addition to other remedies provided for herein, the City's designated official or his or her agent may fix a time and place for an investigation of the correctness of any return and may issue a subpoena to the taxpayer or any other person, to attend upon such investigation and there testify, under oath in regard to the matters inquired into and may, by subpoena, require the taxpayer or any other person to bring with him or her

such books, records and papers as may be required by the designated official. (Ord. 374 Å,Å§ 1, 2005; Ord. 253 Å,Å§ 1(part), 2000; Ord. 215 Å,Å§ 1 (part), 1999.)

03.52.130 - Applications and Returns Confidential

The applications, statements or returns made to the designated official pursuant to this Chapter shall not be made public, nor shall they be subject to the inspection of any person except the City Manager, City Attorney, designated official or authorized agent and to the Mayor and members of the City Council; and it is unlawful for any person to make public or inform any other person as to the contents of or any information contained in or to permit inspection of any application or return; provided, however, that the foregoing shall not be construed to prohibit the designated official from making known or revealing names, addresses and telephone numbers of utilities operating within the City, facts or information contained in any return to any taxpayer or disclosed in any investigation or examination of the taxpayer's books or records to the State Department of Revenue, for official purposes, but only if the statutes of the state grant substantially similar privileges to the proper officers of the City. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.140 - Failure to Make Returns or Pay the Tax in Full

If any taxpayer fails, neglects or refuses to make its return as and when required herein the designated official is authorized to determine the amount of tax payable, and by mail to notify such taxpayer of the amount so determined. The amount so fixed shall thereupon be the tax and be immediately due and payable, together with penalty and interest. Delinquent taxes, including any penalty and interest, are subject to an interest charge of 12 percent per year on any unpaid balance from the date the tax became due as provided in Section 3.52.110 of this Chapter until paid. (Ord. 253 ? 1(part); 2000; Ord. 215 ? 1 (part), 1999.)

03.52.150 - Overpayment of Tax

Any money paid to the City through error, or otherwise not in payment of the tax imposed by this Chapter, or in excess of such tax, shall, upon the request of the taxpayer, be credited against any tax due or to become due from such taxpayer hereunder, or, upon the taxpayer ceasing to do business in the City, be refunded to the taxpayer. (Ord. 253 ? 1(part); 2000; Ord. 215 ? 1 (part), 1999.)

03.52.160 - Appeal to Hearing Examiner

Any taxpayer aggrieved by the amount of the fee or tax determined by the designated official to be due under the provisions of this Chapter may appeal such determination to the City hearing examiner in accordance with, and subject to the procedures set forth in Chapter 1.36 of the Lakewood Municipal Code or such subsequent superseding procedures as may be adopted by ordinance, provided that in such appeal hearing, the hearing examiner shall receive and examine available information, conduct public hearings, prepare records and reports thereof, and make decisions, which shall be final and conclusive. Pending a hearing, a taxpayer may withhold the fee or tax determined by the designated official. If the tax or fee is withheld, the taxpayer shall pay such amount to the City with interest from the date the amount was withheld. The designated official shall periodically set the applicable interest rate for withholding. ((Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.170 - False Returns

It is unlawful for any person subject to this Chapter to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make any false or fraudulent application or return or any false statement or representation in, or in connection with any such application or return, or to aid or abet another in any attempt to evade payment of the fee or tax, or any part thereof; or to testify falsely upon any investigation of the correctness of a return upon the hearing of any appeal or in any manner hinder or delay the City or any of its officers in carrying out the provisions of this Chapter. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.180 - Tax Delinquency Unlawful Acts

Delinquent Penalties and Interest. For each payment due, if such payment is not made by the due date thereof, in addition to any other remedies available under the law, there shall be added penalty and interest as follows:

A. If paid one (1) to ten (10) days late, there shall be a penalty of ten percent (10%) added to the amount of tax due.

B. If paid eleven (11) to twenty (20) days late, there shall be a penalty of fifteen percent (15%) added to the amount of tax due.

C. If paid twenty-one (21) to thirty (30) days late, there shall be a penalty of twenty percent (20%) added to the amount of tax due.

D. If paid more than thirty (30) days late, there shall be a penalty of twenty-five percent (25%) added to the amount of tax due.

E. In addition to the above penalty, the City of Lakewood shall charge the taxpayer interest on all taxes and delinquent penalties due at the rate of one percent per month or the portion thereof that said amounts are past due.

F. The tax imposed by this chapter, and all penalties and interest thereon, shall constitute a debt to the City of Lakewood, and may be collected by court proceedings in the same manner as any other debt which remedy shall be in addition to all other available remedies. Any judgment entered in favor of the City of Lakewood may include an award to the City of Lakewood of all court and collection costs including attorneys' fees to the extent permitted by law. Amounts delinquent more than 60 days may be assigned to a third party for collection, in which case the amount of any collection charges shall be in addition to all other amounts owed. Amounts due shall not be considered paid until the City of Lakewood has received payment for the full amount due or has discharged the amount due and not paid. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.190 - Noncompliance - Penalty

Any person, firm or corporation subject to the provisions of this Chapter, who fails or refuses to apply for a business license for a business to which the provisions of this Chapter apply, or to make tax returns or to pay any tax when due, or who makes any false statement or representation in or in connection with any tax return or any application for a business license or tax return, or who otherwise violates or refuses to comply with any provision of this Chapter, is guilty of a misdemeanor, and each such person, firm or corporation is guilty of a separate offense for each and every day or portion thereof during which any violation of any of the provisions of this Chapter is committed, continued or permitted, and upon conviction of any such violation, such person shall be punishable by a fine not to exceed \$1,000.00 for each day or portion thereof which such person, firm or corporation is found guilty of noncompliance with the provisions of this Chapter. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

the calendar year 2000 and each subsequent calendar year in accordance with Section 3.52.230 of this Chapter;

and means:

C. Have been a resident of the dwelling unit within the City at all times during any period for which a reimbursement is requested, and have contributed to the payment of City utility tax charges from his or her income or resources. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.220 - Claim Filing Procedures

A. All requests for tax relief under Sections 3.52.200 and 3.52.210 of this Chapter must be filed with the City or its agent no later than the date established by the designated official for the calendar year for which "reimbursement" is requested.

B. The designated official shall adopt rules and procedures for the filing of reimbursement claims, and for the administration of Sections 3.52.200, 3.52.210 and 3.52.220 of this Chapter.

(Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.230 - Customer Price Index Changes

The amount of the maximum relief established under Section 3.52.200 of this Chapter, and the aggregate value of gifts, subsidies and benefits excludable from income under Section 3.52.210 of this Chapter, and the median income level figure utilized when the Primary Metropolitan Statistical Area (PMSA) per household for the Seattle-Tacoma area update is not available, shall be periodically reviewed up to one time per year for adjustment based upon recommendations by the designated official and the City Manager to reflect any change in the cost of living, which adjustment, together with supporting documentation, shall be subject to review and approval by the City Council, and any such approval shall be set forth in an ordinance or resolution duly adopted or passed by the City Council. (Ord. 253 ? 1 (part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.240 - Designated Official to Administer, Make Rules

The designated official shall have the power to construe, interpret, administer and enforce the provisions of this Chapter, and shall further have the power, and it shall be his or her duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this Chapter or with the law for the purpose of implementing, interpreting and carrying out the provisions thereof, and it is unlawful to violate or fail to comply with any such rule or regulation. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.250 - Severability

If any provision of this Chapter or the application thereof to any person or circumstance is held to be invalid, the remainder of such Chapter and its provisions and regulations or the application thereof to other person or circumstances shall not be affected. (Ord. 253 ? 1 (part), 2000; Ord. 215 ? 1 (part), 1999)

03.52.200 - Customer Utility Tax Relief

There is granted to persons who meet the qualifications and requirements of Sections 3.52.210 and 3.52.220 of this Chapter relief from the utility business tax of the City as follows:

A. For all billings paid directly or indirectly by the person during a calendar year for service charges to any entity or organization which paid the utility business tax of the City, the City is authorized to pay to such person a "reimbursement" in a maximum amount determined in accordance with Paragraph B, below; provided, that the total amount of all reimbursements paid pursuant to this subsection shall not exceed the total dollar amount established through the budget process.

B. The amount of maximum relief available under Paragraph A, above, for any calendar year is ten dollars (\$10.00) for utility taxes paid for each of the following utilities (1) electric, (2) natural gas and (3) telephone, with a combined total for all three named not to exceed \$30.00; Provided that the amount of the relief shall not to exceed the amount of utility business taxes actually paid to the City for the named utilities. The amount of the maximum relief may be adjusted for subsequent years in accordance with the provisions of Section 3.52.230 of this Chapter. The amount of relief shall be pro-rated on a monthly basis for each month that the customer was a resident of the City, and for which the customer qualified for the relief as set forth in Section 3.52.210 of this Chapter, and was paying the tax. (Ord. 253 ? 1(part), 2000; Ord. 215 ? 1 (part), 1999.)

03.52.210 - Customer Utility Tax Relief Qualifications

To qualify for the relief set forth in Section 3.52.200 of this Chapter, a person must file a request for tax relief and reimbursement of the amount allowable of the City utility occupation taxes imposed in the current year on the form approved by the City, and must:

A. Meet one of the following criteria:

1. Be 62 years of age or older at all times during any period for which "reimbursement" is requested; or
2. Be permanently disabled under the definitions of subsections (2) or (3)(A), (3)(B) or (3)(C) of 42 U.S.C. ? 1382c(a) and receiving funds from a disability program such as Supplemental Security Income, Social Security Disability Insurance or Disabled Veterans payments;

and must:

B. Have an income during the calendar year for which a "reimbursement" is requested from all sources whatsoever, not exceeding 50 percent of the median income level for such calendar year for the Primary Metropolitan Statistical Area (PMSA) per household for the Seattle-Tacoma area, as published by the Secretary of Housing and Urban Development. If the annual update of the PMSA is not available, the median income level shall be determined by adjusting the prior year median income level in accordance with Section 3.52.230 of this Chapter. As used in this subsection, "income" means:

1. "Disposable income," as that term is defined in RCW 84.36.383, as it may be amended or replaced from time to time, plus
2. The aggregate value of all gifts received during the calendar year for which a "reimbursement" is requested, excluding the first \$5,008.69 thereof. The aggregate value of gifts excludable from income as provided in this section shall be adjusted for

05.2.180- Notice and Order

A. The City Manager, or designee, shall issue a notice and order, directed to the licensee whom it has determined is in violation of any of the terms and provisions of any business license or regulation ordinance. The notice and order shall contain:

1. The street address, when available, and a legal description sufficient for identification of the premises upon which the violation occurred or is occurring;
2. A statement that the City Manager, or designee, has found the application submitted by or the conduct of the licensee to be in violation of any business license or regulation ordinance, with a brief and concise description of the facts or conditions found to render such licensee in violation of such business license or regulation ordinance;
3. A statement of any action required to be taken as determined by the City Manager, or designee. If the City Manager, or designee, has determined to assess a civil penalty, the order shall require that the penalty shall be paid within ten (10) days from the date of receipt of the notice and order. If the Director determines to suspend or revoke the license, the order shall require surrender of the licenses to the Director within ten (10) days from the date of receipt of the notice and order.
4. A statement advising that the licensee may appeal from the notice and order or from any action of the City Manager, or designee, to the City Hearing Examiner, provided the appeal is made in writing as provided in this Ordinance and filed with the City Clerk within ten (10) days from the date of receipt of the notice and order, and that failure to appeal shall constitute a waiver of all right to an administrative hearing and determination of the matter.

B. The notice and order, and any amended or supplemental notice and order, shall be served upon the licensee either personally or by mailing a copy of such notice and order by certified mail, postage prepaid, return receipt requested to such licensee at the address which appears on the business license.

C. Proof of service of the notice and order shall be made at the time of service by a written declaration under penalty of perjury executed by the person effecting service, declaring the time, date, and manner in which service was made, or by affidavit of mailing to which shall be attached the postal return receipt or original mailing if returned unclaimed.

(Ord. 300 ? 5, 2003; Ord. 24 ? 18, 1995.)

05.2.190- Appeal From Denial or From Notice or Order

A. The City Hearing Examiner is designated to hear appeals by applicants or licensees aggrieved by actions of the City Manager, or designee, pertaining to any denial, civil penalty suspension, or revocation of business licenses. The Hearing Examiner may adopt reasonable rules and regulations for conducting such appeals. Copies of all rules and regulations so adopted shall be filed with the Director of Finance and with the City clerk, who shall make them freely accessible to the public.

B. Any applicant or licensee may, within ten (10) days after receipt of a notice of denial of application or of a notice and order, file with the City Clerk a written notice of appeal containing the following:

1. A heading with the words: "Before the Hearing Examiner of the City of Lakewood",
2. A caption reading: "Appeal of _____" giving the names of all appellants participating in the appeal;
3. A brief statement setting forth the legal interest of each of

the appellants in the business involved in the denial or notice and order;

4. A brief statement, in concise language, of the specific order or action protested, together with any material facts claimed to support the contentions of the appellant or appellants;

5. A brief statement, in concise language, of the relief

sought, and the reasons why it is claimed the protested action or notice and order should be reversed, modified, or otherwise set aside;

6. The signatures of all persons named as appellants, and their official mailing addresses;

7. The verification (by declaration under penalty of perjury) of each appellant as to the truth of the matters stated in the appeal.

C. As soon as practicable after receiving the written appeal, the City Clerk shall fix a date, time, and place for the hearing of the appeal by the Hearing Examiner. Written notice of the time and place of the hearing shall be given at least ten (10) days prior to the date of the hearing by the City Clerk, by mailing a copy thereof, postage prepaid, by certified mail with return receipt requested, addressed to each appellant at his or her address shown on the notice of appeal.

D. At the hearing, the appellant or appellants shall be entitled to appear in person, and to be represented by counsel and to offer such evidence as may be pertinent and material to the denial or to the notice and order. The technical rules of evidence need not be followed.

E. Only those matters or issues specifically raised by the appellant or appellants in the written notice of appeal shall be considered in the hearing of the appeal.

F. Within ten (10) business days following conclusion of the hearing, the Hearing Examiner shall make written findings of fact and conclusions of law, supported by the record, and a decision which may affirm, modify, or overrule the denial or order of the City Manager, or designee, and may further impose terms and conditions to issuance or continuation of a

business license.

G. Failure of any applicant or licensee to file an appeal in accordance with the provisions of this Chapter shall constitute a waiver of the right to an administrative hearing and adjudication of the denial or of the notice and order.

H. The decision of the Hearing Examiner is final and appeals from this decision are to be before the Superior Court.

I. Enforcement of any suspension or revocation of any business license, or other order of by the City Manager, or designee, shall be stayed during the pendency of an appeal therefrom which is properly and timely filed.

(Ord. 300 ? 6, 2003; Ord. 276 ? 2, 2002; Ord. 108 ? 1, (part) 1996; Ord. 24 ? 19, 1995.)