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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON DEPT. OF REVENUE,
Appellant,

v.

CITY OF SNOQUALMIE, a municipal corporation,
Respondent,

And

KING COUNTY EXECUTIVE DOW CONSTANTINE, an individual, in
his official capacity; KING COUNTY ASSESSOR LLOYD HARA, an
individual in his official capacity; KING COUNTY; Other Parties,

Defendants.

BRIEF OF RESPONDENT

CITY OF SNOQUALMIE
38624 SE River Street
Snoqualmie, WA 98065
(425) 888-1555

PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245-1700

Bob C. Sterbank, WSBA #19514

Matthew J. Segal, WSBA #29797
Taki V. Flevaris, WSBA #42555

Attorneys for City of Snoqualmie

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	ARGUMENT.....	6
A.	The City has standing to challenge the PILT Law as unconstitutional.	6
B.	The City has challenged the Legislature’s methods rather than its underlying goals.	17
C.	The PILT Law establishes a non-uniform real property tax for a portion of landowners.	20
1.	The PILT is not a fee.....	25
2.	The PILT is not an excise tax.....	31
D.	The PILT Law surrenders taxing authority by allowing certain taxpayers to negotiate their own tax rates.	37
E.	The PILT Law lacks minimum standards to avoid arbitrary government action.	39
F.	The PILT Law contains a non-severability clause and should be struck in its entirety.....	43
V.	CONCLUSION.....	44

TABLE OF AUTHORITIES

CASES

<i>Apartment Operators Ass'n of Seattle, Inc. v. Schumacher</i> , 56 Wn.2d 46, 351 P.2d 124 (1960)	32, 35
<i>Automotive United Trades Org. v. State</i> , No. 89734-4, 2015 WL 5076289 (Aug. 27, 2015)	39, 41
<i>Barry & Barry, Inc. v. Dep't of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540 (1972)	39
<i>Belas v. Kiga</i> , 135 Wn.2d 913, 959 P.2d 1037 (1998)	passim
<i>Bentivenga v. City of Delavan</i> , 358 Wis.2d 610, 856 N.W.2d 546 (Wis. Ct. App. 2014)	29
<i>Carkonen v. Williams</i> , 76 Wn.2d 617, 458 P.2d 280 (1969)	38
<i>Cass County v. Leech Lake Band of Chippewa Indians</i> , 524 U.S. 103, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998)	19
<i>Chicago, R.I. & P.R. Co. v. Robertson</i> , 122 Miss. 417, 84 So. 449 (1920)	24
<i>City of Seattle v. State</i> , 103 Wn.2d 663, 694 P.2d 641 (1985)	passim
<i>Covell v. City of Seattle</i> , 127 Wn.2d 874, 905 P.2d 324 (1995)	26, 27, 31
<i>Dean v. Lehman</i> , 143 Wn.2d 12, 18 P.3d 523 (2001)	27
<i>Deheer v. Seattle Post-Intelligencer</i> , 60 Wash.2d 122, 372 P.2d 193(1962)	7
<i>Dept. of Fisheries v. Dewatto Fish Co.</i> , 100 Wn.2d 568, 674 P.2d 659 (1983)	35

<i>Farris v. Munro</i> , 99 Wn.2d 326, 662 P.2d 821 (1983)	16
<i>Flight Options, LLC v. Dep't of Rev.</i> , 172 Wn.2d 487, 259 P.3d 234 (2011)	28
<i>Frank & Sons, Inc. v. State</i> , 136 Wn.2d 737, 966 P.2d 1232 (1998)	25
<i>Goudy v. Meath</i> , 38 Wash. 126, 80 P. 295 (1905)	19
<i>Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004)	10, 11
<i>Gruen v. State Tax Comm'n</i> , 35 Wn.2d 1, 211 P.2d 651 (1949)	37
<i>Harbour Village Apartments v. City of Mukilteo</i> , 139 Wn.2d 604, 989 P.2d 542 (1999)	21, 31, 32, 33
<i>High Tide Seafoods v. State</i> , 106 Wn.2d 695, 725 P.2d 411 (1986)	38, 39
<i>In re Parentage of C.A.M.A.</i> , 154 Wn.2d 52, 109 P.3d 405 (2005)	43
<i>Jensen v. Henneford</i> , 185 Wash. 209, 53 P.2d 607 (1936)	31, 33, 34
<i>Kucera v. State Dep't of Transp.</i> , 140 Wn.2d 200, 995 P.2d 63 (2000)	9
<i>Lane v. City of Seattle</i> , 164 Wn.2d 875, 194 P.3d 977 (2008)	28
<i>McDonald v. Hogness</i> , 92 Wn.2d 431, 598 P.2d 707 (1979)	40
<i>Mukilteo Citizens for Simple Gov't v. City of Mukilteo</i> , 174 Wn.2d 41, 272 P.3d 227 (2012)	13

<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003)	28
<i>Pierce County v. State</i> , 159 Wn.2d 16, 148 P.3d 1002 (2006)	39
<i>Pierce v. Ne. Lake Wash. Sewer and Water Dist.</i> , 123 Wn.2d 550, 870 P.2d 305 (1994)	34
<i>Power, Inc. v. Huntley</i> , 39 Wn.2d 191, 235 P.2d 173 (1951)	32
<i>Riverview Comm'y Group v. Spencer & Livingston</i> , 181 Wn.2d 888, 337 P.3d 1076 (2014)	7, 12
<i>Samis Land Co. v. City of Soap Lake</i> , 143 Wn.2d 798, 23 P.3d 477 (2001)	passim
<i>Seattle Sch. Dist. v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978)	passim
<i>Sheehan v. C. Puget Sound Reg'l Transit Auth.</i> , 155 Wn.2d 790, 123 P.3d 88 (2005)	35
<i>Snohomish Bd. of Equalization v. Dep't of Rev.</i> , 80 Wn.2d 262, 493 P.2d 1012 (1972)	15
<i>State ex rel. Barlow v. Kinnear</i> , 70 Wn.2d 482, 423 P.2d 937 (1967)	40
<i>State ex rel. Morgan v. Kinnear</i> , 80 Wn.2d 400, 494 P.2d 1362 (1972)	20
<i>State ex rel. Namer Inv. Corp. v. Williams</i> , 73 Wn.2d 1, 435 P.2d 975 (1968)	40
<i>State ex rel. Peninsula Neighborhood Ass'n v. Wash. State Dep't of Transp.</i> , 142 Wn.2d 328, 12 P.3d 134 (2000)	40
<i>State ex rel. Schillberg v. Cascade Dist. Court</i> , 94 Wn.2d 772, 621 P.2d 115 (1980)	40

<i>State ex rel. Wash. State Fin. Comm. v. Martin,</i> 62 Wn.2d 645, 384 P.2d 833 (1963)	37
<i>State v. Crown Zellerbach Corp.,</i> 92 Wn.2d 894, 602 P.2d 1172 (1979)	40, 41, 42
<i>State v. Johnson,</i> 179 Wn.2d 534, 315 P.3d 1090 (2014)	7
<i>State v. Ramos,</i> 149 Wn. App. 266, 202 P.3d 383 (2009)	41
<i>State v. Redd,</i> 166 Wash. 132, 6 P.2d 619 (1932)	38
<i>State v. Watson,</i> 155 Wn.2d 574, 122 P.3d 903 (2005)	7
<i>U.S. Steel Corp. v. State,</i> 65 Wn.2d 385, 397 P.2d 440 (1964)	41, 42
<i>Valentine v. Johnston,</i> 83 Wn.2d 390, 518 P.2d 700 (1974)	20
<i>Vance Lumber Co. v. King County,</i> 184 Wash. 402, 51 P.2d 623 (1935)	15
<i>Vovos v. Grant,</i> 87 Wn.2d 697, 555 P.2d 1343 (1976)	15
<i>Walker v. Munro,</i> 124 Wn.2d 402, 879 P.2d 920 (1994)	9, 10
<i>Wash. State Sch. Dirs. Ass'n v. Dep't of Lab. and Indus.,</i> 82 Wn.2d 367, 510 P.2d 818 (1973)	40
<i>Yakima County Clean Air Auth. v. Glascam Bldrs., Inc.,</i> 85 Wn.2d 255, 534 P.2d 33 (1975)	42
<i>Yakima County Fire Prot. Dist. No. 12 v. City of Yakima,</i> 122 Wn.2d 371, 858 P.2d 245 (1993)	9, 10

CONSTITUTIONAL PROVISIONS

Const. art. II, § 1 2, 14, 18
Const. art. VII, § 1 passim
Const. art. VII, § 9 3, 4, 15, 37
Const. art. XI, § 12..... 18, 37

STATUTES AND REGULATIONS

31 U.S.C. § 6902..... 29
Ch. 82.04 RCW..... 32
Ch. 82.08 RCW..... 32
Ch. 82.14 RCW..... 32
Ch. 84.52 RCW..... 3
Const. art. VII, § 3 4, 18
Const. art. VII, § 8 4
Laws of 2014, ch. 207..... 4
Laws of 2014, ch. 207, § 12..... 42
Laws of 2014, ch. 207, § 3..... 33
Laws of 2014, ch. 207, § 5..... 4, 20
Laws of 2014, ch. 207, § 8..... passim
Laws of 2014, ch. 207, § 9..... 20
RCW 35.82.210 29
RCW 35A.12.100..... 11
RCW 77.12.203 29

RCW 84.40.020	35
RCW 84.52.020	3
RCW 84.52.040	3
RCW 84.52.050	3

OTHER AUTHORITIES

EHB 1287, § 3 (2013).....	21
ESHB 1287, § 11 (2014).....	42
ESHB 1287, § 8 (2014).....	22, 42
H.B. Rep. on ESHB 1287 (2014).....	22, 25, 42
S.B. Rep. on EHB 1287 (2013).....	21, 42

I. INTRODUCTION

The Washington State Constitution places essential checks and balances on the Legislature's taxing authority. Among these are the paramount requirement of uniformity in real property taxation, the prohibition against surrender of the taxing power, and the prohibition against legislative delegation without minimum standards. In this case, the Legislature has violated each of these three constitutional rules in authorizing, for the benefit of selected landowners, an alternative to the real property tax, labeled a payment in lieu of tax ("PILT").

Under Laws of 2014, ch. 207 (the "PILT Law"), tribes with off-reservation commercial properties are allowed to negotiate individualized, lesser, non-uniform real property tax payments, in the absence of any meaningful guidelines. Appellant, the State Department of Revenue ("DOR"), administers this scheme. Respondent, the City of Snoqualmie (the "City"), depends upon property tax revenues to provide essential government services within its jurisdiction. The trial court correctly ruled the PILT is unconstitutional. The City respectfully requests that this Court affirm the trial court.

II. STATEMENT OF ISSUES

This appeal presents two essential issues for this Court's review. The first issue is whether the City has standing to challenge the PILT Law, when (1) the City is a central participant in the State's process for real property taxation, (2) the PILT Law substantially constrains the City's ability to raise revenues through that process, (3) the PILT Law is likely to prevent the City from collecting specified tax revenues in the near future, (4) the PILT Law shifts heavier tax obligations to the City's residents, whom the City represents in this action, and (5) DOR admits that the validity of the PILT Law is a matter of broad public importance.

The second issue is whether the Legislature may provide to a subset of landowners, as an alternative to paying Washington's standard real property tax, an option to pay a lesser amount, to be negotiated between each landowner and the surrounding county (or if no agreement can be reached, then whatever amount DOR chooses), up to a specified cap. Such a scheme violates state constitutional prohibitions against (1) non-uniform real property taxation, (2) surrender of the Legislature's taxing authority, and (3) delegation without minimum standards. *See* Const. art. VII, § 1; Const. art. II, § 1.

III. STATEMENT OF THE CASE

The Washington State Constitution provides that all taxation of real property must be uniform. *See* Const. art. VII, §§ 1, 9. Uniformity is “the highest and most important of all requirements applicable to taxation under our system.” *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 805 n.13, 23 P.3d 477 (2001) (internal quotations omitted). In accordance with this mandate, the Legislature has established a standard and regular framework for real property taxation throughout the state. *See* chapter 84.52 RCW. Under this framework, taxing authorities such as the City first determine the total tax levy amount required to meet budgetary needs for the upcoming year. *See* RCW 84.52.020. This amount is then levied proportionally against the total assessed value of non-exempt property within the authority’s jurisdiction. *See* RCW 84.52.040. Both the total dollar levy amount and effective tax rate are subject to statutory caps. *See, e.g.,* RCW 84.52.050. Like other municipalities, the City relies heavily on this real property tax system to fund essential governmental services within its jurisdiction on an ongoing basis, including roads, parks, and municipal courts. CP at 71, 74-75.

In 2014, the Legislature enacted the PILT Law as Engrossed Substitute House Bill 1287, which modifies taxation of tribe-owned real properties that are off-reservation and used for commercial purposes. *See*

Laws of 2014, ch. 207. The PILT Law exempts such properties from the standard real property tax, *id.*, § 5, while simultaneously requiring “payment” to local taxing authorities of an alternative, lesser amount (the PILT) unless there is a taxable leasehold interest on the property, *id.*, §§ 8-9. The amount of the PILT in each case is established in negotiations between the landowner and the surrounding county or, failing agreement, is chosen by DOR. *Id.*, § 8. The PILT funds are then distributed to local taxing authorities for general purposes, the same as if a “tax had been levied.” *Id.*, § 8(3). The PILT amount also cannot exceed the value of a hypothetical leasehold excise tax on the property. *See id.*, §§ 3(2)(g), 8(2).

In 2014, DOR received PILT applications for highly valuable commercial property in King County on which well-established tribal businesses are located. *See, e.g.*, CP at 282-83, 833-45. This included the Salish Lodge and the Emerald Downs horse racetrack, involving tens of millions of dollars in total taxable property values. *See id.*

Respondent the City of Snoqualmie is a small city, with a population of approximately 12,000. Within the City’s jurisdiction, the most notable property subject to the PILT Law is the Salish Lodge. In 2014, the owner of the Salish Lodge, the Muckleshoot Tribe, paid the standard real property tax for that property, totaling \$393,948. CP at 523. The amount paid to the City—approximately \$93,500—represented 1.6

percent of the City's entire regular property tax levy that year. *Id.* For 2015, the tribe instead applied for and negotiated a PILT with King County to "replace [the] property tax which would normally be levied" for the property. CP at 213. The amount agreed upon was 25 percent of the property tax owed the previous year. CP at 24. For 2016, the PILT will be subject to new and separate negotiations. CP at 25.

The PILT Law's cumulative effects on the City are "projected to be significant." CP at 72. The PILT Law exempts certain property from the City's real property tax, which means the City's effective tax rate will have to increase in order to raise the same amount in revenue. *See, e.g.,* CP at 520, 696. The burden of taxation will thus shift to all other property owners in the City. For the same reason, the total amount that the City can raise in a given year will be reduced. *See id.*

The City will also face increased costs related to the development of currently vacant tribe-owned parcels. Projected expansion of the Salish Lodge, for example, includes a 250-room hotel and conference center and 175 new homes on 60 acres immediately north of the existing facilities. *See* CP at 522. The City is party to a binding agreement in support of this expansion—including the special provision of water, sewer, and other municipal services—entered into when the property was subject to standard real property taxation. *See* 267-70, 273-80, 522. Under the PILT

Law, this expansion will no longer generate real property tax revenues for the City, but will still increase the need for general municipal services—such as police, fire, and emergency medical services. *See* CP at 521-23.

In light of the above, the City brought this lawsuit on its own behalf and on behalf of its residents, challenging the PILT scheme as unconstitutional. CP at 1-17. On cross-motions for summary judgment, the trial court ruled in favor of the City. The trial judge, the Honorable Mary E. Roberts, concluded that the PILT Law violates the constitutional requirement of uniform real property taxation and the prohibition against surrender of the Legislature’s taxing authority, declaring the PILT Law “unconstitutional, null and void in its entirety.” *Id.* DOR then sought immediate and direct review of the trial court’s ruling, arguing that the City lacks standing and defending on the merits. CP at 921-24.

IV. ARGUMENT

A. The City has standing to challenge the PILT Law as unconstitutional.

As the trial court correctly concluded, the City has standing to challenge the PILT Law as an unconstitutional taxing scheme.¹

¹ Below, DOR sought dismissal of the City’s Complaint on the basis that the City lacked standing, *and* that the case was not justiciable. CP at 334, 340. DOR has abandoned this latter argument. Although DOR’s Brief assigns error to the trial court’s conclusion that the case is justiciable (App Br. at 1), DOR fails to identify any issue pertaining to such an assignment of error, or to include any briefing on the issue. App. Br. at 11-23. An assignment of error not supported by argument is deemed waived and abandoned. *Seattle*

The purpose of the standing doctrine is to ensure each case is “brought and defended by the parties whose rights and interests are at stake.” *Riverview Comm’y Group v. Spencer & Livingston*, 181 Wn.2d 888, 893, 337 P.3d 1076 (2014). A claimant may establish standing through a “personal injury” within the “zone of interests” of a relevant statute or constitutional provision. *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014). This is not the exclusive means for standing, however, and when “an important issue is at stake,” a far more “liberal” inquiry is applied. *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005). In each case, the fundamental question is whether the asserted claims of a given party should be adjudicated. Here, adjudication of the City’s claims is warranted for five independent and alternative reasons.

First, the City has standing because it is a central participant in the State’s process of real property taxation, including the assessment and use of PILT funds. When a city participates in and obtains benefits from a state “process,” the city has “a direct interest in the fairness and constitutionality” of that process. *City of Seattle v. State*, 103 Wn.2d 663, 669, 694 P.2d 641 (1985) (holding city had sufficient interest at stake to challenge constitutionality of annexation process). Here, the City plays a key role in, and derives its general funding from, the State’s process of

Sch. Dist. v. State, 90 Wn.2d 476, 488, 585 P.2d 71 (1978); *Deheer v. Seattle Post-Intelligencer*, 60 Wash.2d 122, 126, 372 P.2d 193(1962).

real property taxation, including the PILT. *See* CP at 71-72. Because the City's challenge implicates the fundamental fairness and constitutionality of that process, the City's interests are sufficient for standing. *See City of Seattle*, 103 Wn.2d at 669.

Second, the City has standing because the PILT Law reduces the City's ability to raise revenues from real property taxation. An imposition of "actual financial constraints" on a public entity provides a sufficient basis for standing. *Seattle Sch. Dist.*, 90 Wn.2d at 493. Here, the PILT Law reduces the total value of real property within the City's jurisdiction subject to the State's real property tax, thus requiring a higher tax rate to raise the same amount in revenue. *See, e.g.*, CP at 520. This poses political and practical problems for the City, both because its residents will be relatively dissatisfied with a higher tax rate and because the City is subject to a maximum cap on the rate it can impose. *See* CP at 520, 523. Regardless of how the City proceeds under these new constraints, the constraints are themselves sufficient for standing. *See Seattle Sch. Dist.*, 90 Wn.2d at 493 (upholding a "more liberalized view of standing" that recognizes overall legal and practical interests); *City of Seattle*, 103 Wn.2d at 669 ("[The] City . . . is constrained by the procedures established by the State. The fact that the City may choose not to annex territory does not diminish its interest in the fairness and constitutionality of the annexation

procedures.”); CP at 72 (noting budgeting is “already difficult and complicated” for the City).

Third, the City has independent financial interests at stake based on the likelihood of substantial new construction within the City’s jurisdiction that would be subject to the PILT as opposed to the standard real property tax. Specifically, the City and the Muckleshoot Tribe have entered into a detailed “Development Agreement” for a Salish Lodge expansion project. CP at 521-22. For the City, application of the PILT to this project would result in a loss of over \$600,000 in “new construction property tax revenue,” in addition to long-term negative effects on the City’s revenue stream. CP at 521-22. The expansion project is the subject of a binding agreement, which adds to the City’s substantial interests in challenging the PILT Law. See CP at 274 (reaffirming mutual “commitment to the Project”); *Kucera v. State Dep’t of Transp.*, 140 Wn.2d 200, 213, 995 P.2d 63 (2000) (noting even “speculative and undocumented” allegations of impending injury suffice).

DOR relies on distinguishable authority to suggest that the City’s financial interests are too speculative here. See Br. of App. at 16-17 (citing *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993) and *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994)). In *Yakima*, this Court held that a fire district had no

standing to challenge the validity of certain agreements because it was not a party to those agreements, its only relevant interest was in preventing annexation, the agreements would make annexation only marginally more likely, and annexation still depended on numerous independent factors. 122 Wn.2d at 379-380. And in *Walker*, this Court held that certain advocacy groups could not challenge a statute because the statute had not yet gone into effect and the public officials involved were not asking for judicial review. 124 Wn.2d at 414-18. Here, in contrast, the PILT Law has gone into effect, the City and its officials are challenging that statute directly, and the City has substantial financial interests flowing from a binding agreement to which the City is a party. As the trial court concluded, the Salish Lodge expansion is a “practical likelihood” and the City’s interests are neither “hypothetical” nor “speculative.” CP at 683.

Fourth, the City has standing as a representative of its residents. This Court “has recognized that . . . municipalities acting on behalf of their residents have standing to raise constitutional issues.” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004). Ignoring this straightforward rule, DOR suggests, without support, that municipalities have no representational standing rights. Br. of App. at 19. But this Court’s well established jurisprudence on the subject affords municipalities standing when their residents’ interests are

materially threatened, especially if no other plaintiffs have come forward. *See, e.g., City of Seattle*, 103 Wn.2d at 668-69 (city could challenge annexation process based on its “duty to represent the interests of area residents”). This sensible doctrine acknowledges the legitimacy of municipalities representing their constituents in litigation when deemed appropriate by their duly elected public officials. *See, e.g., RCW 35A.12.100* (authorizing city officials to “cause any legal proceedings to be instituted and prosecuted in the name of the city”); CP at 331-32 (copy of the City’s resolution authorizing this litigation).

In this case, the City’s residents have material interests at stake. Application of the PILT to the Salish Lodge and other such properties would “shift” the real property tax burden onto “remaining . . . properties” in the City. CP at 523. The effect of this shift would be “\$30/year or more in additional property taxes for the average home in Snoqualmie, in just 2015.” *Id.* The Salish Lodge expansion would cause an even greater shift in the near future. Because the City’s residents would suffer such injury as a result of the PILT, and because a municipality has standing to represent the interests of its residents, the City has standing to challenge the PILT Law as unconstitutional.²

² Notably, the City in this capacity is representing its “residents,” *Grant County*, 150 Wn.2d at 803, rather than its “taxpayers,” Br. of App. at 20. And the interests of the City’s residents in this instance are universally aligned. *See* CP at 523. Even if they

The straightforward rule governing representational standing for municipalities is entirely distinct from the doctrine of private organizational standing discussed at length in DOR's brief, which does not apply here. *See* Br. of App. at 18-22. The test for private organizational standing imposes "prudential" requirements intended to ensure a given private organization has genuine members with relevant interests and that the organization is qualified to represent those interests in litigation. *E.g.*, *Riverview*, 181 Wn.2d at 894 & n.1. As discussed above, when a municipality's residents have sufficient interests at stake, the municipality is qualified to represent those interests, as a matter of law.

Even if the test for private organizational standing did apply here, the City would meet it. The test requires (1) members who "would otherwise have standing," (2) an organizational purpose "germane to the issue" presented, and (3) a claim that can be remedied without "the participation of individual members." *Id.* at 894. The City satisfies each element here: first, the City's residents would otherwise have standing to sue based on the tax shift resulting from the PILT Law (a point DOR concedes, *see* Br. of App. at 20); second, the City's fundamental purpose

were not universally aligned, a municipality never has been required to make such a showing to enjoy representational standing. *See, e.g., City of Seattle*, 103 Wn.2d at 669 (observing in abstract that residents would have had standing to assert claims); *cf. Riverview*, 181 Wn.2d at 894 (private organization had standing because "[s]everal of its members" would have had standing to assert claims).

of promoting the interests and fair treatment of its residents is germane to the taxation issues presented in this case; and third, the PILT Law can be invalidated without the participation of individual city residents. *Cf., e.g., Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012) (association of residents had standing to challenge initiative because its members were city residents, issue presented was “germane to a stated organizational purpose (public safety),” and “invalidation” of the initiative did not “require the participation of individual members”).

DOR goes on to argue in the alternative that representative standing for a municipality requires that no taxpayers could possibly be joined as parties. *See* Br. of App. at 20. DOR provides no authority in support of this proposition, which is contrary to this Court’s jurisprudence. *See, e.g., Seattle Sch. Dist.*, 90 Wn.2d at 493. Indeed, if DOR’s position were correct, the tax assessors in *Belas v. Kiga* never would have had standing to bring a constitutional uniformity challenge. *See* 135 Wn.2d 913, 916, 959 P.2d 1037 (1998). In effect, DOR’s proposed requirement would eviscerate representational standing for municipalities, requiring a municipality to prove that *no* taxpayer could bring suit—which, in turn, could easily mean the absence of any interests for the municipality to represent. Individual taxpayers would be forced to bear the costs of

litigation even when their municipal governments are willing to represent their interests. In sum, DOR's approach to municipal standing is wrong, and the City has representational standing here.

Based on each of the above grounds for standing, the City has standing to challenge the PILT Law specifically under the state constitution, namely, the requirement of uniform taxation and the prohibitions against surrender or improper delegation of the legislative taxing authority. *See* Const. art. VII, § 1; art. II, § 1. As a general matter, municipalities are allowed to invoke such constitutional requirements when challenging state statutes. *See Seattle Sch. Dist.*, 90 Wn.2d at 493 (noting that “liberalized” standing principles allow “a municipal corporation” to “challenge[], as unconstitutional, a legislative act”); *City of Seattle*, 103 Wn.2d at 668-69 (allowing city to invoke constitutional provision even though city did “not itself have rights under” the provision, because “fairness and constitutionality” of state scheme were at issue). In addition to this generalized authority, the constitutional sections at issue in this case are also specifically intended, at least in part, to protect cities and their residents from improper exercises of taxing authority. *See, e.g.*, Const. art. VII, § 1 (“Property of . . . municipal corporations . . . shall be exempt from taxation.”); Const. art. VII, § 9 (allowing for municipal taxation that must also be “uniform”).

In attempting to refute the City's ability to invoke the constitutional requirement of tax uniformity, DOR relies on superseded case law, citing *Vance Lumber Co. v. King County*, 184 Wash. 402, 51 P.2d 623 (1935). In *Vance*, this Court refused to allow a county to raise a uniformity argument because there was "no statute making counties guardians of their taxpayers in this respect." 184 Wash. at 405. But this formalistic approach to standing has since been abandoned in a long line of cases. See, e.g., *Vovos v. Grant*, 87 Wn.2d 697, 700, 555 P.2d 1343 (1976); *Snohomish Bd. of Equalization v. Dep't of Rev.*, 80 Wn.2d 262, 264, 493 P.2d 1012 (1972); *City of Seattle*, 103 Wn.2d at 645-55. This Court has moved on from "strict reliance upon" the "over legalistic" approach that was followed in *Vance*, adopting a "more liberalized view" in which the meaningful interests of local governments in asserting such claims are now considered and respected. *Seattle Sch. Dist.*, 90 Wn.2d at 493. As a result, this Court "no longer consider[s] standing an insurmountable barrier . . . when a municipal corporation challenges, as unconstitutional, a legislative act." *Id.* This modern approach resonates with the modest purpose of the standing doctrine, to provide rudimentary assurance that parties with genuine, relevant, and opposing interests are arguing each case, as here. The modern doctrine as applied here also

prevents DOR from shifting the financial burden to challenge taxing legislation to individual taxpayers.

Finally, the City has standing also because the continued application of the PILT Law presents an issue of public importance that merits judicial resolution. If a case presents an issue of sufficient public importance that warrants immediate adjudication, formal standing requirements may be relaxed. *See, e.g., Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983). Here, DOR has conceded that this case “raises important constitutional questions, the resolution of which will have a broad impact on the administration of property taxes.” Br. of App. at 23. The trial court’s decision is presently stayed, *see infra*, n.3, and application of the PILT Law could be invoked expansively and statewide. This militates in favor of deciding the merits of this case now.

As a party with standing, the City may seek a conclusive declaration that the PILT Law is unconstitutional. *See, e.g., Seattle Sch. Dist.*, 90 Wn.2d at 481 (holding that city had “standing to seek declaratory relief”). Whether the City is entitled to any additional relief has no bearing on the City’s standing and is not currently before the Court. *See, e.g., CP* at 922-34 (direct appeal limited to trial court’s ruling on constitutionality of the PILT Law). The arguments in DOR’s brief about

the availability of a tax refund are thus irrelevant and premature. *See* Br. of App. at 21-22.³

In sum, any suggestion that the City lacks standing in this case is groundless. The City's claims are squarely before this Court and should be determined.

B. The City has challenged the Legislature's methods rather than its underlying goals.

In this case, the City has successfully challenged the tax framework established in the PILT Law as unconstitutional. The City's claims address the constitutionality of the Legislature's methods—not the Legislature's goal of assisting Native American tribes. As the City's agreement for the Salish Lodge expansion project demonstrates, the City *supports* the promotion of tribal commercial activities off-reservation. *See* CP at 274. The City objects, however, to the method used here to pursue that goal: an alternative real property tax that is non-uniform, based on individualized taxpayer negotiations, and that lacks minimum standards.

The Washington State Constitution establishes the general framework within which the Legislature must exercise its power of

³ The Court of Appeals has stayed consideration of appropriate remedies and the City's claims under the Public Records Act pending this Court's decision on the merits. *See City of Snoqualmie v. King County Executive Down Constantine*, No. 73437-7-I (Wash. Ct. App. June 18, 2015) (Commissioner's Ruling Granting a Stay).

taxation. Initially, the “legislative authority of the state” is vested in the Legislature. Const. art. II, § 1. But, the constitution specifies that the Legislature’s “power of taxation shall never be suspended, surrendered, or contracted away.” Const. art. VII, § 1. The constitution further mandates that “[a]ll taxes shall be uniform upon the same class of property,” and that “[a]ll real estate shall constitute one class.” *Id.*

The state constitution also identifies which property is or may be exempted from property taxation. In particular, “[p]roperty of the United States and of the state, counties, school districts and other municipal corporations . . . shall be exempt from taxation.” *Id.*; *see also* Const. art. XI, § 12. Also exempted is “[s]uch property as the legislature may by general laws provide” Const. art. VII, § 1. Because such statutory exemptions are “generally harmful to the community as a whole,” they are disfavored and strictly construed, and must be both express and unambiguous. *Belas*, 135 Wn.2d at 929-35 (internal quotations omitted) (rejecting argument that alternative valuation formula qualified as an exemption). Finally, the constitution clarifies that the “United States and its agencies and instrumentalities, and their property, may be taxed . . . whenever . . . permitted under the laws of the United States” Const. art. VII, § 3.

The City's request for declaratory relief in this case is *not* about tribal property or economic development, but rather, whether the Legislature can offer an alternative, negotiated payment scheme to any selected portion of landowners. DOR has not defended the PILT Law on any grounds that distinguish tribal off-reservation property from the property of any other group of landowners the Legislature might decide to favor (or disfavor). *See* Br. of App at 24-50. Indeed, for purposes of the analysis in this case, a tribe's off-reservation real estate is the equivalent of private land subject to state and local taxation. *See, e.g., Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 112, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998) (noting that tribal land that is freely alienable is subject to state and local taxation); *Goudy v. Meath*, 38 Wash. 126, 131-32, 80 P. 295 (1905) (noting that alienable tribal land is "taxable"); Const. art. VII, §§ 1, 3.

Were this Court to reverse the trial court's resolution of the present challenge to the PILT Law, it would essentially eliminate the requirement that property taxes be uniform. Under DOR's theory of the PILT Law, *any* group of landowners could lobby the Legislature for a PILT scheme, as the tribes apparently did here. *See* CP at 96-137. Conversely, the Legislature could impose upon politically disfavored landowners a PILT that dramatically exceeds the standard real property tax. The question is

whether the Legislature is free to offer or impose such divergent tax treatment for any persons as it sees fit. The answer is no. As explained below, the PILT scheme is unconstitutional, for three independent reasons.

C. The PILT Law establishes a non-uniform real property tax for a portion of landowners.

The first reason the PILT Law is unconstitutional is that it establishes an alternative real property tax for a subset of landowners. As noted above, Washington's constitution requires that all property taxes be uniform. Const. art. VII, § 1. This means "both an equal tax rate and equality in valuing the property taxed." *Belas*, 135 Wn.2d at 924. In conformance with this constitutional directive, the Legislature has established a standardized process for the taxation of real estate in Washington that involves both state and local governments.

The requirement of uniformity in property taxation, and especially taxation of real property, is "the highest and most important of all requirements applicable to taxation under our system." *Samis*, 143 Wn.2d at 805 n.13. Uniformity ensures that real property taxation is "systematic and without discrimination," *Valentine v. Johnston*, 83 Wn.2d 390, 394, 518 P.2d 700 (1974), and promotes fairness, "certainty," and "equity" in the use and enjoyment of real estate, *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 400-01, 494 P.2d 1362 (1972).

Due to the fundamental requirement of uniformity, the Legislature has no authority to pick out a group of landowners or parcels for a special real property tax scheme, whether favorable or unfavorable. This Court has rejected prior attempts to do so. *See, e.g., Belas*, 135 Wn.2d at 923 (invalidating use of a “different assessment ratio for property . . . appreciating in excess of 15 percent” as opposed to property “not appreciating as rapidly”); *Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 604, 989 P.2d 542 (1999) (invalidating add-on charge imposed only on rental dwelling properties).

The PILT Law is no different than these other non-uniform taxes. The PILT Law first exempts from the standard real property tax any tribal property that is used for “economic development” and “owned by the tribe prior to March 1, 2014.” Laws of 2014, ch. 207, § 5. Economic development is defined as “commercial activities,” without limitation. *Id.* Any qualifying tribe must file an application with DOR to be exempted. *Id.*, § 9. At the same time, the PILT Law requires any such tribe to make an alternative “payment” if the qualifying property is off-reservation, lacks a “taxable leasehold interest,” and is not otherwise exempt from taxation. *Id.*, § 8(1).

In each case, the amount of the PILT is determined in negotiations between the tribe and the surrounding county, or summarily set by DOR if

those negotiations fail. *Id.*, § 8(2). The amount assessed cannot exceed the “tax amount that would otherwise be owed by a taxable leasehold interest in the property.” *Id.*, § 8(3). Payment is then made to the county and distributed to all relevant “local taxing districts” as if a leasehold tax had been levied. *Id.*

In sum, as to any tribal properties owned prior to 2014 that are off-reservation and used for commercial purposes, a tribe is allowed to pay the PILT (or lease the property) in lieu of paying the standard real property tax, with the amount of the PILT varying not only from the standard tax, but also from one tribe to the next. Otherwise, the tribe must pay the standard tax.

Consistent with the terms and practical effect of the PILT Law, the law’s legislative history confirms that the Legislature intended the PILT to serve as a stand-in for the standard real property tax. An earlier version of the law would have exempted tribal economic development properties from real property taxation *without* requiring a PILT payment. *See* EHB 1287, § 3 (2013). Serious concerns were raised about “the tax shifts and potential tax losses” that could result. S.B. Rep. on EHB 1287 at 3 (2013). A subsequent version then added the PILT provisions. *See* ESHB 1287, § 8 (2014). The new “PILT mechanism” reflected “conversations with stakeholders” and was intended to address “concerns about tax exempt

property [without] a leasehold.” H.B. Rep. on ESHB 1287 at 4 (2014). In other words, the PILT was inserted as a replacement for the standard real property tax (which would no longer apply), in order to avoid an outright loss of general tax revenues.

As an alternative real property tax payment, the PILT does not qualify as a tax exemption. DOR does not argue otherwise. As discussed, exemptions are disfavored and strictly construed, and must be both express and unambiguous. *Belas*, 135 Wn.2d at 929-35. Here, the PILT is not labeled an exemption, nor does it function as one. It imposes a qualitatively different payment obligation, rather than mere freedom from the standard tax. Structurally, the PILT Law provides a tax exemption in one section, and then imposes the PILT in a corresponding section. The legislative history also reflects that the PILT was added separately and subsequently, as a payment to generate revenues, which further confirms that the PILT is an alternative payment rather than an exemption. *See* H.B. Rep. on ESHB 1287 at 4 (2014).

The PILT does not meet the constitutional requirement of uniformity. As an alternative charge against real property, the PILT represents a different rate and method of valuation from the standard tax. This alone fails the uniformity requirement. *See Belas*, 135 Wn.2d at 924; *see also Chicago, R.I. & P.R. Co. v. Robertson*, 122 Miss. 417, 84 So. 449,

449, 451 (1920) (striking down alternative property tax scheme for freight liners because uniformity clause “forbids the substitution of [any] method of taxing property” and the legislature’s apparent intent “was not to exempt the property of freight line companies from taxation, but to tax it in a [different] manner”). The PILT Law actually goes further, allowing for variation even among those persons paying the alternative tax, with amounts paid in each instance depending on negotiations or DOR’s choice. In this additional way, the uniformity requirement is violated.

DOR does not contest that the PILT is non-uniform. *See* VRP (Feb. 13, 2015) at 30:11-20. Instead, DOR attempts to distance the PILT from the standard real property tax by labeling it a “fee” or an “excise tax”—types of government charges that are not subject to the uniformity requirement. *See* Br. of App. at 24-39. As this Court has recognized, there is an “inherent danger that legislative bodies might circumvent constitutional constraints, such as the all-important tax uniformity requirement . . . by levying charges that, while officially labeled [something else], in fact possess all the basic attributes of a [property] tax.” *Samis*, 143 Wn.2d at 805. For this reason, the Court has deemed it “critical” to differentiate “carefully” when called upon to determine the status of a given charge. *Id.* at 805 n.13. The status of any given charge

will depend on its “core nature,” as reflected in “its purpose, design and function in the real world.” *Id.* at 806.

As demonstrated above, the PILT is a direct alternative to the standard real property tax for a specified portion of landowners, and was intended and designed to serve that role. As a result, for constitutional purposes the PILT must be treated as a property tax subject to the uniformity requirement. The trial court properly concluded that DOR’s alternative labels for the PILT ignore reality and should be rejected.

1. The PILT is not a fee.

DOR’s suggestion that the PILT is a fee, rather than a tax, is groundless. A tax “is defined as a levy made for the purpose of raising revenue for a general governmental purpose,” whereas a fee “is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation.” *Frank & Sons, Inc. v. State*, 136 Wn.2d 737, 750, 966 P.2d 1232 (1998). A tax is thus “imposed under a state’s taxing power,” whereas a “fee is imposed under a state’s regulatory power.” *Id.* at 749. These underlying powers “are treated differently for constitutional purposes.” *Id.* The uniformity requirement, for example, does not apply to regulatory fees. *Samis*, 143 Wn.2d at 805.

In close cases, when a critical and careful inquiry is required to determine the nature of a given charge, this Court has identified three

factors to be considered: (1) whether the “primary purpose” of the charge is “to raise revenue” or “to regulate,” (2) whether “the money collected must be allocated only to [an] authorized regulatory purpose,” and (3) whether there is “a direct relationship” between the charge and a “service” or “burden” the payer receives or creates. *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). These factors are meant to help identify the core nature of any given charge.

This is not a close case, however, and none of the above factors support labeling the PILT as a fee. First, the primary purpose of the PILT is to raise revenue for general governmental purposes, not to regulate. In particular, the “PILT mechanism” was created to generate revenue in lieu of the standard real property tax. H.B. Rep. on ESHB 1287 at 4 (2014). The PILT Law does not restrict, require, or otherwise regulate any tribal commercial activities. It merely provides a different payment scheme for tribal properties used for that purpose. Thus, the PILT is a tax. *See, e.g., Covell*, 127 Wn.2d at 888 (street utility charge was unrelated to regulation of traffic and was thus a tax).

Second, PILT funds are not allocated to any regulatory purpose. Instead, PILT funds are distributed to local taxing authorities for general purposes, specifically as if a “tax had been levied.” Laws of 2014, ch. 207, § 8(3). The allocation and use of PILT funds is disconnected from

the underlying tribal properties being charged, further demonstrating that the PILT is a tax. *See, e.g., Samis*, 143 Wn.2d at 810-11 (noting that fee revenues must be “used to regulate the entity or activity *being assessed*” (emphasis in original, internal quotations omitted)).

DOR argues that revenues from fees can be allocated to general funds without losing their regulatory character. *See* Br. of App. at 31 (citing *Dean v. Lehman*, 143 Wn.2d 12, 31, 18 P.3d 523 (2001)). Yet this Court’s comments to that effect, in *dicta*, concerned a “direct ‘user fee’” in which the government charged participants for a specific regulatory service. *Dean*, 143 Wn.2d at 27-31. On the other end of the spectrum, this Court has observed that in the total “absence of a regulatory purpose,” allocation of revenues is equally “insignificant,” because the charge is necessarily a tax. *Covell*, 127 Wn.2d at 888. Here, there is *neither* a regulatory purpose *nor* a regulatory allocation of funds.

Third and finally, there is no direct relationship between the PILT and any relevant service or burden. The PILT Law does not establish or require any specified services for which the tribes could be charged a regulatory fee. Nor does the PILT Law identify any specific burdens from qualifying properties that are being regulated or remedied with PILT funds. Instead, the PILT Law simply offers an alternative scheme of tax payment to a segment of landowners.

DOR suggests that the PILT pays for “services local governments provide to exempt tribal properties” Br. of App. at 32. But a fee must relate directly to a specific service provided on an individualized basis—not the ongoing provision of governmental services in general. *See, e.g., Lane v. City of Seattle*, 164 Wn.2d 875, 883, 194 P.3d 977 (2008) (payment for general hydrant services was a tax); *Okeson v. City of Seattle*, 150 Wn.2d 540, 554, 78 P.3d 1279 (2003) (street light charge was a tax). Indeed, property taxes are *required*, as a matter of due process, to have some “practical . . . relation to opportunities, benefits, or protection conferred or afforded by the taxing State.” *Flight Options, LLC v. Dep’t of Rev.*, 172 Wn.2d 487, 498, 259 P.3d 234 (2011). The mere presence of such a general relationship does not convert every property tax into a regulatory fee. Here, the PILT Law has no direct relationship to any distinct service or burden that is specific to the charged properties. *See* Br. of App. at 32 (arguing only that the PILT addresses a “*general burden . . . upon local governments*” (emphasis added)).

In sum, the PILT is intended to raise general revenues as an alternative to the standard real property tax, the funds collected are allocated just as if they were tax revenues, and there is no specific service or burden involved much less a direct relationship to one. In the end, the core nature of the PILT is taxation, not regulation.

Ironically, DOR's primary argument in support of the "fee" label is that the PILT serves as "a condition of a property tax exemption," specifically "to offset the burden caused to local jurisdictions when tribal economic development property receives an exemption under the Act." Br. of App. at 26-27. In other words, the PILT offsets revenues lost from a tax exemption. But exempting real property from the standard tax cannot be a valid basis for imposing an alternative charge on that same property. If it were, the Legislature could always "exempt" any real property from the standard tax and impose an alternative "fee" to "offset" the resulting burden on taxing authorities. In truth, replenishing the tax coffers is an exercise of taxing power that has nothing to do with regulation. See *Bentivenga v. City of Delavan*, 358 Wis.2d 610, 616-17, 856 N.W.2d 546 (Wis. Ct. App. 2014) (holding that "fee in lieu of room tax" city imposed as a "way of collecting revenue that it had hoped to receive through taxation" was really a tax). DOR's argument to the contrary wrongly puts form over substance, which this Court has consistently rejected when distinguishing taxes from fees. See, e.g., *Samis*, 143 Wn.2d at 805.

DOR also points to three federal and state statutes involving other payments in lieu of tax, but these laws are distinguishable and irrelevant here. See Br. of App. at 28-29 (citing statutes). The first is a federal

statute in which Congress has voluntarily provided for federal payments to certain local governments. *See* 31 U.S.C. § 6902. The voluntary nature of these payments means they cannot be considered taxes, and in any case, DOR has identified no corresponding federal uniformity requirement. The second is a state statute that allows housing authorities to “agree to make payments” to surrounding local governments for “services and facilities furnished” to the authority. RCW 35.82.210. These payments are entirely optional, and in any case, they are for specific services. Third is a state statute directing the Department of Fish and Wildlife to pay to local authorities “an amount in lieu of real property taxes” for state game lands. RCW 77.12.203. This statute can also be distinguished on numerous grounds, including as a voluntary state payment of state funds, or because there is not an underlying property tax being replaced. *See* CP at 464 (noting these state lands are not subject to taxation). Regardless, none of the statutes DOR cites has been subjected to judicial review, and the lone existence of such a statute does not change the result here. Other Washington statutes provide for alternative payments that are equal to the underlying tax, and thus, do not implicate uniformity concerns. *See, e.g.,* RCW 35.21.755 (providing for payment by public corporation in certain cases of “the amounts which would be paid upon real property . . . were it in private ownership”). The PILT remains a tax rather than a fee.

2. The PILT is not an excise tax.

DOR's alternative argument, that the PILT is an excise tax rather than a property tax, also does not hold up to scrutiny. A property tax is "a tax on things tangible or intangible," or in other words, a required payment for "property or the ownership of property." *Covell*, 127 Wn.2d at 890. In contrast, an excise tax is a tax on "the voluntary action of the person taxed," specifically on the exercise of a "privilege" or "occupation" within the state. *Covell*, 127 Wn.2d at 889 (internal quotations omitted). Acknowledging the importance of property ownership, the state constitution imposes greater restrictions on the Legislature's authority to tax property as opposed to conduct. The uniformity requirement, for example, applies only to property taxation. *See* Const. art. VII, § 1.

To determine the nature of a tax, this Court looks to its "real nature and purpose," or in other words, "its incidents" rather than "its name." *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936). This inquiry includes the tax's "subject matter," the "manner in which it is assessed," and the "measure of the tax." *Harbour Vill.*, 139 Wn.2d at 607 n.1. The underlying question is whether, in reality, a given tax is levied on the "right to own and hold property," or instead, on the voluntary "exercise of a substantive privilege granted or permitted by the state" *Jensen*, 185 Wash. at 218.

In light of the fundamental importance of the uniformity requirement, distinguishing between property and excise taxation must be “carefully” conducted. *Samis*, 143 Wn.2d at 805 n.13. On numerous occasions, this Court has struck down laws purporting to be excise taxes because they effectively functioned as taxes on property. *See Harbour Vill.*, 139 Wn.2d at 606-07 (striking down tax on “properties rented or offered for rent” as a non-uniform tax on a subset of “real property defined by its [] use”); *Apartment Operators Ass’n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 351 P.2d 124 (1960) (invalidating tax on income from real property rentals); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951) (invalidating tax on corporate income as a non-uniform property tax rather than an excise tax on the conduct of business).

Here, the PILT is a tax on the ownership of real property rather than an excise tax aimed at conduct. First, the PILT is closely linked to the standard real property tax in purpose and effect, functioning as an alternative for a distinct class of properties exempted from the standard tax. It is a tax on the property itself—the landowner is simply allowed to make an alternative payment for that property. *See* Laws of 2014, ch. 207, § 8 (providing that defined “[p]roperty . . . is subject to payment” (emphasis added)). The core nature of the PILT is thus that of a property tax. *See Power*, 39 Wn.2d at 196 (rejecting excise tax label where tax was

“geared throughout” toward related “[property] tax legislation”); *Jensen*, 185 Wash. at 218 (rejecting excise tax label because “the Legislature was concerned with the *property* [] upon which the . . . tax was to be levied” (emphasis in original)).

Second, the only relevant conduct on the levied properties—commercial activity—already is the subject of broad excise taxation. *See, e.g.*, chapters 82.04 RCW (“Business and Occupation Tax”), 82.08 RCW (“Retail Sales Tax”), 82.14 RCW (“Local Retail Sales and Use Taxes”). This further demonstrates that the PILT is a tax on real property rather than an excise tax. *See Harbour Vill.*, 139 Wn.2d at 607 (rejecting excise label because conduct in question was “already separately taxed”).

Third, the PILT is allowed as an alternative payment regardless of the extent of particular activities taking place on the levied properties, so long as the overall use is commercial. This translates into a blanket charge on real estate defined by its use, further demonstrating that the PILT is a property tax. *See Harbour Vill.*, 139 Wn.2d at 607 (noting that rental tax was imposed on property “regardless of . . . the number of rental transactions . . . or any other factors normally associated with ongoing business activity”).

Fourth, specific measurement of the PILT in each case is not based on any actual conduct. The PILT amount is instead determined through

negotiations, or chosen by DOR. DOR speculates that a negotiated amount might reflect ongoing activities at each property. *See* Br. of App. at 36. But the only actual restriction involved is a cap on the total, which cannot exceed the “tax amount that would otherwise be owed by a taxable leasehold interest in the property.” Laws of 2014, ch. 207, § 8(2). And in the absence of an actual leasehold—a prerequisite to any PILT payment—the amount that would otherwise be owed is determined “based upon . . . rental[s] being paid to other lessors” and “the market value of the property” *Id.*, § 3(2)(g). Thus, to the extent there is *any* benchmark for measuring the PILT, it is tied up with the value of the property rather than any actual conduct taking place on it.

Finally, even if the PILT were truly aimed at the myriad commercial activities taking place on the properties in question, such a broad tax on all commercial activities would still be a property tax. At a general level, the ability to use real estate for commercial purposes is a fundamental element of owning such property. *See, e.g., Pierce v. Ne. Lake Wash. Sewer and Water Dist.*, 123 Wn.2d 550, 560-61 & n.49, 870 P.2d 305 (1994) (“Ownership of property . . . includes the right to use the land. . . . [L]andowners’ economic interest in their property . . . [is] an essential element of ownership.”). A general tax on a “necessary element of ownership” is a property tax. *Jensen*, 185 Wash. at 218; *see also*

Apartment Operators, 56 Wn.2d at 47 (“[A] tax upon rents from real estate is a tax upon the real estate itself . . .”).⁴

DOR overlooks all these determinative aspects of the PILT Law in arguing that the PILT is a tax on the use of property, citing *Sheehan v. C. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005). *See* Br. of App. at 35-37. In *Sheehan*, this Court held that Washington’s longstanding motor vehicle tax is an excise tax, rather than a property tax, because it is levied on only a portion of vehicle users—those who opt to use public roadways—and has a long history of judicial approval as an excise tax. 155 Wn.2d at 800-01, 806-07. Here, unlike in *Sheehan*, the charge at issue is directly linked to a standard property tax and serves only as a stand-in for that tax; the allegedly taxed use of property is already subject to excise taxation; the charge is on all commercial use of that property, which is so broad as to be a tax on the property itself; and there is no history of judicial approval. For these reasons, the PILT is still necessarily a property tax.

DOR’s primary argument in support of the “excise” label is that the PILT applies only “when a tribe chooses to seek a tax exemption,” or

⁴ The PILT is not an excise tax for the additional reason that, if it were, it would raise serious constitutional problems under the Indian Commerce Clause of the United States Constitution, which prohibits discriminatory taxation against tribal commerce. *See Dept. of Fisheries v. Dewatto Fish Co.*, 100 Wn.2d 568, 572-73, 674 P.2d 659 (1983).

in other words, when a tribe volunteers to pay the PILT instead of the standard real property tax. Br. of App. at 35. Again, DOR's argument misses the mark. A landowner's choice to invoke an exemption from the standard real property tax cannot be a valid basis for imposing an alternative charge on that landowner. If that were true, the Legislature could always provide a portion of landowners with an optional "exemption" from the standard real property tax while imposing an alternative "excise" tax for invoking that exemption—which again would be nothing more than a non-uniform property tax. In truth, the PILT is an alternative property tax, not a tax on a landowner's decision to pay less.

DOR also points out that, unlike the standard real property tax, the PILT "is not based upon the value of an annual assessment." Br. of App. at 38. Yet this is not a constitutional requirement for a property tax, even if it is the method the Legislature has chosen for reasonably valuing real property subject to taxation. *See* RCW 84.40.020. And the reason the PILT is a non-uniform tax is precisely because of the substantial differences between it and the standard tax. In the end, the PILT is a non-uniform, and thus unconstitutional, real property tax.

D. The PILT Law surrenders taxing authority by allowing certain taxpayers to negotiate their own tax rates.

The second reason the PILT Law is unconstitutional is that it surrenders the Legislature's taxing authority to certain taxpayers. The Washington State Constitution specifically provides that "[t]he power of taxation shall never be suspended, surrendered or contracted away." Const. art. VII, § 1. In this context, to "[s]urrender" means to yield, render, or deliver up" *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 53, 211 P.2d 651 (1949), *overruled on other grounds*, *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 663, 384 P.2d 833 (1963). This means the Legislature must retain control over its weighty power of taxation, and cannot yield it to taxpayers or other special interests.

The Legislature does have limited power to delegate its taxing authority to local governments. In particular, "[t]he legislature may vest the corporate authorities of cities, towns and villages" with the power of "special taxation" and may also vest "all municipal corporations . . . with authority to assess and collect taxes" that must "be uniform in respect to persons and property within the jurisdiction of the body levying the same." Const. art. VII, § 9; *see also* Const. art. XI, § 12 (authorizing delegation to counties and municipalities). These provisions serve as "a limitation upon the power of the Legislature to delegate the right of local taxation to *any*

other than the local authorities of the county, city, town, or other municipal corporation concerned.” *State v. Redd*, 166 Wash. 132, 139, 6 P.2d 619 (1932) (emphasis added), *modified on other grounds*, *Carkonen v. Williams*, 76 Wn.2d 617, 625, 458 P.2d 280 (1969).

The PILT Law unconstitutionally surrenders a portion of the Legislature’s taxing authority to individual taxpayers. In particular, the PILT Law authorizes each applicant to negotiate the amount of the PILT that will be paid for any given qualifying parcel of real property. This unprecedented allocation of power gives certain taxpayers a disproportionate degree of influence over the tax rate that will be applied to them, which will vary from one such taxpayer to the next. The prohibition against surrendering any taxing authority precludes such a method of taxation, which would otherwise facilitate unfairness and abuse throughout state and local taxation.

In *High Tide Seafoods v. State*, 106 Wn.2d 695, 725 P.2d 411 (1986), this Court upheld a tax scheme that allowed each taxpayer “to pass on to their sellers part of the burden of the tax,” which was valid only because the taxpayer remained “responsible for the [full amount of the] tax regardless of whether a deduction [was] taken” 106 Wn.2d at 700-01. In stark contrast, the PILT Law allows a portion of taxpayers to negotiate the ultimate tax rate to be paid, which will vary depending on

each such taxpayer's individual objectives, negotiating skills, and other resources. This framework thus surrenders a portion of taxing power to a segment of taxpayers and "trench[es] upon the legislative function." *Id.* at 701.

In sum, the PILT Law represents an unprecedented surrender of the taxing power by authorizing a portion of taxpayers to negotiate their own individual rate. Under the Washington State Constitution, the Legislature's taxing authority cannot be surrendered in this manner.

E. The PILT Law lacks minimum standards to avoid arbitrary government action.

The third reason the PILT Law is unconstitutional is because it delegates legislative authority to counties and DOR without minimum standards. As a matter of state constitutional law, a legislative delegation of taxing authority (or any other legislative authority) requires "standards or guidelines" to direct agency action and "procedural safeguards" to prevent arbitrary or abusive exercises of power. *Pierce County v. State*, 159 Wn.2d 16, 43-44, 148 P.3d 1002 (2006) (citing *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972)); *Automotive United Trades Org. v. State*, No. 89734-4, 2015 WL 5076289 (Aug. 27, 2015) ("*AUTO*") (same). Here, the PILT Law fails to meet these minimum requirements.

When the Legislature delegates authority over financial matters, including taxation, at least *some* policies or goals must be identified in order to guide the agency's conduct. See, e.g., *Wash. State Sch. Dirs. Ass'n v. Dep't of Lab. and Indus.*, 82 Wn.2d 367, 381, 510 P.2d 818 (1973) (upholding delegation for worker compensation scheme because it directed agency to "fix the basic rates or premiums in accordance with recognized insurance principles" and "degree[s] of hazard").⁵ The extent of detail or precision required depends on the extent to which the relevant "subject matter" is "susceptible" to specific policymaking in advance. *McDonald v. Hogness*, 92 Wn.2d 431, 445, 598 P.2d 707 (1979). In any case, an agency cannot be given discretion to exercise authority "on any grounds," that is, without meaningful limits on the agency's decision-making. *State ex rel. Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772, 781, 621 P.2d 115 (1980).⁶

⁵ See also *State ex rel. Peninsula Neighborhood Ass'n v. Wash. State Dep't of Transp.*, 142 Wn.2d 328, 337, 12 P.3d 134 (2000) (upholding scheme for negotiated tolling agreements in part because it included a "prescribed reasonable standard [] to determine a maximum rate of return on investment"); *State ex rel. Namer Inv. Corp. v. Williams*, 73 Wn.2d 1, 9, 435 P.2d 975 (1968) (noting that statutory definition and related tax provisions provided "the constitutionally required framework" for county's determination of amount to be used in calculating excise tax); *State ex rel. Barlow v. Kinnear*, 70 Wn.2d 482, 486-87, 423 P.2d 937 (1967) (upholding delegation to tax commission because "administrative standards" of "uniformity and equalization" had been identified).

⁶ See also *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 896-902, 602 P.2d 1172 (1979) (noting that delegation of "sole and unrestricted discretion" is "an unlawful delegation," but upholding scheme that included substantive statutory provisions identifying overall policies, when more specific "environmental factors" were "not readily subject to standardization or quantification"); *U.S. Steel Corp. v. State*, 65 Wn.2d

In *AUTO*, this Court recently upheld a scheme allowing negotiations with tribes over payments related to fuel taxation, but only because the scheme included “fairly detailed standards and guidelines,” with substantive terms and audit requirements, and an evident guiding purpose of avoiding “conflicts over tribal immunity and the State’s desire to collect fuel taxes.” 2015 WL 5076289, ¶¶ 30-31. The Court thus reaffirmed that a guiding purpose and meaningful standards are required under Washington law.

Here, the PILT Law provides no standards to be followed or goals to be pursued when the counties negotiate or DOR sets the amount of each PILT. There is no underlying conflict over tribal immunity in this context. Further, DOR has expressly recognized that there is “no restriction on what method to use when the amount is set by . . . negotiations.” CP at 208. And the PILT Law provides no additional guidance for when DOR takes over. This legislative silence is especially inappropriate in the context of setting a tax or fee, a matter readily susceptible to “standardization or quantification.” *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 900, 602 P.2d 1172 (1979). The Legislature’s silence leaves

385, 389, 397 P.2d 440 (1964) (delegation to tax commission to determine tax penalty “in its sole and unrestricted discretion” was unconstitutional); *State v. Ramos*, 149 Wn. App. 266, 275-76, 202 P.3d 383 (2009) (statute delegating authority to classify sex offenders provided agency with no “standards or methodology for making this determination” and was thus invalid).

DOR's decisions completely discretionary, and thus, effectively immunized from any sort of meaningful review.

Under the PILT Law, there is only *one* restriction placed on the authority delegated to the counties and DOR in setting the PILT: a maximum cap on the amount that may be assessed. *See* Laws of 2014, ch. 207, § 8. This bare restriction does not render the delegation a lawful one. In each instance, the agencies remain free to opt for the maximum amount, or zero, or anything else in between, with nothing to guide or limit that decision. *See* Laws of 2014, ch. 207, § 8(2) (stating that DOR “may” set the PILT amount if agreement cannot be reached in negotiations). Even with a tax or fee that is capped, an agency cannot be given such unfettered discretion, especially when potentially large sums of money are still involved, as here. *Compare U.S. Steel Corp. v. State*, 65 Wn.2d 385, 386-89, 397 P.2d 440 (1964) (holding that agency’s “sole and unrestricted discretion” to impose a tax penalty of up to six percent was unconstitutional), *and Crown Zellerbach*, 92 Wn.2d at 901-02 (citing and discussing *U.S. Steel* with approval), *with Yakima County Clean Air Auth. v. Glascam Bldrs., Inc.*, 85 Wn.2d 255, 261-62, 534 P.2d 33 (1975) (distinguishing *U.S. Steel* and upholding delegation of authority to determine amount of mandatory penalty capped at \$250 per day for violating comprehensive clean air laws). Because the PILT Law provides

no meaningful standards or guidance for public agencies setting the PILT, the PILT Law is unconstitutional on this additional ground.

F. The PILT Law contains a non-severability clause and should be struck in its entirety.

The PILT Law is unconstitutional based on the three grounds stated above, and by its terms should therefore be invalidated in its entirety. Unless “the Legislature would have passed the statute absent the unconstitutional provisions, the proper remedy is complete statutory invalidation rather than changing legislative intent by upsetting the legislative compromise.” *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 67, 109 P.3d 405 (2005). Here, both the text and the legislative history of the PILT Law demonstrate the Legislature would not have passed the PILT Law absent the PILT itself. DOR does not argue or suggest otherwise.

First, the PILT Law contains a rare non-severability clause, providing that “[i]f any provision of [the] act . . . is held invalid, the remainder of the act is null and void.” Laws of 2014, ch. 207, § 12. “A severability clause is often given great weight in determining the Legislature’s intent” regarding severability. *City of Seattle*, 103 Wn.2d at 678. The PILT Law was intended to stand as a whole or not at all.

Second, the non-severability clause and PILT mechanism both were added at the same time during the legislative drafting process,

indicating that the non-severability clause was targeted specifically at potential invalidation of the PILT. *See* ESHB 1287, §§ 8, 11 (2014)

Third, the final version of the PILT Law was a legislative compromise after serious concerns were raised that exempting tribal off-reservation commercial properties from taxation would impose too great a burden on local taxing authorities. *See* H.B. Rep. on ESHB 1287 at 4-5 (2014); S.B. Rep. on EHB 1287 at 3 (2013). Because mere removal of the PILT mechanism would “transform” the PILT Law into a much broader statute that would not have been enacted, the entire PILT Law must be struck down. *City of Seattle*, 103 Wn.2d at 678.

V. CONCLUSION

The PILT Law offers an alternative taxing scheme to a subset of landowners. It allows those landowners to negotiate the amount of tax to be paid in each instance. It also fails to provide any standards to guide those negotiations or, if necessary, DOR’s selection of an amount. This scheme harms the City and its residents and implicates issues of broad public importance related to real property taxation. The Court should enforce the constitutional limits on the Legislature’s taxing authority and

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affirm the trial court's invalidation of the PILT Law.

RESPECTFULLY SUBMITTED this 15th day of September, 2015.

PACIFICA LAW GROUP LLP

By 
Matthew J. Segal, WSBA #29797
Taki V. Flevaris, WSBA #42555

Attorneys for City of Snoqualmie

CITY OF SNOQUALMIE
38624 SE River Street
Snoqualmie, WA 98065\
(425) 888-1555

Bob C. Sterbank, WSBA #19514

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I certify that I served a copy of this document via email service

agreement on the following parties:

Margaret A. Pahl
Senior Deputy Prosecuting Attorney
W 400 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Ruth Leers, Legal Assistant

Peggy.Pahl@kingcounty.gov

Ruth.Leers@kingcounty.gov

*Attorney for Defendants
King County Executive Dow Constantine;
King County Assessor Lloyd Hara; King County*

David M. Hankins
Kelly Owings
Andrew Krawczyk
Washington State Office of the
Attorney General Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504

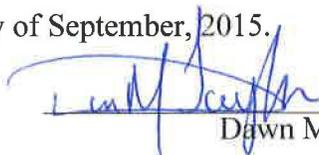
Susan Barton, Legal Assistant

DavidH1@atg.wa.gov
KellyO2@ATG.WA.GOV
AndrewK1@atg.wa.gov

Susanb5@atg.wa.gov
REVolyEF@atg.wa.gov

*Attorney for Appellant,
the State of Washington Department of Revenue*

DATED this 15th day of September, 2015.



Dawn M. Taylor