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STATE OF WASHINGTON
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No. 96360-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

KING COUNTY WATER DISTRICTS Nos. 20, 45, 49, 90, 111, 119 and
125, CEDAR RIVER WATER AND SEWER DISTRICT; COAL
CREEK UTILITY DISTRICT; COVINGTON WATER DISTRICT;
FALL CITY WATER DISTRICT; HIGHLINE WATER DISTRICT;
LAKEHAVEN WATER AND SEWER DISTRICT; NE SAMMAMISH
SEWER AND WATER DISTRICT; SAMMAMISH PLATEAU WATER
AND SEWER DISTRICT; SKYWAY WATER AND SEWER
DISTRICT; SOUTHWEST SUBURBAN SEWER DISTRICT; VALLEY
VIEW SEWER DISTRICT; VASHON SEWER DISTRICT;
WOODINVILLE WATER DISTRICT

AMES LAKE WATER ASSOCIATION, DOCKTON WATER
ASSOCIATION, FOOTHILLS WATER ASSOCIATION, SALLAL
WATER ASSOCIATION, TANNER ELECTRIC COOPERATIVE, and
UNION HILL WATER ASSOCIATION,

Respondents.

DISTRICTS' RESPONSE BRIEF

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I. INTRODUCTION

King County (“County”) has been unsuccessful in numerous attempts over the years to gain legislative authority to tax utilities. The County’s search for added revenues to address its financial challenges led to the County adopting Ordinance 18403 (the “Ordinance”) and the Rules for Determining Franchise Compensation (the “Rules”). Relying on the Ordinance and Rules, the County attempts to charge water, sewer, gas and electric utilities “franchise compensation” or “rent” for the utilities’ use of public rights-of-way (referred to herein as the “rental fee/tax”). The \$10,000,000 in anticipated annual revenue from the rental fee/tax will flow to the County’s general fund to support the County’s general governmental services. The Ordinance and Rules essentially enact an illegal “back door tax” on water, sewer, gas and electric customers who will pay higher rates to the utilities using public rights-of-way.

The twenty Districts (collectively, the “Districts”) sued by the County are independent municipal corporations formed and authorized under Title 57 RCW to provide essential water and/or sewer service to customers in incorporated and unincorporated areas of King County. The Districts opposed the County’s adoption of the Ordinance and Rules, asserting that the Ordinance and Rules imposed an unlawful tax and that

the Districts already have a statutory franchise granted by the Legislature to use public rights-of-way pursuant to RCW 57.08.005(3) and (5) without the requirement to pay the rental fee/tax to the County. The Districts' objections were ignored.

The trial court correctly held that the Ordinance and Rules are unlawful. This Court should affirm the trial court's decision which invalidated portions of the Ordinance and the entirety of the Rules relating to the imposition of the rental fee/tax.

II. ASSIGNMENT OF ERRORS

The Districts do not take issue with the County's general assignments of error in Section II of its brief, except for the County's assertion that the trial court's ruling was erroneous. The trial court's ruling was thoughtful, well-reasoned and correct as it relates to the Districts' motion for summary judgment. However, the Districts disagree with the County's statement of the issues contained in Section III of its brief. Therefore, the Districts offer the following statement of the issues which more appropriately describe the issues before the Court.

A. Whether the Ordinance and Rules imposing the rental fee/tax are invalid when the Legislature has not expressly delegated to the County the power to tax or charge rent to the Districts for the use of the public rights-of-way?

B. Whether the rental fee/tax is an unlawful tax intended to raise \$10,000,000 in annual revenue from utilities using the public rights-of-way that will flow into the County's general fund to pay for general governmental services?

C. Whether RCW 57.08.005 grants the Districts a statutory franchise to use public rights-of-way without any requirement to pay a rental fee/tax to the County?

III. STATEMENT OF THE CASE

A. History of the Ordinance and Rules.

Since 2000, there have been at least 14 bills introduced at the Legislature seeking statutory authority for counties to impose a utility tax or excise tax on certain utilities, including water and sewer utilities. CP 201. The County's budget director testified that the County has previously sought specific legislative authority to impose utility taxes, the last legislative effort being in 2015 or 2016, but noted those efforts were unsuccessful. CP 222. The budget director also testified that due to the County's chronic financial challenges, the County has been trying to find new sources of general fund revenue. CP 214. In an email from the budget director to a County Councilmember, the director suggested the concept of charging franchisees rent "could be a fallback option if we [County] fail to get any revenue flexibility in the upcoming legislative session." CP 1729, 1736.

On October 24, 2016, without any advance outreach to the Districts, a bill proposing to impose a rental fee/tax on water, sewer, gas and electric utilities using public rights-of-way was introduced to the County Council.¹ CP 123, 761, 805, 955. The staff report supporting the proposed ordinance estimated the revenue to be generated from the ordinance would be approximately \$10,000,000 per year which would be deposited into the general fund to pay for general governmental services. CP 288.

The proposed ordinance moved quickly through the legislative process and was adopted two weeks later on November 7, 2016 by a 7-2 vote. CP 266-83. Prior to the Council vote, two Councilmembers spoke about the proposed ordinance and compared the rental fee/tax to charging “rent” for the County’s buildings and land and indicated the proposed ordinance was simply managing valuable County assets. CP 520.

The Ordinance delegated to the Facilities Management Division (“Facilities Management”) the responsibility to establish policies for determining the amount of the rental fee/tax to be paid by each utility. The County engaged in the rulemaking process and solicited public comments. The Districts submitted detailed comments and objections to the draft and

¹ The bill was referred to as proposed Ordinance 2016-0521. CP 285.

final Rules prepared by Facilities Management. CP 329-354, 410-419.² Over 1,000 comments were submitted in opposition to the proposed Rules. The County's director of Facilities Management acknowledged he was not aware of any favorable comments. CP 240-41. Nearly one year after the Ordinance was adopted, Facilities Management issued the final Rules. CP 294-98. The Rules went into effect on January 29, 2018. *Id.* at 298.

After the Rules were adopted, Facilities Management began issuing "compensation notices" to Districts with current franchises and "compensation estimates" to Districts with expired franchises (the "Notices"). The Notices were intended to put the Districts on notice of the amount of the rental fee/tax the County intended to collect from the Districts. In some cases, the compensation amounts were in excess of \$400,000 per year. CP 802, 853. Had the Ordinance and Rules not been invalidated, the Districts would have been forced to pay the rental fee/tax to the County which would have resulted in significant increases in the water and sewer rates charged to their customers. Based on the Notices issued by the County, one water-sewer district serving more rural areas was faced with a possible increase of 44.7% for its sewer rates and 23.7% for

² Due to space limitations, it is not possible to address all the legal infirmities relating to the draft and final Rules. However, the Districts' comments on the Rules contained in the record discuss them in great detail.

its water rates. CP 854.

B. Legal Proceedings.

The Districts intended to commence legal action against the County to challenge the Ordinance and Rules in Snohomish County Superior Court on or after January 29, 2018, the expected effective date of the Rules. CP 22. In anticipation of the Districts commencing legal action, the County filed a preemptive Declaratory Judgment action in King County Superior Court four (4) days before the purported effective date of the Rules, perhaps to secure a “home field advantage” before a King County Superior Court judge. CP 1-9, 22. Because the dispute involved primarily legal issues, the parties stipulated to have this matter heard by summary judgment motion. CP 71-76.

The trial court heard the cross-motions for summary judgment. RP 5-53. During oral argument, the County conceded no other county in the State was charging rent for the use of rights-of-way in the manner authorized by the Ordinance and Rules. RP 9-10.

On August 1, 2018, the trial court issued its oral ruling finding the County lacked the authority to impose franchise compensation or rent against the Districts and the intervenor defendants, a group of non-profit water and electric utilities. CP 2286-2300. *See* Appendix. In its oral ruling,

the trial court acknowledged this case was really about statutory construction. CP 2294. The trial court stated that the County's statutory authority over the rights-of-way must be read in harmony with RCW 57.08.005 which authorizes the Districts to locate, operate and maintain their water and sewer facilities in public highways, roads, and streets. CP 2295. The court referred to three statutes (RCW 57.08.005, RCW 36.55.010 and RCW 36.55.060) and concluded that when reading these statutes together the County lacks the authority to charge rent to the Districts and other utilities because the County statutes were silent as to a legislative grant of the authority to charge rent. CP 2296-97. The court also carefully reviewed and relied upon the holding in *City of Lakewood v. Pierce Co.*, 106 Wn. App. 63, 23 P.3d 1 (2001) which the court noted involved a similar county statute that was "identical and analogous." CP 2297. Near the end of the trial court's oral ruling, relying on the *Lakewood* holding, the court stated: "A franchise is a contract and requires the parties to negotiate and enter into an agreement. The county, despite the valiant efforts and all the hard work by many smart people cannot compel its terms unilaterally on the utilities." CP 2297-98. Because the trial court found the County did not have the authority to charge rent, the court granted the Districts' and the intervenor defendants' motions and denied the County's motion. CP 2298.

On September 4, 2018, the trial court issued its final order granting the Districts' and the intervenor defendants' motions for summary judgment and denying the County's motion. CP 2277-2300.³ Importantly, the order provides, in part, as follows: "*Water-sewer districts have statutory authority under RCW 57.08.005(3) and (5) to locate, operate and maintain their water and sewer facilities in 'public highways, roads, and street.'*" CP 2283. Further, the trial court found the County lacks the authority to impose franchise compensation or rent on the defendant utilities or to require the utilities to pay franchise compensation or rent to the County as a condition of using public rights-of-way. CP 2298.

On September 24, 2018, the County filed its appeal. CP 2301-2329.

C. Public Rights-of-Way Located In King County.

The County operates and maintains more than 1500 miles of roadway. CP 1193. The County acquired these rights-of-way by various methods, including fee purchase, condemnation, adverse possession, donation and dedication. CP 1193-94. The majority of the County's rights-of-way have been acquired by dedication. CP 1245.

³ The parties were unable to agree upon the final form of the order. Therefore, a presentment hearing was scheduled during which the parties made arguments to the trial court regarding their respective position on the form of the final order. RP 61-83.

Historically, the Districts have routinely constructed their water and sewer facilities in public rights-of-way as authorized by RCW 57.08.005. This is a standard practice as evidenced by the 170 franchise agreements the County has entered into with various utilities. CP 1194. However, under the Ordinance and Rules the County will not issue franchises to the Districts and other utilities unless they enter into franchise agreements which provide for the payment of the rental fee/tax and accept the other terms required by the Ordinance and Rules. CP 298, 1197. Without such a franchise, the County's position is that the Districts will need to relocate their water and sewer facilities outside of the public rights-of-way. CP1829.

IV. SUMMARY OF ARGUMENT

The Washington Constitution, article VII, § 9 and article XI, §12, authorize the Legislature to delegate taxing authority to counties and cities. In addition, the governmental immunity doctrine is violated where one government seeks to tax another government without express statutory authority. Since no statute expressly authorizes the County to impose the rental fee/tax, the Ordinance and Rules are unlawful and should be invalidated.

The County's rental fee/tax also constitutes an unlawful tax under this Court's ruling in *Covell*. Washington courts regularly invalidate fees

or charges imposed by government entities that are really taxes in disguise. In this case, the County dresses up the rental fee/tax and calls it “rent.” Notwithstanding the rent label, the rental fee/tax is an unlawful tax under *Covell*. In addition, under Washington law franchise fees that exceed actual administrative costs constitute unlawful taxes. Because the Ordinance and Rules are designed to raise revenue for the County’s general fund which exceeds the County’s actual administrative costs associated with its franchise program, the Ordinance and Rules constitute an unlawful tax.⁴

While the trial court did not base its ruling on these unlawful tax arguments, they provide clear legal grounds under accepted legal precedent pursuant to which this Court can affirm the trial court’s ruling.

One of the Districts’ primary legal arguments before the trial court was that the Legislature expressly granted the Districts a “statutory franchise” pursuant to RCW 57.08.005 to use public rights-of-way to provide essential water and sewer services to the public. The County argues that statutory franchises do not exist in Washington. The Districts will show that statutory franchises have been recognized in Washington and other

⁴ The Districts do not contest the County’s ability to recover its costs associated with administering its franchise program. In fact, the respondents proposed language for inclusion in the final court order acknowledging the County’s authority to regulate the use of County roads and to charge reasonable administrative costs for performing such duties. RP 68.

states for more than a century. Since the Legislature has already granted the Districts a statutory franchise pursuant to RCW 57.08.005 to use public rights-of-way, no franchise is required from the County. Further, because the Districts hold a statutory franchise, the County has no right to demand payment of the rental fee/tax from the Districts.

The County asserts erroneously that its authority under RCW 36.55.010 to “grant franchises” provides it with the authority to impose the rental fee/tax on the Districts. The County also contends that the authority granted counties under RCW 36.75.020 to regulate county roads gives the County a “controlling interest” in the rights-of-way sufficient to impose the rental fee/tax. Both of the County’s positions ignore the plain and unambiguous language of RCW 57.08.005 granting the Districts a statutory franchise. The trial court engaged in a proper exercise of statutory construction and concluded that the applicable statutes were not in conflict and had to be construed together giving meaning to each statute. The trial court correctly ruled that the statutes relied on by the County did not give the County the authority to impose the rental fee/tax.

The County also asserts that its status as a home rule county gives it the broadest powers possible and that as a home rule county it is permitted to enact any ordinances and regulations it desires unless expressly

prohibited by law. Contrary to the County's assertion, home rule counties are only permitted to establish regulations on matters that are considered "purely local affairs." Since the Legislature has retained sovereign power over highways, streets and roads, the Ordinance and Rules extend beyond purely local affairs and attempt to regulate matters of statewide significance. Further, regulations adopted by home rule counties are required to be consistent with the Constitution, as well as general law. The County Ordinance and Rules violate at least two significant statutes pursuant to which the Districts have the right to use public rights-of-way. Therefore, the County has exceeded its legitimate home rule powers.

This case will have a significant effect across the State. If the Court reverses the trial court's decision and sanctions the County's Ordinance and Rules, then counties and cities throughout this State will consider imposing similar rental fees/taxes on water-sewer districts and other public utilities using public rights-of-way. The Court should affirm the trial court's decision.

V. ARGUMENT

A. Standard of Review.

1. Court's Review is *De Novo*.

Since the trial court's summary judgment ruling was based solely on legal issues, this Court's review is *de novo*. *Howe v. Douglas County*, 146 Wn.2d 183, 188, 43 P.3d 1240 (2002). An appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof. *Int'l Bhd. of Elec. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000).

2. Rules of Statutory Construction and Interpretation.

The issues before this Court will require the Court to engage in an exercise of statutory construction and interpretation. When interpreting statutes, courts should look to the plain meaning of words used in the statutes. *Lakewood*, 106 Wn. App. at 70. If the statutory language is clear and unambiguous, courts assume the Legislature meant exactly what it said and determine the meaning of the statutes from their language alone. *Id.*; *see also Watson v. City of Seattle*, 189 Wn.2d 149, 175 401 P. 3d 1 (2017) (courts should not speak for the Legislature when it can speak for itself). On the other hand, if the statutory language is ambiguous, courts then resort to

the tools of statutory construction to ascertain the Legislature's intent. A statute is ambiguous when it is fairly susceptible to two or more reasonable interpretations. *Id.*

Where two statutes are in apparent conflict, courts are required to reconcile them, if possible, so that each statute may be given effect. Statutes must be read together to achieve a "harmonious total statutory scheme ... which maintains the integrity of the respective statutes." *Id.* at 71. Further, when two statutes are in apparent conflict, the more specific statute is given preference. *In re Little*, 106 Wn.2d 269, 284, 721 P.2d 950 (1986).

It is important to note the Legislature has expressly mandated in Title 57 RCW relating to water-sewer districts that: "The rule of strict construction shall not apply to this title, which shall be liberally construed to carry out its purposes and objects." RCW 57.02.030. Therefore, when engaging in the exercise of statutory construction involving provisions of Title 57 RCW, including RCW 57.08.005 at issue in this case, these statutes should be liberally construed in the Districts' favor.

B. The Ordinance and Rules Impose an Unlawful Tax.

The County has been searching for added revenue for its general fund to address its chronic financial situation. Since the County was unsuccessful in getting the Legislature to give counties the power to impose

utility taxes, the County decided to enact a rental fee/tax for the use of the rights-of-way, a *de facto* utility tax, which is anticipated to generate \$10,000,000 per year in general fund revenue to fund general governmental services. Although the trial court did not specifically rule on this issue, the Ordinance and Rules can and should be invalidated as an unlawful tax.

1. The County has No Authority to Tax the Districts.

As political subdivisions of the State, municipal entities possess only those powers granted to them by the Legislature. *Okeson v. City of Seattle*, 159 Wn.2d 436, 445, 150 P.3d 556 (2007). In addition, our Constitution confers upon the Legislature the power to authorize local governments to impose taxes. Wash. Const. art. VII, §9; Wash. Const. art. XI, §12. However, since municipalities have no inherent right to tax and their constitutional authority is not self-executing, this Court has held the Legislature must expressly delegate taxing power to municipal corporations. *City of Spokane v. Horton*, 189 Wn.2d 696, 702, 406 P.3d 638 (2017). Since no statute expressly authorizes the County to impose the rental fee/tax against the Districts, the Ordinance and Rules are unlawful.

Similarly, the governmental immunity doctrine provides that one municipality may not impose a tax on another municipality without express statutory authorization. *King County v. City of Algona*, 101 Wn.2d 789,

793-94, 681 P.2d 1281 (1984).⁵ A majority of jurisdictions adhere to this rule on the theory that a local tax imposed on a political subdivision is tantamount to a tax imposed on the state. *Id.* at 794. Based on the cases cited by this Court in *Algona*, this Court did not limit the governmental immunity doctrine to governmental services and the doctrine would apply equally to proprietary functions. *See e.g., Salt River Project Agric. Improvement and Power Dist. v. City of Phoenix*, 631 P.2d 553 (Ariz. App. 1981) (applied doctrine to taxation of district's surplus electrical sales which were proprietary in nature); *Village of Willoughby Hills v. Bd. of Park Comm'rs of Cleveland Metro. Park Dist.*, 209 N.E.2d 162 (Ohio 1965) (doctrine applied to village's attempt to tax golf course green fees of the park district which was proprietary in nature).

This Court should apply the governmental immunity doctrine recognized in *Algona* to the rental fee/taxes the County seeks to impose on the Districts without any distinction between whether the services provided by the Districts are considered governmental or proprietary in nature.

⁵ In *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007), in *dicta*, the Court suggested that *Algona* may not be a settled issue of law. However, the majority decision of the *Burns* court considered, but did not decide, whether the governmental immunity doctrine applied to electrical services which were considered proprietary in nature. In *Burns*, this Court merely acknowledged this was an unresolved issue which the Court did not need to decide. *Burns*, at 159-60.

The trial court correctly found that no statute gives the County the power to impose this rental fee/tax. The Districts believe this is why the County attempts to characterize this tax program as being akin to charging rent for the County's buildings and land. But that comparison fails. Because the County lacks express statutory authority to impose the rental fee/tax, the Court should affirm the trial court's ruling invalidating the Ordinance and Rules.

2. The Rental Fee/Tax is an Unlawful Tax.

The rental fee/tax imposed by the County is an unlawful tax.

a. Unlawful Tax under *Covell*.

The Ordinance and Rules impose an unlawful tax under what is generally referred to as the "*Covell* factors." See *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995). In *Covell*, this Court adopted a three part test to determine whether a fee or charge imposed by a government is actually a tax. Under *Covell*, courts are to consider the following factors: (1) whether the primary purpose of the fee or charge is to raise revenue for desired public benefits rather than to regulate a particular activity; (2) whether the money collected is allocated to a specific authorized regulatory purpose, and (3) whether there is a direct relationship between the fee

charged and services received. *Covell*, at 879. The County's Ordinance and Rules fail on each of these factors and this "rent" is an unlawful tax.

It is undisputed that the County adopted the Ordinance and Rules to raise revenues for general governmental services and not to regulate any particular activity. In addition, all of the money anticipated to be generated from the Ordinance and Rules is going into the County's general fund and is not allocated to a specific authorized regulatory purpose.⁶ Finally, there is no direct relationship between the fee charged and the services received. In fact, the County is not providing any services to the Districts, nor does the County grant the Districts any property rights supporting the demand for payment of the rental fee/tax. Rather, the County seeks to collect revenues from the Districts' customers and use the Districts as its tax collector. Under *Covell*, the rental fee/tax is an unlawful tax.

The County relies on this Court's ruling in *Snoqualmie v. King County*, 187 Wn.2d 289, 386 P.3d 279 (2016), to argue the rental fee/tax is neither a tax or a regulatory fee because it is "rent" for the Districts' use of the rights-of-way. App. Br. at 48-49. While not all demands for payments are taxes, the rental fee/tax authorized by the Ordinance and Rules is

⁶ Depositing funds collected from the use of County roads into the County's general fund is also a violation of RCW 36.82.010 which requires funds to be deposited in the County road fund and used for road purposes.

unquestionably an unlawful tax and this Court's ruling in *Snoqualmie* does not suggest otherwise.

Snoqualmie is clearly distinguishable. There, the payment at issue involved a "payment in lieu of taxes" ("PILT") that was negotiated and paid by the Muckleshoot Indian Tribe to King County. Importantly, this Court recognized the PILT was used to offset or reimburse the County for the cost of municipal services actually provided to tribal lands. In other words, the Court found that the tribal lands were receiving a service which needed to be reimbursed. In comparison, the rental fee/tax imposed by the County is not intended to reimburse the County for anything and no services are being provided. Rather, it is pure profit that goes into the County's general fund.⁷

The County also appears to suggest that the *Covell* factors are no longer relevant. App. Br. at 48. This Court should reject that argument. In a recent case, *Watson v. City of Seattle*, 189 Wn.2d at 175, this Court affirmed the relevance of the *Covell* factors. This Court stated: "a charge intended to raise revenue for the public benefit is a tax." The Court further cautioned reviewing courts "to be dubious of regulations masquerading as taxes (and vice versa)." *Id.* at 156. In this case, the County's rental fee/tax

⁷ Section 6 of the Ordinance already authorizes the County to recover 100% of its administrative costs relating to its franchise program. CP 270-72.

is an unlawful tax masquerading as “rent.” The rental fee/tax should be struck down as an unlawful tax.

b. Unlawful Tax Under *Lakewood*.

Division II’s opinion in *Lakewood* provides another basis upon which this Court can find that the rental fee/tax imposed by the Ordinance and Rules is an unlawful tax. In *Lakewood*, the court ruled that Lakewood’s franchise fee would not be an impermissible tax, so long as the fee did not exceed the costs incurred by Lakewood in administering the franchise. *Id.* at 77-79. Importantly, the *Lakewood* court found: “There is no evidence that Lakewood intends to use the franchise fee to raise revenue for other purposes.” *Id.* at 75.

In this case, the County seeks not only to recover 100% of its administrative costs relating to the franchise program, but an additional \$10,000,000 per year to bolster its general fund. Therefore, the ruling in *Lakewood* is dispositive on the issue that the rental fee/tax is an unlawful tax. This Court should invalidate the Ordinance and Rules as an unlawful tax.

C. The Legislature Granted Water-Sewer Districts a Statutory Franchise to Use Public Rights-of-Way.

The County Council’s findings intended to support its adoption of

the Ordinance claim that County franchises grant valuable property rights to utility companies to use the rights-of-way which allow the utilities to profit and benefit from the use of the rights-of-way in a manner not generally available to the public. CP 267. While this “finding” may have some application to private “for profit” utilities, it does not apply to Title 57 water-sewer districts⁸ which already enjoy a statutory franchise and privilege to use public rights-of-way.

1. RCW 57.08.005 Grants the Districts a Statutory Franchise to Use Public Rights-of-Way Without Payment of the Rental Fee/Tax.

Title 57 water-sewer districts have independent express statutory authority to use all “public highways, roads, and streets within and without” the districts in connection with providing essential water and sewer services to the public. Pursuant to RCW 57.08.005(3), districts providing water service have the following statutory powers:

(3) To construct, condemn and purchase, add to, maintain, and supply waterworks to furnish the district and inhabitants thereof and any other persons, both within and without the district, with an ample supply of water for all uses and purposes public and private with full authority to regulate and control the use, content, distribution, and price thereof in such a manner as is not in conflict with general law and may construct, acquire, or own buildings and other necessary

⁸ Titles 56 and 57 RCW were combined into a single title effective July 1, 1997. The combined statute refers to water and sewer districts collectively as “water-sewer districts.” RCW 57.02.001

district facilities. . . . *For such purposes, a district may . . . by means of aqueducts or pipeline conduct the same throughout the district and any city or town therein and carry it along and upon public highways, roads, and streets, within and without such district.*

RCW 57.08.005(3) (emphasis added).

Similarly, pursuant to RCW 57.08.005(5) districts providing sewer service have the following statutory powers:

(5) To construct, condemn and purchase, add to, maintain, and operate systems of sewers for the purpose of furnishing the district, the inhabitants thereof, and persons outside the district with an adequate system of sewers for all uses and purposes, public and private *For such purposes a district may conduct sewage throughout the district and throughout other political subdivisions within the district, and construct and lay sewer pipe along and upon public highways, roads, and streets, within and without the district*

RCW 57.08.005(5) (emphasis added).

By their plain language, RCW 57.08.005(3) and (5) grant the Districts an independent statutory right to construct, operate and maintain their water and sewer facilities within all county roads and rights-of-way. Further, those statutes do not condition the Districts' right to use public rights-of-way on obtaining consent from the municipality responsible for the rights-of-way. Since the Districts already have the statutory right to use County roads and rights-of-way, the Legislature has directed that the

Districts have no obligation to pay the County for that use. The County cannot subvert this Legislative direction by its Ordinance and Rules.

The County relies on what it claims is 100 years of case law that relates to private *for profit* utilities that do not otherwise have a statutory right to locate their facilities in the public rights-of-way. Given the Districts' statutory franchise argument under RCW 57.08.005, the cases cited by the County are inapposite.⁹

2. Discussion of Franchises Granted by Statute.

a. Statutory Franchises Are Recognized in Washington.

"A franchise [is] a right of a public utility to make use of the city [or county] streets for the purpose of carrying on the business in which it is generally engaged, that is, of furnishing service to members of the public generally." *Lakewood*, 106 Wn. App. at 73-74. A franchise may derive from either a statute or municipal ordinance. As discussed above, the Districts' franchise rights were granted to them by the Legislature through RCW 57.08.005(3) and (5) which gives the Districts the right to occupy and use the public rights-of-way.

⁹ The inapposite cases include: *St. Louis v. Western Union Telephone Co.*, 148 U.S. 92 (1893); *Spokane v. Spokane Gas & Fuel Co.*, 175 Wash. 103, 26 P.2d 1034 (1933); and *Pacific Telephone & Telegraph Co. v. Everett*, 97 Wash 259, 166 P. 650 (1917).

The County dismisses the Districts' statutory franchise argument under RCW 57.08.005(3) and (5) and refers to it as "the so-called statutory franchise." Then, the County contends the term "statutory franchise" does not exist in Washington case or statutory law." App. Br. at 37, n. 15. The County is wrong on both accounts.

This Court has previously recognized the existence of statutory franchises. In *Tukwila v. Seattle*, 68 Wn.2d 611, 414 P.2d 597 (1966), for example, this Court stated: "Franchises, whether *statutory* or by ordinance, have the legal status of contracts, binding with equal force, according to the terms thereof, upon the granting authority and the granting entity." *Id.* at 615 (emphasis added) (*citing* 5 E. McQuillin, *Municipal Corporations* §§ 19.39, 19.40 (1949)); *see also*, *State v. Walker*, 87 Wash. 582, 152 P. 11 (1915) (statute granted telephone or telegraph companies a franchise to construct and maintain lines along public roads, streets and highways). The Attorney General has also recognized statutory franchises. *See* AGO 1968 No. 32 (a franchise granted by statute or ordinance has the legal status of a contract). In fact, statutory franchises have been the subject of legal jurisprudence for over 100 years.¹⁰

¹⁰ The County even quotes a passage out of McQuillin from 1911 in its brief which acknowledges the existence of statutory franchises. *See* App. Br. at 42.

Therefore, contrary to the County's contention, statutory franchises are recognized under Washington law. Moreover, the statutory franchise granted by the Legislature to the Districts under RCW 57.08.005(3) and (5) is *fatal* to the County's effort to impose the rental fee/tax on the Districts as a condition of using public rights-of-way.

This Court previously considered a case involving a claim of a statutory franchise in *State ex rel. Washington Water Power v. Superior Court for Grant County*, 8 Wn.2d 122, 111 P.2d 577 (1941). While *Washington Water Power* involved a condemnation action commenced by a public utility district to obtain electric plants and facilities, this Court's ruling nevertheless supports the Districts' claims to hold a statutory franchise. The issue before the Court in *Washington Water Power* was an interpretation of a statute relating to the powers granted to public utility districts ("PUDs") that contained very similar statutory language to that contained in RCW 57.08.005(3) and (5). The relevant statute granted PUDs the power to "construct and lay said aqueducts, pipe or pole lines, and transmission lines along and upon public highways, roads and streets" *Id.* at 130-31.

In connection with a "public use" argument, *Washington Water Power* ("WWP") argued that public utility districts already "have

franchises given to them by the provisions of the act and therefore do not have any need for the franchise held by [WWP].” *Id.* at 130. In its ruling, this Court held:

There would be much force to that argument if the public utility districts had general franchises or a general right to occupy highways, roads and streets for the purposes of carrying on the business delegated to them by statute. However, we are unable to hold that the act gives to the districts such general franchises or rights.

Id. Based on the particular language of the PUD statute, the Court concluded it was “unable to hold that the act gives to the districts such general franchises or rights.” *Id.* Instead, the Court concluded that the act was not a grant of a general franchise because the franchise-granting language was limited to “inter-tie lines” and not the entire electrical systems. *Id.* at 131.

The significance of the *Washington Water Power* ruling is that this Court was prepared to accept WWP’s argument if the statute was viewed as a general grant of a franchise for the entire electrical transmitting system and not just the inter-tie lines. In this case, RCW 57.08.005(3) and (5) have clear and unambiguous language providing a general statutory franchise to water-sewer districts to construct, operate and maintain their water and

sewer facilities within the “public highways, roads, and streets.” There are no limitations included in RCW 57.08.005.

Because the Districts have already been given a statutory franchise by the Legislature to use public rights-of-way, the Districts do not need a second franchise from the County in order to occupy the public rights-of-way. Further, the County lacks the authority to condition the Districts’ use of the rights-of-way on the payment of the rental fee/tax. Therefore, the Court should affirm the trial court’s decision that the Districts have the right pursuant to RCW 57.08.005 to occupy and use public rights-of-way without payment of the rental fee/tax.

b. Statutory Franchises Are Recognized in Other Jurisdictions.

The Districts’ position that they hold a statutory franchise pursuant to RCW 57.08.005 is further supported by an abundance of case law from other jurisdictions.

A prominent authority on municipal law issues notes: “An ordinance purporting to grant to a company a franchise to use the streets, where the rights to use the streets is conferred by federal or state statutes, is a mere attempt to give what the company already has and it seems that it should not be considered a franchise. . . .” 12 E. McQuillin, *Municipal*

Corporations §34:6 (3d. ed. 2017). In that regard, what the County purports to offer the Districts is technically not even a franchise.

McQuillin provides a detailed discussion of franchises granted by statute (i.e., statutory franchises) and acknowledges that: “Sometimes the right to use the streets is conferred by a general statute or the charter of the company” *Id.* at §34:10. Many of the cases cited by McQuillin recognizing the existence of statutory franchises date back to the early 1900s. Several of the referenced cases are particularly relevant to the issues before this Court and are discussed below.

In *Corpus Christi v. Southern Comm. Gas Co.*, 368 S.W.2d 144 (Tex.Civ. App. 1963), a gas company asserted it had the legal right to operate its gas distribution system using facilities located in public streets in certain annexed areas without the need for a city franchise and without payment of the “street rental charge” authorized by another state statute. After annexing an area that included the gas company’s gas distribution system, the city passed an ordinance purporting to grant the gas company a five year franchise. The ordinance included the requirement the gas company pay the city a street rental charge equal to 2% of its annual gross receipts. *Id.* at 145. Although the gas company refused to accept the terms of the franchise, it did pay 2% of its annual gross income for one year.

However, the gas company made no further payments after that for a period of six years asserting it had a right to operate its gas distribution system in the annexed area without payment to the city under a statute. The city filed a lawsuit seeking to recover the unpaid street rental fees.

Significantly, the court in *Corpus Christi* ruled a franchise was not required from the city because the gas company was using the public streets pursuant to a statute. Further, since the gas company did not need a franchise from the city, the court ruled the city lacked the authority to charge the gas company the street rental fee for its consent to use the public streets. *Id.* at 146-47. The same holding applies to our case. Since the Districts have a statutory franchise under RCW 57.08.005, the County lacks authority to charge the Districts the rental fee/tax.

In *Michigan Public Service Co. v. Cheboygan*, 324 Mich. 309, 37 N.W.2d 116 (1949), the court ruled the electric utility had the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity in city streets pursuant to a statute, notwithstanding that a franchise granted by the city to the utility's predecessor had expired. The city argued the utility was not occupying the rights-of-way pursuant to the statute but as a consequence of securing a franchise from the city. Although the trial court accepted the city's

argument, the appellate court reversed, holding: “At no time was the company required to elect as to whether it was occupying the city streets and alleys in pursuance of [a statute], . . . or in pursuance of a municipal franchise.” *Id.* at 322. The court concluded the electric utility had a franchise right granted by the State to use the streets of the city for its poles and wires. *Id.* at 323-24. Applied here, the fact that the Districts may have had County franchises in the past is irrelevant. The Districts still maintain the right to assert their rights under their statutory franchise granted by RCW 57.08.005.

The case of *Public Service Corp. v. De Grote*, 70 N.J.Eq. 454, 62 A. 65 (1905) involved a contentious situation where a gas utility was attempting to install gas pipes in the village of Ridgefield Park and its attempts to do so were being interfered with by agents of the village. The gas company commenced a lawsuit seeking to enjoin the defendants from interfering with its efforts to lay gas pipes. *Id.* at 455. The village took the position that pursuant to an ordinance adopted by the village the gas utility could not install gas pipes without the consent of the village.

The *De Grote* court recognized the gas utility had a right to lay gas mains and pipe under the streets of the village based on a corporate charter granted by the State to the utility’s predecessor. *Id.* at 458-59. The court

found this legislative charter provided a franchise to the utility to use the public streets. *Id.* at 460-64.

In its opinion, the *De Grote* court stated:

The question which has been debated in this cause is not whether the complainants . . . have an absolute right, free and untrammled from all restrictions on the part of the village, to lay and maintain their gas plant, but whether the village has the absolute right to prohibit the complainants . . . from excavating the streets until or unless a written permission is given in each case by the superintendent of streets of the village. No question of regulation is raised in this cause. It is not the power of the village to regulate which is insisted upon here – to reasonably regulate the exercise of rights and franchises of these companies. It is the power of the village under this ordinance of 1893 to prohibit which is insisted upon. I find no such power exists in this case, for the reasons that I have mentioned.”

Id. at 465.

The *De Grote* court’s ruling is equally applicable here. The Districts do not contest the County’s ability to regulate the use of the public rights-of-way.¹¹ Rather, it is the County’s attempt to prohibit the Districts’ use of the rights-of-way without payment of the rental fee/tax that is at issue.

¹¹ The County’s own “Regulations for Accommodations of Utilities on County Road Rights-of-Way” acknowledge the County doesn’t need a franchise to regulate utilities using public rights-of-way. *See* Section 1.04 of the Regulations (“All Utilities with facilities within King County road rights-of-way, *whether or not the Utility holds a franchise from King County*, shall comply with these Regulations and with all applicable federal, state and local laws, codes, rules and regulations. . .”) (emphasis added). CP 424-464.

In *Petaluma v. Pacific Telephone and Telegraph Co.*, 44 Cal.2d 284, 282 P.2d 43 (1955), the city attempted to restrain Pacific Telephone from using city streets for telephone and telegraph service until it obtained a municipal franchise for its business from the city. *Id.* at 285.

Pacific was the successor to Sunset Telephone which had been granted a 25-year franchise within the city in 1891. Sunset assigned its properties and franchises to Pacific in 1917 and Pacific operated under Sunset's franchise until it expired. The city granted Pacific a new franchise in 1926 for a 25-year term. When that franchise expired, Pacific refused to apply to the city for a new franchise, believing it already had a statutory franchise pursuant to a 1905 statute. The city subsequently filed a lawsuit seeking to restrain Pacific from using the city streets until it obtained a franchise from the city. *Id.* at 285-86.

In its opinion, the *Petaluma* court analyzed the interplay between a similar statute that provided counties in California with the power to grant franchises over public roads. The court noted that the "state franchise" granted by a statute was "superior to and free from any grant made by a subordinate legislative body" under another statute authorizing counties to grant franchises along public highways. *Id.* at 287-88.

Based on its analysis, the *Petaluma* court then ruled that Pacific had acquired a “state franchise” to use the streets in the city for telephone lines and equipment. The court further held that state franchise rights were vested rights and could not be impaired by a subsequent delegation of power to a city. Finally, the court ruled that Pacific could not be required to obtain a municipal franchise to use the streets. *Id.* at 288-89.

Applied to this case, the *Petaluma* court’s ruling supports a similar finding that the statutory franchise granted to the Districts by RCW 57.08.005 supersedes any rights the County claims to hold though RCW 36.55.010 to grant franchises for the use of public rights-of-way and that the Districts cannot be required to obtain a franchise from the County.

Finally, in *City of Englewood v. Mountain States Telephone and Telegraph Co.*, 163 Colo. 400, 431 P.2d 40 (1967), the court considered whether Mountain States had the right, without a franchise, to use public streets within the city for its telephone and telegraph business. Mountain States was originally granted a 20-year franchise by the city but when the franchise expired Mountain States refused to enter into a new franchise with the city. The city commenced a declaratory judgment action against Mountain States seeking a ruling that Mountain States lacked the authority to use the streets for its poles, lines, wires and pipes without first securing

a franchise from the city. Mountain States defended the city's action and asserted it had the right to occupy the city's public streets without a new city franchise by virtue of a statute enacted by the Colorado Legislature. The trial court ruled in Mountain States' favor and dismissed the city's lawsuit. *Id.* at 41-42.

On appeal, the city of Englewood argued because it was a "home rule" city, it had the general authority to require a franchise before a utility could use the city's public ways. *Id.* However, based on a review of the applicable statutes, the *Englewood* court concluded Mountain States had acquired a valid "state franchise or right" by virtue of a separate Colorado statute. *Id.* at 405-07. The *Englewood* court also ruled that Mountain States was not required to obtain a franchise from the city because it already had such a right granted by state statute. The court held that Mountain States: ". . . need not seek a second one, and Englewood cannot force it to either." *Id.* at 406. The court further stated that its ruling "does no violence to the constitutional provisions permitting home rule cities to grant franchises." *Id.* at 406-07.

The cases from other jurisdictions discussed above are consistent with, and supportive of, the Districts' claim that the Legislature has already granted water-sewer districts a statutory franchise by RCW 57.08.005.

3. The County Does Not “Own” the Rights-of-way.

The County has struggled to characterize the Ordinance as authorizing the County to charge rent, just like the County charges rent for the use of its buildings or lands. However, the County’s characterization is wrong.

a. The County is a Mere Agent for the State.

Recognizing that charging rent for the use of the rights-of-way or buildings requires the County to actually *own* the rights-of-way, the final Rules adopted by Facilities Management claim: “King County owns the ROW, which is a substantial public asset.” CP 295. In fact, it is undisputed that the County does not “own” the rights-of-way in its individual capacity at all. Rather, the County’s interests in the rights-of-way are as a mere agent for the State. The County has now abandoned its unsupported claim of ownership of rights-of-way in favor of the argument that it “controls” the rights-of-way. App. Br. at 10; CP 1198. However, the right to control and regulate the rights-of-way does not encompass the authority to charge the rental fee/tax.

RCW 36.75.020 provides as follows:

All of the county roads in each of the several counties shall be established, laid out, constructed, altered, repaired, improved, and maintained by the legislative authority of the respective

counties *as agents of the state*, or by private individuals or corporations who are allowed to perform such work under an agreement with the county legislative authority. Such work shall be done in accordance with adopted county standards under the supervision and direction of the county engineer.

(emphasis added). Since the County has only been granted limited agency powers to act on behalf of the State, the County's claim of an ownership interest in the rights-of-way is not supported by the law.

Further, as an agent of the State, the County only has the powers granted to it by RCW 36.75.020. This statute only provides the County with the authority to establish, lay out, construct, alter, repair, improve and maintain the county road. Nothing in this statute authorizes the County to charge rent for the use of rights-of-way. Therefore, the County is acting outside its agency authority by seeking to charge rent for the use of the State's or public's rights-of-way.

b. Discussion of Law Applicable to Rights-of-Way.

The County Rules which claim ownership of the rights-of-way are contrary to well established Washington law. This Court's ruling in *State ex rel. York v. Board of Comm'rs of Walla Walla County*, 28 Wn.2d 891, 184 P.2d 577 (1947) is instructive. There, this Court held:

It is true that land dedicated as a highway is thereby devoted to a general, or public, use. . . . Normally, the interest acquired by the public is but an easement. . . . But whatever

the nature of the interest may be, it is held in trust for the public, and the primary purpose for which highways and streets are established and maintained is 'for the convenience of public travel.'

Id. at 898 (internal citations omitted). The fact that the County serves in the capacity of a trustee for the public is critically important. McQuillin speaks to this issue when he states: "The use of streets is designed for the public at large, as distinguished from the legal entity known as the city, or municipality, and its residents." 10A E. McQuillin, *Municipal Corporations* §30:39 (3d. ed. 2018). In other words, these are not the County's rights-of-way. The rights-of-way belong to the public. Further, with respect to the powers of the trustee relating to these public rights-of-way, McQuillin states:

Whatever may be the quality or quantity of the estate of the city in its streets, that estate is essentially public and not private property, and the city in holding it is considered the agent and trustee of the public and not a private owner for profit or emolument.

Id. at §30:41. In this case, the County seeks to take advantage of its powers as a trustee of the public rights-of-way and use them to impose a rental fee/tax on the Districts to raise general fund revenue to fund the County's general governmental services. This is a clear breach of the County's duties as trustee and the Court should not sanction the County's actions.

In *York*, this Court also discussed the recognized “primary” and “secondary” purposes of public highways and streets. The Court acknowledged the primary purpose of public highways and streets is “for the convenience of public travel.” However, the Court also recognized that there are numerous “secondary uses” of highways and streets, “such as for watermains, gas pipes, telephone and telegraph lines, etc.” *York*, 28 Wn.2d at 898. These secondary uses are permissible provided they are not inconsistent with the use of the highways for public travel. *Id.* The County implicitly acknowledges the Districts’ water and sewer facilities are not inconsistent with the use of the rights-of-way by seeking to charge the Districts a rental fee/tax for use of the rights-of-way. Further, the County’s own regulations that were adopted pursuant to the requirements of Chapter 136-40 WAC (Accommodation of utilities on county roads) acknowledge that the County is required to accommodate utilities using public rights-of-way. CP 424-464.

Since the County does not own the rights-of-way and the Districts have a statutory franchise to use the rights-of-way, the County has no legal basis to demand the payment of the rental fee/tax as a condition of using the rights-of-way.

4. Statutory Franchises Are Not Irrevocable Franchises.

The County asserts that interpreting RCW 57.08.005 to be a statutory franchise would violate art. I, §8 of the Washington Constitution which prohibits the granting of irrevocable franchises. App. Br. at 43. The Court should reject the County's erroneous argument.

In *Neils v. City of Seattle*, 185 Wash. 269, 53 P.2d 848 (1936), this Court held: "The power to grant franchises is a sovereign power, resting in the state. . . . In the exercise of its sovereign power, the state may withdraw from a municipality or from a board of public officers powers delegated to, or exercised by, them and redelegate such powers to another agency." *Id.* at 274-75. In other words, even if a statutory franchise granted to a local government is the type of use of the rights-of-way that is constrained by art. I, §8 of the Washington Constitution, the statutory franchise cannot be viewed as permanent because the Legislature may statutorily revoke it at any time.

The *Englewood* court ruling, discussed *supra*, considered and disposed of a similar argument. The *Englewood* court held that although the statutes granting the franchise right to Mountain States do not require the consent of the city, "[t]his does not mean, however, that a perpetual right has vested in the utility, by virtue of any statutory grant, for such

would violate Article II, Section 11 of the Colorado Constitution.” The *Englewood* court stated: “The right is merely one to continue until the state, which granted the privilege, desires to modify, alter or withdraw it.” *Englewood*, 163 Colo. at 43-44.

There is nothing in RCW 57.08.005(3) and (5) which purports to grant the Districts a perpetual or irrevocable franchise and the Legislature retains full power to withdraw that power from the Districts. Therefore, contrary to the County’s argument, there is no violation of art. I, §8 of the Constitution which precludes perpetual or irrevocable franchises.

5. Upholding the Districts’ Statutory Franchises Would Not Violate the State Accountancy Act, RCW 43.09.210.

The County further asserts that it is required to impose and collect the rental fee/tax on the Districts to ensure compliance with the State Accountancy Act, RCW 43.09.210 (“Act”), that requires a government entity to pay for any services it receives from another government entity at their “true and fair value.” App. Br. at 44-45. The County contends that charging Districts a rental fee/tax for their use of public rights-of-way is consistent with its obligations under the Act. This Court should quickly dispose of this argument.

Since RCW 57.08.005 provides the Districts with a statutory franchise, the County has no authority to impose or collect the rental fee/tax. Further, the County is not providing the Districts with any “services” which require or warrant payment of the rental fee/tax. Moreover, even if the Act applied, §6 of the Ordinance allows the County to recover its full administrative costs. Reimbursing the County for its actual administrative costs clearly satisfies the requirement to pay “true and full value,” which is to be applied flexibly and practically. *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 592, 269 P.3d 1017 (2012).

D. The Trial Court Properly Construed the Applicable Statutes Giving Effect to Each Statute.

Based on the trial court’s oral ruling, it is clear the court engaged in a proper exercise of statutory construction and interpretation, the results of which were twofold. First, the trial court correctly ruled that RCW 57.08.005 authorizes the Districts to locate, operate and maintain their water and sewer facilities in public highways, roads, and streets. CP 2283, 2295-96. Second, the trial court held that the statutes relied on by the County were silent as to rent and do not give the County the authority to impose the rental fee/tax on the District and other utilities using the public

rights-of-way. *Id.* The trial court was correct on both accounts and its decision should be affirmed.

1. The Power to Grant Franchises Is Not the Power to Require a Franchise.

The County asserts that its power to charge rent flows, in part, from its authority to grant franchises. However, as "creatures of statute," municipal corporations (including counties) possess only those powers conferred on them by the constitution, statutes, and their charters.¹² *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 685-86, 743 P.2d 793 (1987) (citing 2 E. McQuillin, *Municipal Corporations* § 10.09 (3d rev. ed. 1979)). The County exaggerates its powers under RCW 36.55.010.

RCW 36.55.010 provides as follows:

Any board of county commissioners may grant franchises to persons or private or municipal corporations to use the right-of-way of county roads in their respective counties for the construction and maintenance of waterworks, gas pipes, telephone, telegraph, and electric light lines, sewers and any other such facilities.

¹² The County relies on two general charter provisions (Sections 110 and 220.20), neither of which provide any specific grant of authority to the County to impose the rental fee/tax. App. Br. at 46-47. Moreover, the Ordinance purports to authorize the imposition of the rental fee/tax, but delegates the authority to promulgate the Rules to be used to establish the rental fee/tax to its Facilities Management Division. As argued in the Districts' summary judgment briefing, the Ordinance is an unlawful delegation of the County's legislative powers. CP 113-14.

The only power delegated to the County under RCW 36.55.010 is the power to grant franchises. However, the power to “grant” franchises is not the power to “require” a franchise. *See Lakewood*, 106 Wn. App. at 73. Further, there is nothing in RCW 36.55.010 that provides the County with the authority to charge “rent” for the use of county roads and rights-of-way. The Court should affirm the trial court’s ruling that the County has not been granted the authority to impose the rental fee/tax.

2. The Applicable Statutes Are Not In Conflict and *Lakewood* is Dispositive of the County’s Claims.

a. The Relevant Statutes are Not In Conflict.

The County mispresents the Districts’ position as it relates to the issue of a conflict between the Ordinance and RCW 57.08.005. In its brief, the County wrongly states: “But as the District Utilities conceded, *see* CP 1708-11, RP 46, there is no conflict between Ordinance 18403’s Franchise Rental Compensation provisions and RCW 57.08.005.” App. Br. at 38. A simple review of the cited Clerk’s Papers and the Report of Proceedings will clearly show that the Districts never conceded the Ordinance was not in conflict with RCW 57.08.005. In fact, the Districts’ primary argument has always been that the Ordinance and Rules were in violation of, and in conflict with, the Districts’ statutory franchise under RCW 57.08.005.

What the Districts actually argued to the trial court was the fact that the statutes relied upon by the Districts and the County (i.e., RCW 57.08.005, RCW 36.55.010 and 36.75.020) were not in conflict. RP 46-47. Therefore, the statutes needed to be construed together which is precisely what the trial court did before issuing its ruling. Furthermore, even if the relevant statutes were determined to be in conflict, since RCW 57.08.005 is a specific statute, it would supersede the County's authority under RCW 36.55.010 to grant franchises which is only a general statute. *In re Little*, 106 Wn.2d at 284.

b. *Lakewood* is Dispositive on the Issue of Conflicting Statutes.

The Districts' argument that the statutes were not in conflict was based on the plain language of the statutes, in addition to the court's ruling in *Lakewood* which is on point and dispositive of the County's claims. The record is clear the trial court carefully and thoughtfully considered the *Lakewood* ruling and its impact on the parties' claims. The trial court correctly found that *Lakewood* was applicable to this case. *See* CP 2297-98; RP 59-60, RP 81-82. In fact, the trial court correctly noted that the language of the statute involved in *Lakewood* "is identical and analogous" to the statutes considered in this case. CP 2297.

The County engages in a tortured reading of RCW 57.08.005 and RCW 36.55.010 in an attempt to convince this Court the statutes would be rendered meaningless if the Court accepts the Districts' statutory franchise argument. *See* App. Br. at 38-40. For example, cherry picking words from the RCW 57.08.005, the County argues the Districts do not have a statutory franchise. Rather, the County asserts the Districts have to first acquire the necessary property rights for their facilities "by purchase or condemnation," or "acquire" such rights from the County. The County suggests this means the Districts must obtain a County franchise. The Districts' statutory franchise argument discussed above should allow this Court to easily dispatch with the County's argument.

Contrary to the County's assertions, the Districts have already been given a statutory right to use the public rights-of-way. The references to "purchase or condemnation" and "acquire" found in RCW 57.08.005 provide the Districts with the legal authority to acquire such additional rights as may be necessary to operate their water or sewer systems. This language relates to areas that are not within public rights-of-way. Similar to portions of the County's utility facilities, all the Districts have some portion of their water or sewer facilities located in areas outside of public rights-of-way. In those instances when it is necessary to locate facilities

outside of rights-of-way, the Districts have the authority under state law to purchase, condemn or acquire the necessary real property interests, whether in fee or by easement. The language relied upon by the County does not apply to rights-of-way the Legislature has already granted the Districts the right to use.

The County similarly strains to make the argument that the reference in RCW 36.55.010 which gives counties the authority to grant franchises to “municipal corporations” means the Legislature intended that Districts had to acquire a franchise from the County. App. Br. at 40. Again, the plain language of RCW 57.08.005 undercuts the County’s argument. Further, excluding water-sewer districts from the broad definition of “municipal corporations” does not render the statute meaningless because it still leaves the universe of other municipal corporations (e.g., cities, towns, counties, irrigation districts, flood control districts, fire districts, hospital districts, etc.) that do not already enjoy a statutory franchise granted by the Legislature. The Court should reject the County’s arguments in this regard.

The County also argues that this Court should take into consideration the fact the Legislature passed a statute in 1982, RCW 35.21.860, which prohibited cities and towns from imposing franchise fees

upon light, power or gas distribution business or telephone businesses using the rights-of-way. The County asserts that because the Legislature did not similarly restrict counties from imposing franchise fees through similar statutes, the County still retains the authority to charge the rental fee/tax. RCW 35.21.860 is irrelevant to this matter because it relates only to franchises granted by cities and towns to certain utilities, *i.e.*, utilities that do not already have a statutory franchise.¹³ Further, nothing in this statute would supersede the Districts' statutory franchise under RCW 57.08.005. Therefore, this Court should reject the County's argument.

In their motion for summary judgment, the Districts argued that the court's ruling in *Lakewood* was dispositive of the County's claims as it relates to the issue of conflicting statutes. In *Lakewood*, the court ruled that the city could not compel Pierce County to enter into a franchise agreement for the operation of its sewer system under Lakewood's streets. *Lakewood*, at 74. In its ruling, Division II considered a similar issue to what is now being raised by the County and rejected it.

¹³ The County further tries to confuse this Court by making reference to the fact that some districts have entered into franchise agreements with cities which provide for the payment of certain franchise fees. App. Br. at 40 n.17. This fact is irrelevant and inapposite. Cities have express statutory authority to assume and take over the Districts' jurisdiction and facilities. *See* Chapter 35.13A RCW. The County does not enjoy such statutory powers, nor can the County condemn the Districts' systems. RCW 36.94.020.

Lakewood's complaint focused on the asserted conflict between RCW 35A.47.040, authorizing cities to grant franchises for sewer operations under city streets, and RCW 36.94.140, authorizing counties to operate sewer systems. The city franchise statute in *Lakewood* is similar to the county franchise statute at issue in our case (RCW 36.55.010) and both statutes are general authorizations by the Legislature to "grant franchises."

Pierce County argued it had the authority to operate its sewer system under Lakewood's streets without a franchise pursuant to RCW 36.94.140, which provided the county with "full jurisdiction and authority to manage, regulate, and control" its sewer system. *Id.* at 67. The trial court agreed and ruled that Lakewood: (1) could not require Pierce County to obtain a franchise to operate its sewer system beneath Lakewood's streets and (2) could not charge Pierce County a franchise fee in excess of Lakewood's administrative costs. *Id.* at 68. As part of its decision, the trial court found that there was an inconsistency between RCW 35A.47.040 (city's power to grant franchises) and RCW 36.94.140 (county's full authority to regulate and control its sewer system) and that RCW 36.94.140 supersedes RCW 35A.47.040. The trial court found that RCW 35A.47.040 had to be construed to remove county sewers from the authority to permit and regulate and to grant franchises provided to Lakewood by statute.

On appeal, Division II reversed, holding that RCW 35A.47.040 and RCW 36.94.140 were not inconsistent. As such, the court found the trial court erred in excluding Pierce County's sewers from Lakewood's authority under RCW 35A.47.040 to grant franchises for the use of its streets for sewer systems. The court then reviewed what authority Lakewood did have under RCW 35A.47.040 "to grant nonexclusive franchises for the use of public streets." The court concluded that the power to "grant" franchises was not the power to "require" a franchise. *Id.* at 73. Ultimately, the court affirmed the trial court's decision that Lakewood could not require Pierce County to enter into a franchise agreement for the operation of its sewer system under Lakewood's streets. *Id.* at 74.

Concerned about the impact of *Lakewood*, the County asserts erroneously that the facts in *Lakewood* are wholly unrelated to the current dispute and the Districts were merely relying on non-binding *dicta* from *Lakewood*. App. Br. at 18. The County is wrong. The ruling in *Lakewood* has been recognized and cited with approval by this Court in *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007), which involved the legality of certain franchise agreements entered into between Seattle City Light and several cities. While the *Burns* case involved different legal issues, this Court similarly held that: "A city has the statutory authority to 'grant' a

franchise, not to ‘require’ one.” *Id.*, at 142 (citing *Lakewood*, 106 Wn. App. at 73). This Court further stated: “A city cannot compel the [utility] to accept its terms for the continued occupation of the streets.” *Id.* (citing *Gen. Tel. Co. of Nw., Inc. v. City of Bothell*, 105 Wn.2d 579, 586, 716 P.2d 879 (1986)). Therefore, it is obvious the legal principles set forth in *Lakewood* do not constitute mere *dicta*. The court’s ruling in *Lakewood* is dispositive to the County’s claims.

Based on the ruling in *Lakewood*, this Court should find that RCW 57.08.005(3) and (5) are not inconsistent with the County’s right to grant franchises under RCW 36.55.010 or the County’s right under RCW 36.75.020 to establish, layout, construct, alter, repair, improve and maintain its county roads.¹⁴ Since the statutes are not inconsistent, all the statutes must

¹⁴ It should also be noted that the Legislature granted this statutory franchise to water districts in laws dating back to 1913. *See* Ch. 161, Laws of 1913. The statutory franchise language for sewer districts was enacted in 1941. *See* Ch. 210, Laws of 1941. In 1997, Title 56 (for sewer districts) was merged into and re-codified as Title 57. As such, the statutory franchise for sewer districts also relates back to the original adoption date in 1913. In comparison, RCW 36.55.010, the current version of the general statute relied upon by the County giving counties the power to grant franchises, was enacted in 1937. *See* Ch. 187, Laws of 1937. Importantly, Section 38 of the Laws of 1937 specifically provided: “This act shall not be construed as an addition to existing laws and *shall not limit powers or rights which may be exercised under existing laws.*” (emphasis added). Therefore, the Legislature’s passage of the law giving counties the power to grant franchises did not limit or impact the pre-existing statutory franchise rights given to water districts twenty-five years earlier. The fact that the County statute, RCW 36.55.010, may be a re-enactment of prior law is irrelevant. There is nothing in the County statute (RCW 36.55.010) which states the Legislature intended its delegation of authority to counties to grant franchises to be superior to, or to supersede, the statutory franchise previously granted by the Legislature to water-sewer districts under RCW 57.08.005.

be read together in a manner which maintains the integrity of the respective statutes. The Districts have a statutory franchise to construct, operate and maintain their water and sewer facilities within public rights-of-way and the County may not condition the Districts' use of the rights-of-way on the payment of the rental fee/tax.

E. The County Exceeded its Legitimate "Home Rule" Powers.

The County contends its broad "home rule" powers give it authority to adopt the Ordinance because no statute expressly prohibited it. App. Br. at 45-47. The County's assertion is contrary to the applicable legal standard and should be rejected.

Art. XI, §4 of our Constitution states, in part: "Any county may frame a "Home Rule" charter for its own government subject to the Constitution and laws of this state. . . ." In *Carroll v. King County*, 78 Wn.2d 452, 457-58, 474 P.2d 877 (1970), this Court stated: "The people of this state, in adopting [Art. XI, §4], manifested an intent that they should have the right to conduct their *purely local affairs* without supervision by the state, so long as they abided by the provisions of the constitution and did not run counter to considerations of public policy of broad concern, *expressed in general laws.*" (emphasis added); *see also*, *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 168, 149 P.3d 616 (2006). A

similar constitutional restriction is found in art. XI, §11, pursuant to which counties are granted the power to make and enforce “all such local police, sanitary and other regulations as are *not in conflict with general laws.*” Wash. Const. art. XI, §11 (emphasis added).¹⁵

1. The Ordinance and Rules Fail to Address “Purely Local Affairs”.

The Ordinance and Rules which seek to impose a rental fee/tax on utilities using the public rights-of-way do not address “purely local affairs.” It is beyond question that the State has sovereign authority over all county roads. *See* RCW 36.75.020. Counties have been delegated the authority to establish, lay out, construct, alter, repair, improve and maintain the county road as mere agents of the state. *Id.*; *see also* 10A E. McQuillin, *Municipal Corporations* § 30:39, at 536, fn.5 (“Highways are of state-wide, not merely local, concern”) (case citation omitted). Because the Ordinance and

¹⁵ When the Legislature adopted the “code city” provisions in 1967 granting cities broad “home rule” powers, the Legislature specifically excluded the powers of eminent domain, borrowing, taxation and the granting of franchises from the scope of home rule powers. Home rule cities may only act in these four areas based on a specific statutory authorization. *See* RCW 35A.11.030; *see, also* Washington State Municipal Code Committee memorandum dated June 13, 1966 (A Review of the Objectives of the Municipal Code Committee; A Summary of the Chapters of the Optional Code as Prepared to Date; and a Survey of the Areas to be Completed). This memorandum discusses both the scope and limits intended to be granted to home rule cities. This memorandum was submitted to the 1967 Legislature as part of the proposed code city legislation which is codified in Title 35A RCW. Washington State Archives, Washington State Legislature, Municipal Committee, 15/E-1, 73-8-739, Boxes 17 & 18.

Rules involve issues that are of statewide concern, the Court should rule that the County has exceeded its legitimate home rule powers in the adoption of the Ordinance and Rules.

2. The Ordinance and Rules Conflict with General Law.

The County's adoption of the Ordinance and Rules is in conflict with two statutes of general application. A "general law" is one which applies to all persons or things of a class. *Young Men's Christian Ass'n v. Parish*, 89 Wash. 495, 497-98, 154 P. 785 (1916). As such, the County's exercise of its home rule powers is unlawful.

a. The Ordinance and Rules Conflict with RCW 57.08.005 Which Grant the Districts a Statutory Franchise.

As previously established, because the Ordinance and Rules seek to deny the Districts their statutory right under RCW 57.08.005 to use the public rights-of-way without the payment of the rental fee/tax, the Ordinance and Rules are in violation of general law (i.e., RCW 57.08.005).

The Constitution expressly relegates home rule charters and regulations to an inferior position in relation to the Constitution and the general laws of the state. *Washam v. Sonntag*, 74 Wn. App. 504, 508-09, 874 P.2d 188 (1994). If there is a conflict between a general law enacted by the Legislature and a charter provision or regulation adopted by a

municipal entity, the law is superior and supersedes the charter provision or regulation. *Id.* at 509; *see also* *Chemical Bank v. Washington Public Power Supply System*, 99 Wn.2d 772, 792-93, 666 P.2d 329 (1983) (*quoting* Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash.L.Rev. 743, 772 (1963)) (When the interest of the State is paramount to or joint with that of another municipality, the municipality has no power to act absent a delegation from the Legislature). Therefore, even if the State and the County are determined to have joint interests in public rights-of-way by virtue of RCW 36.55.010 and RCW 36.75.020, the County lacks a specific delegation of authority from the Legislature to impose the rental fee/tax. As such, the Districts' statutory franchise under RCW 57.08.005 supersedes the County's Ordinance and Rules.

Because the Ordinance and Rules are in conflict with the Districts' statutory rights under RCW 57.08.005, the Court should rule that the County has exceeded its legitimate home rule powers.

b. The Ordinance and Rules Further Conflict with the Districts' Rights Under Chapter 58.17 RCW Relating to Dedications.

The record before the Court includes numerous examples of plat dedications which establish that the majority of County roads were

dedicated “to the public” “for all public purposes” or similar words to that effect. CP 171-198, 935-950, 979-1012. The Districts are the intended beneficiaries of these dedications which are considered to be easements. As such, the Districts do not have to pay the County for using the Districts’ own easement rights.

The public nature and benefit of roads and streets becomes clear when one reviews the statutes relating to plats and subdivisions set forth in Chapter 58.17 RCW. Pursuant to RCW 58.17.010 municipal agencies engaged in the platting or subdivision process are required to “facilitate adequate provision for water [and] sewerage. . .” as development occurs. RCW 58.17.010. In addition, RCW 58.17.165 which relates to the formal process used to evidence a dedication requires plats to “contain the dedication of all streets and other areas to the public.” RCW 58.17.165; *see also* RCW 58.17.020 (defines dedications as being for “public uses”).

Under these platting statutes, when the County approves and records the plat, the County accepts the dedication on behalf of the *public* and not for the sole benefit of the County. Importantly, plat developers install water and sewer facilities in the platted streets, do the paving, install the sidewalks, storm drainage, etc. These facilities are in place (or bonded for) when the plat is accepted by the County. The County takes over the

platted streets with everything having been paid for by the developer, the real cost of which is passed on to the home buyers. Those home buyers become district customers – who bear all of the costs of water and sewer operations. To charge rent to the Districts is to effectively charge the homeowners again for what they already paid for when they bought their houses.

Plats that contain similar dedication language (*i.e.*, “to the public . . . for all public purposes”) have the legal effect of granting to the Districts an easement right to use the rights-of-way. See *Northwest Supermarkets, Inc. v. Crabtree*, 54 Wn.2d 181, 186, 338 P.2d 733 (1959) (court found similar “to the public” dedication language covered a storm water facility); *see also North Spokane Irrigation Distr. No. 8 v. County of Spokane*, 86 Wn.2d 599, 604-606, 547 P.2d 859 (1976) (irrigation district’s interest via dedication was sufficient to support a takings claim).

Because the Districts hold easement rights to use public rights-of-way through these dedications, the Districts do not have to pay the County the rental fee/tax for such use. Therefore, the Ordinance and Rules are in conflict with the Districts’ statutory rights under Chapter 58.17 RCW and the Court should rule that the County has exceeded its legitimate home rule powers.

F. The Ordinance Mandates Indemnification of the County in Violation of State Law.

RCW 70.315.060(3) expressly provides that the County and Districts “may, as the parties mutually agree” enter into a franchise or other agreement whereby the County is provided with an indemnification relating to fire suppression activities during fire events. The plain meaning of this statute is that any indemnification agreement provided by the Districts is to be the subject of voluntary negotiations and must be mutually agreed to by the parties.

However, §7 of the Ordinance makes it mandatory that all County franchises include an indemnification provision pursuant to which the Districts will be required to indemnify the County from damages relating to fire suppression activities during fire events. CP 272-73. Further, the Rules provide that a County franchise will not be issued to any utility that fails to reach an agreement with the County on the terms of a franchise consistent with the Ordinance. CP 298. When read together, the language in the Ordinance and Rules regarding the indemnification requirement will allow the County to withhold granting a franchise to any District that is unwilling to indemnify the County. The County’s Ordinance mandating this indemnification as a condition of obtaining a franchise violates RCW

70.315.060(3) and is unenforceable. *See Lakewood*, 106 Wn. App. at 74 (city cannot compel Pierce County to accept franchise terms with which it does not agree).

This Court should rule that §7 of the Ordinance requiring the Districts to indemnify the County in any new franchise agreement is contrary to law and unenforceable.

VI. CONCLUSION

For the reasons discussed above, this Court should affirm the trial court's well-reasoned decision that the County lacks the authority to impose the rental fee/tax on the Districts. The rental fee/tax constitutes an unlawful tax. Moreover, the Districts already enjoy a statutory franchise granted by the Legislature in RCW 57.08.005 to use the rights-of-way. Therefore, the Districts are not required to pay the County a rental fee/tax as a condition of using the public rights-of-way.

Respectfully submitted this 15th day of May, 2019.

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DECLARATION OF SERVICE

I, Leslie M. Addis, declare under penalty and perjury under the laws of the State of Washington, that on the 15th day of May, 2019, I caused to be served a true and correct copy of the foregoing document, via E-Service through the Washington State Appellant/Supreme Court Portal, upon the parties listed below:

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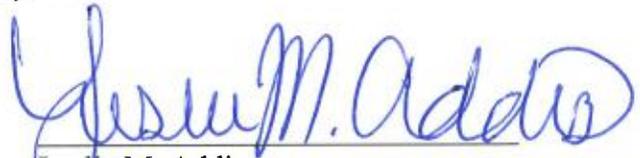
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DATED this 15th day of May, 2019.



Leslie M. Addis
Legal Assistant

APPENDIX

Order & Judgment Granting Defendants' Motions for Summary Judgment	App. 1-24
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Honorable Samuel Chung

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KING COUNTY,

Plaintiff,

v.

KING COUNTY WATER DISTRICTS Nos.
20, 45, 49, 90, 111, 119 and 125; *et al.*,

Defendants,

and

AMES LAKE WATER ASSOCIATION, *et al.*,

Intervenor-Defendants.

NO. 18-2-02238-0 SEA

ORDER AND JUDGMENT
GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

This matter came on for hearing before this Court on July 27, 2018, upon cross-motions for summary judgment by plaintiff King County, the defendant water-sewer districts, and the intervenor-defendants (the defendant water-sewer districts and intervenor-defendants are referred to collectively herein as the "utility defendants"). The Court heard and duly considered

1 the oral arguments of counsel and has reviewed the following documents submitted in support
2 of or in opposition to the motions for summary judgment:

3 1. King County's Motion for Summary Judgment, filed on June 22, 2018 (clerk's
4 docket submittal number ("sub.") 55);
5

6 2. Declaration of Anthony Gibbons, MAI, CRE in Support of King County's
7 Motion for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 57);

8 3. Declaration of Anthony Wright in Support of King County's Motion for
9 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 59);

10 4. Declaration of Rick Brater in Support of King County's Motion for Summary
11 Judgment, filed on June 22, 2018, and exhibits thereto (sub. 58);
12

13 5. Declaration of Matthew J. Segal in Support of King County's Motion for
14 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 56);

15 6. Defendant Districts' Motion for Summary Judgment, filed on June 22, 2018
16 (sub. 33);

17 7. Declaration of Cynthia Lamothe in Support of the Defendant Districts' Motion
18 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 39);
19

20 8. Declaration of Darcey Peterson in Support of the Defendant Districts' Motion
21 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 42);

22 9. Declaration of Eric Frimodt in Support of the Defendant Districts' Motion for
23 Summary Judgment, filed on June 22, 2018, and exhibits thereto (subs. 37 and 60);
24
25

1 10. Declaration of James Kuntz in Support of the Defendant Districts' Motion for
2 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 43);

3 11. Declaration of John C. Krauss in Support of the Defendant Districts' Motion for
4 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 34);

5 12. Declaration of Michael Amburgey in Support of the Defendant Districts' Motion
6 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 41);

7 13. Declaration of Patrick Sorensen in Support of the Defendant Districts' Motion
8 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 40);

9 14. Declaration of Thomas D. Keown in Support of the Defendant Districts' Motion
10 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 38);

11 15. Defendant-Intervenors' Motion for Summary Judgment, filed on June 22, 2018
12 (sub. 45);

13 16. Declaration of David Jurca in Support of Intervenor-Defendants' Motion for
14 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 52);

15 17. Declaration of Denny Scott in Support of Intervenor-Defendants' Motion for
16 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 47);

17 18. Declaration of Kelly Robinson in Support of Intervenor-Defendants' Motion for
18 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 51);

19 19. Declaration of Nick Himebauch in Support of Intervenor-Defendants' Motion
20 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 50);

1 20. Declaration of Robert Pancoast in Support of Intervenor-Defendants' Motion for
2 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 46);

3 21. Declaration of Teresa L. Fowlkes in Support of Intervenor-Defendants' Motion
4 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 49);

5 22. Declaration of Tim Ashcraft in Support of Intervenor-Defendants' Motion for
6 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 48);

7 23. Motion of Washington Rural Electric Cooperative Association to File an Amicus
8 Brief, with subjoined Amicus Brief of Washington Rural Electric Cooperative Association in
9 Opposition to King County's Motion for Summary Judgment, filed on July 16, 2018 (sub.
10 77B);

11 24. Declaration of Kent Lopez in Opposition to King County's Motion for Summary
12 Judgment and in Support of WRECA's Motion to File Amicus Brief, filed on July 16, 2018,
13 and exhibits thereto (sub. 77D);

14 25. Declaration of Steven Walter in Opposition to King County's Motion for
15 Summary Judgment and in Support of WRECA's Motion to File Amicus Brief, filed on July
16 16, 2018, and exhibits thereto (sub. 77C);

17 26. King County's Combined Opposition to Motions for Summary Judgment, filed
18 on July 16, 2018 (sub. 76);

19 27. Second Declaration of Anthony Wright, filed on July 17, 2018 (sub. 78);

20 28. Second Declaration of Matthew J. Segal, filed on July 16, 2018, and exhibits
21 thereto (sub. 77);
22
23
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- 1 29. Defendant Districts' Response to King County's Motion for Summary
2 Judgment, filed on July 16, 2018 (sub. 65);
- 3 30. Declaration of Byron Murgatroyd, filed on July 16, 2018, and exhibits thereto
4 (sub. 68);
- 5 31. Supplemental Declaration of Eric Frimodt, filed on July 16, 2018, and exhibits
6 thereto (sub. 66);
- 7 32. Declaration of Hannah McFarland, filed on July 16, 2018, and exhibits thereto
8 (sub. 69);
- 9 33. Declaration of S. Murray Brackett, filed on July 16, 2018, and exhibit thereto
10 (sub. 67);
- 11 34. Errata re: Supplemental Declaration of Eric Frimodt to Correct Date of
12 Signature, filed on July 17, 2018, and attachment thereto (sub. 81);
- 13 35. Intervenor-Defendants' Response to King County's Motion for Summary
14 Judgment, filed on July 16, 2018 (sub. 71);
- 15 36. King County's Combined Reply Brief in Support of Motion for Summary
16 Judgment, filed on July 23, 2018 (sub. 87);
- 17 37. Praecipe to the Declaration of Anthony Gibbons in Support of King County's
18 Motion for Summary Judgment, filed on July 23, 2018, and attachment thereto (sub. 96);
- 19 38. Second Declaration of Anthony Gibbons, MAI, CRE in Support of King
20 County's Reply to Its Motion for Summary Judgment, filed on July 23, 2018, and exhibits
21 thereto (sub. 89);
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1 39. Third Declaration of Matthew J. Segal, filed on July 23, 2018, and exhibits
2 thereto (sub. 88);

3 40. Defendant Districts' Reply, filed on July 23, 2018 (sub. 85);

4 41. Intervenor-Defendants' Reply in Support of Their Motion for Summary
5 Judgment, filed on July 23, 2018 (sub. 82);

6 42. King County's Opposition to Motion of Washington Rural Electric Cooperative
7 Association's Motion to File an Amicus Brief, filed on July 25, 2018 (sub. 100);

8 43. Response of WRECA to King County's Objection to Motion of Washington
9 Rural Electric Cooperative Association's Motion to File an Amicus Brief, filed on July 26,
10 2018 (sub. 108);

11 44. Order Granting Motion to File Amicus Brief in Opposition to King County's
12 Motion for Summary Judgment, filed on July 26, 2018 (sub. 113); and

13 45. King County's Response to Amicus Brief of Washington Rural Electric
14 Cooperative Association, filed on July 31, 2018 (sub. 117).

15 At the conclusion of the hearing on July 27, 2018, the Court took the matter under
16 advisement and advised counsel that its decision would be announced at a telephonic hearing on
17 August 1, 2018. At a telephonic hearing on that date, the Court announced its decision on the
18 cross-motions for summary judgment. A transcript of the Court's oral ruling on that date is
19 attached hereto and by this reference is incorporated herein.

20 Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

21 1. Plaintiff King County's motion for summary judgment is denied;
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1 2. Defendant water-sewer districts' motion for summary judgment is granted, to the
2 extent set forth herein;

3 3. Intervenor-defendants' motion for summary judgment is granted, to the extent
4 set forth herein;

5 4. Water-sewer districts have statutory authority under RCW 57.08.005(3) and (5)
6 to locate, operate and maintain their water and sewer facilities in "public highways, roads, and
7 streets";

8 5. King County may regulate the use of county roads and public rights-of-way in
9 the public interest and charge utilities for the reasonable administrative costs of performing
10 such regulation;

11 6. However, King County (i) lacks authority to impose "franchise compensation"
12 or "rent" as provided in Ordinance 18403 on the utility defendants for using county roads or
13 public rights-of-way for delivery of utility services, and (ii) lacks the authority to require the
14 utility defendants to pay, or to agree to pay, "franchise compensation" or "rent" as provided in
15 Ordinance 18403 for use of county roads or public rights-of-way for delivery of utility services,
16 either as a condition of obtaining, maintaining or renewing a franchise or otherwise;

17 7. Franchises are contracts which must be negotiated and agreed upon by the
18 parties thereto, and King County may not require the utility defendants to enter into a franchise
19 agreement by accepting King County's franchise terms;

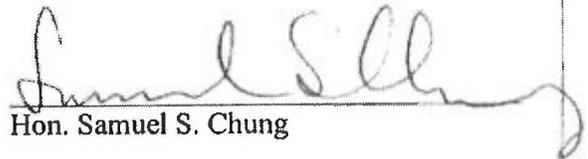
20 8. Sections 1.F, 1.G, 7.B, 8, and 10.B of Ordinance 18403, and the reference to
21 franchise compensation in section 10.A thereof ("or to pay franchise compensation as required
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1 by K.C.C. 6.27.060.B”), as well as Rule RPM 9-2 promulgated pursuant to said Ordinance, and
2 any other provision, interpretation or implementation of the Ordinance not consistent with this
3 Order, are invalid and unenforceable;

4
5 9. King County’s complaint is dismissed, with prejudice; and

6 10. The water-sewer district defendants and intervenor-defendants are deemed the
7 prevailing parties in this action and are entitled to an award of taxable costs, subject to the filing
8 and approval of a cost bill.

9
10 Dated this 4th day of September, 2018.

11 
12 Hon. Samuel S. Chung

13
14 Presented by:

15 INSLEE, BEST, DOEZIE & RYDER, P.S.

16 By _____
17 Eric C. Frimodt, WSBA #21938
18 John W. Milne, WSBA #10697

19
20 _____
21 Hugh D. Spitzer, WSBA #5827

22 Attorneys for Water-Sewer District Defendants

23 JONSON & JONSON, P.S.

24 By _____
25 Richard Jonson, WSBA #11867

1 HELSELL FETTERMAN LLP

2 By _____
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4 Attorneys for Intervenor-Defendants

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1 SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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3 KING COUNTY,)

4 Plaintiff,)

5 vs.) 18-2-02238-0 SEA

6 KING COUNTY WATER DISTRICTS)

7 NOs. 20, 45, 49, 90, 111, 119,)

8 et al,)

9 Defendants,)

10 and)

11 AMES LAKE WATER ASSOCIATION,)

12 DOCKTON WATER ASSOCIATION,)

13 Foothills Water Association,)

14 SALLAL WATER ASSOCIATION,)

15 TANNER ELECTRIC COOPERATIVE,)

16 and UNION HILL WATER)

17 ASSOCIATION,)

18 Intervenor-Defendants.)

19

20 VERBATIM REPORT OF PROCEEDINGS BEFORE

21 THE HONORABLE SAMUEL S. CHUNG

22

23 AUGUST 1, 2018

24 TRANSCRIBED FROM RECORDING BY:

25 CHERYL J. HAMMER, RPR, CCR 2512



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I N D E X

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Court presents ruling	7



1 MR. HARRIS: Malcolm Harris.
2 THE COURT: I'm sorry. Let's do one
3 by one.
4 MR. HARRIS: Malcolm Harris is on the
5 line.
6 THE COURT: And who do you represent?
7 MR. HARRIS: Water District 119.
8 THE COURT: All right.
9 MALE VOICE: We also have some
10 additional King County attorneys listening in. Do you
11 want their names as well?
12 THE COURT: I don't think it's
13 necessary. No offense. I think we have everyone's
14 representation on the record. So, all right. Let's
15 move forward.
16 MR. JONSON: Your Honor, my name's
17 Richard Jonson. I'm co-counsel.
18 THE COURT: I'm sorry, sir.
19 MR. JONSON: I'm co-counsel for the
20 interveners. I'm also on the line.
21 THE COURT: All right. Thank you. So
22 this is King County versus King County Water District,
23 et al, Case Number 18-2-02238-0. This is a
24 cross-motion for summary judgment. A hearing was held
25 on Friday, July 27, 2018. At the hearing I told the

1 parties that I will announce my ruling at this
2 conference call.

3 We're on record, and we're being
4 recorded. I'm going to read my ruling into the
5 record, and if there are any questions that I'll --
6 that you need to ask, if you could hold it till the
7 very end and then we can talk about it afterwards.

8 I'll try to read slow. All right. Is
9 everyone following so far?

10 COLLECTIVE VOICES: Yes, Your Honor.

11 THE COURT: Thank you. All right.

12 This matter concerns King County Ordinance 18403,
13 adopted by the county council on November 7, 2016.

14 According to the ordinance section
15 ^A 8 (a), quote, each franchise for electric, gas, water,
16 or sewer utilities granted by King County shall
17 include a requirement that the grantee of the
18 franchise provide the county reasonable compensation
19 ⁱⁿ and return for the right to use the right-of-way for
20 the purposes of constructing, operating, maintaining,
21 repairing utility facilities and related appurtenances
22 for which the purpose of the section is franchise
23 compensation.

24 Section B of the ordinance states,
25 franchise compensation shall be in the nature of rent



1 and shall be paid annually. The methodology for
 2 calculating the rents are land value of the
 3 right-of-way, the ^{approximate} amount of the area, reasonable rate
 4 of return for the use, et cetera.

5 The rules adopted for this ordinance
 6 provides a detailed procedure and criteria for
 7 calculating the rent and provides that the utility --
 8 that a utility would not be in compliance -- who's not
 9 in compliance will result in not being granted a
 10 franchise. Let me repeat that. It provides that a
 11 utility that is not in compliance will result in not
 12 being granted a franchise.

13 According to the King County Council
 14 Budget and Fiscal Management Committee report, the new
 15 fee is anticipated to generate approximately 9.78
 16 million dollars in 2018. The ordinance has other
 17 aspects such as an increase in the application fee, et
 18 cetera, but the issue before this court is whether the
 19 franchise compensation, as is set forth in this
 20 ordinance, is legal.

21 I rule that it is not, and I grant
 22 summary judgment in favor of the defendant utilities.
 23 I will now explain my reasoning.

24 Ordinance 18403 states that RCW
 25 36.75.020 and 040 grants King County broad authority



1 to establish and regulate the use of county roads.
 2 The county cites other sections under Title 36.75 and
 3 asserts that the county, as a home ruled county, has
 4 broad powers and that the county's rights are such
 5 that it effectively encompasses the critical
 6 attributes of a fee interest.

7 The secondary use of the
 8 right-of-ways by the utilities are permitted by state
 9 statute, but they are under the authority of the
 10 county.

11 During oral argument, counsel for the
 12 county asserted that the county's authority and powers
 13 are broad, and that unless there is a specific
 14 prohibition against such fees, the franchise
 15 compensation in this case must be upheld.

16 This case is really about statutory
 17 interpretation, which is a question of law reviewed de
 18 novo. Department of Ecology versus Campbell, 146
 19 Washington 1, a 2002 case.

20 This court's primary goal in
 21 interpreting statutes is to ascertain and give effect
 22 to legislative intent. State versus Pacific Health
 23 Center, Inc., 135 Washington App 149, a 2006 case.

24 Statutes on the same subject matter
 25 must be read together to give each effect and to



1 harmonize each with -- with the other. US West
2 Communications, Inc. versus Washington Utilities and
3 Transportation, 134 Washington 2nd 74, a 1997 case.

4 Every provision of a statute must be
5 viewed in relation to other provisions and harmonized,
6 if at all possible. In Re: Arbitration of Mooberry
7 108 Washington App 654, a 2001 case.

8 Statutes relating to the same subject
9 must be read together as unified whole to achieve a
10 harmonious statutory scheme that maintains the
11 integrity of the respective statutes. In Re: Mooberry
12 at 657.

13 As stated, the county's authority over
14 the right-of-ways must be read in harmony with other
15 statutes in play in this case. One of them is RCW
16 57.08.005, that authorizes utilities districts to have
17 certain powers. Subsection 3 provides, quote, a
18 district may take, condemn, and purchase by means of
19 aqueducts or pipeline, conduct the same throughout the
20 district and in any city or town therein and carry it
21 along and upon public highways, roads, and streets, et
22 cetera.

23 At least with respect to the public
24 utilities, this enabling statutes -- statute
25 recognizes their statutory authority to carry their



1 business over the public roads and streets.

2 The second relevant statute is RCW
3 36.⁵⁵~~00~~.010 regarding the grant of franchise by the
4 county. It states, quote, any board of county
5 commissioners may grant franchises to persons or
6 private ^{or municipal} ~~permissible~~ corporations to use the
7 right-of-way of county roads in their respective
8 counties for the construction and maintenance of water
9 works, et cetera.

10 The third relevant statute is RCW
11 36.55.060, entitled limitations upon grants. It
12 provides, subsection 1, any person constructing or
13 operating any utility on or along the county road
14 shall be liable to the county for all necessary
15 expense incurred in restoring the county road to a
16 suitable condition for travel. I'm not going to read
17 all five subsections on that one.

18 Reading these statutes together, it is
19 apparent to this court that the county, when it grants
20 a franchise to utilities, is entitled to recover its
21 restoration costs and other related expenses. It is
22 the -- the statutes are silent as to any rents based
23 on usage.

24 I recognize that this is a new area of
25 law. Counsel for the county conceded at oral argument



1 that this franchise compensation rent is brand new and
 2 no other county in Washington has tried it before. As
 3 a result, there really is no case squarely on point,
 4 and the closest case that comes to provide guidance is
 5 a published opinion from Division 2, the City of
 6 Lakewood versus Pierce County, 106 Washington App 63,
 7 a 2001 case.

8 I'm not going to recite the facts, as
 9 the parties seem to know the case much better than I
 10 do and have spent many pages trying to uphold or
 11 distinguish it, depending on which side you're on.

12 The setting, however, was the city
 13 versus county, and although it involved a different
 14 statute, RCW 35A.47.040, the language of the statute
 15 is identical and analogous because it states a city,
 16 quote, may grant nonexclusive franchise ^{for} use of the
 17 public streets, similar to RCW 36.55.010, which
 18 provides county, quote, may grant franchise, end
 19 quote.

20 The holding in that case upholding the
 21 trial court's decision that the City of Lakewood may
 22 not require the county to enter into a franchise
 23 agreement and to accept the terms it offered is
 24 applicable here as well.

25 A franchise is a contract and requires



1 the parties to negotiate and enter into an agreement.
2 The county, despite its valiant efforts and all the
3 hard work by many smart people, cannot compel its
4 terms unilaterally on the utilities.

5 Because I'm finding that the county
6 lacked the authority to impose a franchise
7 compensation rent, I'm granting summary judgment in
8 favor of the defendant utilities, and I will sign an
9 order accordingly.

10 That's the ruling, and I'm going to
11 ask the prevailing party to submit a written order for
12 review and my signature.

13 Any questions from anyone?

14 MALE VOICE: First question, Your
15 Honor. This is ^{Dave Jurea} (~~unintelligible~~). Will the reporter
16 be able to provide us with a copy of the -- or the
17 transcript of the ruling? It would be very helpful in
18 preparing the order.

19 THE COURT: I was hoping that you
20 would have recorded this by now, but can you provide
21 them a transcript? We can make arrangements to do
22 that and Mr. Palmer will stick around to have that
23 done.

24 MALE VOICE: Thank you.

25 THE COURT: All right. I want to



1 thank all the counsels for all their work. It was a
2 hard fought battle, it appears, and good luck on your
3 appeals.

4 All right. I don't have anything to
5 add, so I'll sign off then.

6 MALE VOICE: Thank you, Your Honor.

7 MALE VOICE: Thank you, Your Honor.

8 THE COURT: All right. Bye bye.

9 (Proceedings concluded at 3:43 p.m.)

10 (END OF TRANSCRIPTION)

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TRANSCRIPTION CERTIFICATE

I, CHERYL J. HAMMER, the undersigned
Certified Court Reporter in and for the state of
Washington, do hereby certify:

That the foregoing transcript was
transcribed under my direction; that the transcript is
true and accurate to the best of my knowledge and
ability to hear the audio; that I am not a relative or
employee of any attorney or counsel employed by the
parties hereto; nor am I financially interested in the
event of the cause.

WITNESS MY HAND this 21st day of August
2018.

Cheryl J. Hammer

CHERYL J. HAMMER
Certified Court Reporter
CCR No. 2512
chammer@yomreporting.com

INSLEE, BEST, DOEZIE & RYDER, P.S.

May 15, 2019 - 1:53 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96360-6
Appellate Court Case Title: King County v. King County Water Districts, et al
Superior Court Case Number: 18-2-02238-0

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Comments:

1. Motion for Leave to File Over-Length Brief of District Respondents 2. Districts' Response Brief

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