

FILED
SUPREME COURT
STATE OF WASHINGTON
3/26/2019 12:51 PM
BY SUSAN L. CARLSON
CLERK

No. 96585-4

SUPREME COURT
OF THE STATE OF WASHINGTON

LAKEHAVEN WATER AND SEWER DISTRICT, HIGHLINE
WATER DISTRICT, and MIDWAY SEWER DISTRICT,
municipal corporations,

Appellants,

v.

CITY OF FEDERAL WAY, a municipal corporation,

Respondent.

BRIEF OF APPELLANTS

John W. Milne
WSBA #10697
Mark S. Leen
WSBA #35934
Inslee Best Doezie & Ryder PS
10900 NE Fourth Avenue
Suite 1500
Bellevue, WA 98004-8345
(425) 455-1234

Philip A. Talmadge
WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Appellants

Steven H. Pritchett
WSBA #12792
Lakehaven Water and
Sewer District
PO Box 4249
Federal Way, WA 98063
(253) 941-1516
Attorney for Lakehaven Water
and Sewer District

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-ix
A. INTRODUCTION	1
B. ASSIGNMENT OF ERROR	2
(1) <u>Assignment of Error</u>	2
(2) <u>Issues Pertaining to Assignment of Error</u>	2
C. STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT	10
E. ARGUMENT	13
(1) <u>The City’s Power to Tax</u>	13
(2) <u>The City May Not Tax the Districts</u>	16
(a) <u>The City Lacks Express Statutory Authority to Tax the Districts</u>	17
(b) <u>The Governmental Immunity Doctrine Is Not Confined to “Governmental Services”</u>	20
(c) <u>If the Court Chooses to Apply the Governmental/Proprietary Services Distinction, the Districts’ Services Are Governmental</u>	26
(d) <u>The City May Not Tax District Revenues Devoted to Pay for Governmental Services</u>	40
(3) <u>The City’s Tax Is Unconstitutional on Its Face and As Applied to the Districts</u>	43

(a)	<u>The City’s Tax Violates the Districts’ Due Process Rights Because It Is Void for Vagueness</u>	44
(b)	<u>The City’s Tax Is Unconstitutional under Article I, § 12 Because the City Gave Tacoma Special Treatment in Exempting It from Its Utility Tax</u>	49
F.	CONCLUSION.....	55

Appendix

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Arborwood Idaho L.L.C. v. City of Kennewick</i> , 151 Wn.2d 359, 89 P.3d 217 (2004).....	14, 15
<i>Assoc. of Wash. Spirits and Wine Distributors v. Wash. State Liquor Control Bd.</i> , 182 Wn.2d 342, 340 P.3d 849 (2015).....	52
<i>Boyer v. City of Tacoma</i> , 156 Wash. 280, 286 Pac. 659 (1930).....	32
<i>Burba v. City of Vancouver</i> , 113 Wn.2d 800, 783 P.2d 1056 (1989).....	18
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	23
<i>Carkonen v. Williams</i> , 76 Wn.2d 617, 458 P.2d 280 (1969).....	14
<i>Carpenter v. Island County</i> , 14 Wn. App. 843, 545 P.2d 1218 (1976), <i>aff'd</i> , 89 Wn.2d 881, 577 P.2d 575 (1978).....	37
<i>Cedar River Water and Sewer Dist. v. King Cty.</i> , 178 Wn.2d 763, 315 P.3d 1065 (2013).....	4, 36
<i>Central Puget Sound Regional Transit Authority v. WR-SRI 120th North LLC</i> , 191 Wn.2d 223, 422 P.3d 891 (2018).....	15
<i>Citizens for Financially Responsible Gov't v. City of Spokane</i> , 99 Wn.2d 339, 662 P.2d 845 (1983).....	14
<i>City of Bellevue v. Patterson</i> , 16 Wn. App. 386, 556 P.2d 944 (1976), <i>review denied</i> , 89 Wn.2d 1004 (1977).....	18
<i>City of Kennewick v. Benton Cty.</i> , 131 Wn.2d 768, 935 P.2d 606 (1997).....	16
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	43
<i>City of Seattle v. Dencker</i> , 58 Wash. 501, 108 Pac. 1086 (1910).....	53
<i>City of Seattle v. State</i> , 59 Wn.2d 150, 367 P.2d 123 (1961).....	18
<i>City of Seattle v. Stirrat</i> , 55 Wash. 560, 104 Pac. 834 (1909).....	28
<i>City of Seattle v. T-Mobile West Corp.</i> , 199 Wn. App. 79, 397 P.2d 931, <i>review denied</i> , 189 Wn.2d 1018 (2017).....	15
<i>City of Spokane v. Carlson</i> , 73 Wn.2d 76, 8436 P.2d 454 (1968).....	34

<i>City of Spokane v. Horton</i> , 189 Wn.2d 696, 406 P.3d 638 (2017).....	14, 49
<i>City of Spokane v. Macho</i> , 51 Wash. 322, 98 Pac. 755 (1909).....	52-53
<i>City of Tacoma v. City of Bonney Lake</i> , 173 Wn.2d 584, 269 P.3d 1017 (2012).....	32, 33
<i>City of Tacoma v. Taxpayers of the City of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	14
<i>City of Wenatchee v. Chelan County Pub. Util. Dist. No. 1</i> , 181 Wn. App. 326, 325 P.3d 419 (2014).....	<i>passim</i>
<i>Dep't of Revenue v. March</i> , 25 Wn. App. 314, 610 P.2d 916 (1979).....	21
<i>Dowler v. Clover Park Sch. Dist. No. 400</i> , 172 Wn.2d 471, 258 P.3d 676 (2011).....	13
<i>Ex parte Camp</i> , 38 Wash. 393, 80 Pac. 547 (1905).....	52
<i>Fabre v. Town of Ruston</i> , 180 Wn. App. 150, 321 P.3d 1208 (2014).....	6
<i>Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	51, 53
<i>Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue</i> , 106 Wn.2d 391, 722 P.2d 787 (1986).....	15
<i>Hayes v. City of Vancouver</i> , 61 Wash. 536, 112 Pac. 498 (1911).....	35
<i>Housing Authority of City of Seattle v. City of Seattle</i> , 56 Wn.2d 10, 351 P.2d 117 (1960).....	54
<i>King County v. City of Algona</i> , 101 Wn.2d 789, 681 P.2d 1281 (1984).....	<i>passim</i>
<i>King County v. City of Seattle</i> , 68 Wn.2d 688, 414 P.2d 1016 (1966).....	15
<i>King County Fire Protection Dists. #16, 36, 40 v. Housing Authority of King County</i> , 123 Wn.2d 819, 872 P.2d 516 (1994).....	54
<i>Kittitas County v. Allphin</i> , 190 Wn.2d 691, 416 P.3d 1232 (2018).....	13
<i>Lane v. City of Seattle</i> , 164 Wn.2d 875, 194 P.3d 977 (2008).....	32, 33, 34
<i>Loger v. Wash Timber Prods., Inc.</i> , 8 Wn. App. 921, 509 P.2d 1009, <i>review denied</i> , 82 Wn.2d 1011 (1973).....	4
<i>Nelson v. City of Spokane</i> , 104 Wash. 219, 176 Pac. 149 (1918).....	4
<i>Nolte v. City of Olympia</i> , 96 Wn. App. 944, 982 P.2d 659 (1999).....	32
<i>Ockletree v. Franciscan Health Sys.</i> , 179 Wn.2d 769, 317 P.3d 1009 (2014).....	51, 52, 54
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003).....	15, 41, 42, 43
<i>Okeson v. City of Seattle</i> , 159 Wn.2d 436, 150 P.3d 556 (2007).....	13

<i>Pac. First Fed. Sav. & Loan Ass'n v. Pierce Cty.</i> , 27 Wn.2d 347, 178 P.2d 351 (1947).....	15
<i>Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health</i> , 151 Wn.2d 428, 90 P.3d 37 (2004).....	32, 38
<i>Pub. Util. Dist. No. 1 of Okanogan County v. State</i> , 182 Wn.2d 519, 342 P.3d 308 (2015).....	15
<i>Ranger Ins. Co. v. Pierce Cty.</i> , 164 Wn.2d 545, 192 P.3d 886 (2008).....	13
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997), review denied, 140 Wn.2d 1021 (2000).....	21
<i>Snavely v. City of Goldendale</i> , 10 Wn.2d 453, 117 P.2d 221 (1941)	35
<i>Spokane Research & Defense Fund v. Spokane Cty.</i> , 139 Wn. App 450, 160 P.3d 1096 (2007).....	16
<i>State v. Murray</i> , 190 Wn.2d 727, 416 P.3d 1225 (2018).....	45
<i>State v. W.W. Robinson Co.</i> , 84 Wash. 246, 146 Pac. 628 (1915).....	53
<i>State v. Vance</i> , 29 Wash. 435, 70 Pac. 34 (1902)	52, 53
<i>State ex rel. Church v. Superior Court</i> , 40 Wn.2d 90, 240 P.2d 1208 (1952).....	35
<i>Steifel v. City of Kent</i> , 132 Wn. App. 523, 132 P.3d 1111 (2006).....	29
<i>Sunshine Heifers, Ltd. v. Wash. State Dep't of Agriculture</i> , 188 Wn. App. 960, 355 P.3d 1204 (2015).....	4
<i>Taylor v. Stevens Cty.</i> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	4
<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1985).....	30-31
<i>Thurston County v. Cooper Point Ass'n</i> , 148 Wn.2d 1, 57 P.3d 1156 (2002).....	36
<i>Town of Steilacoom v. Thompson</i> , 69 Wn.2d 705, 419 P.2d 989 (1966).....	35
<i>Voter Educ. Committee v. Wash. State Pub. Disclosure Comm'n</i> , 161 Wn.2d 470, 166 P.3d 1174 (2007), cert. denied, 553 U.S. 1079 (2008).....	45
<i>Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.</i> , 165 Wn.2d 679, 202 P.3d 924 (2009).....	4, 28, 37
<i>Watson v. City of Seattle</i> , 189 Wn.2d 149, 401 P.3d 1 (2017).....	14
<i>Whatcom County v. Hirst</i> , 186 Wn.2d 648, 381 P.3d 1 (2016)	31
<i>Wheeler v. Ronald Sewer Dist.</i> , 58 Wn.2d 444, 364 P.2d 30 (1961).....	13

Federal Cases

City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849,
144 L. Ed. 2d 67 (1999).....44, 45

Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110,
74 S. Ct. 403, 98 L. Ed. 546 (1954).....16

M’Culloch v. Maryland, 17 U.S. 316,
4 L. Ed. 579 (1819).....16

New York v. United States, 326 U.S. 572, 66 S. Ct. 310,
90 L. Ed. 326 (1946).....25

Pacific Tel. & Tel. Co. v. City of Seattle, 291 U.S. 300,
54 S. Ct. 383, 78 L. Ed. 810 (1934).....47

Patel v. City of San Bernardino, 310 F.3d 1138 (9th Cir. 2002).....21

Puget Sound Power and Light Co. v. City of Seattle, 291 U.S. 619,
78 L. Ed. 1025, 54 S. Ct. 542 (1934).....47

Sessions v. Dimaya, __ U.S. __, 138 S. Ct. 1204,
200 L. Ed. 2d 549 (2018).....44

Other States

City and County of Denver v. Mountain States, Tel. and Tel. Co.,
754 P.2d 1172 (Colo. 1988).....25

City of Portland v. Multnomah Cty., 296 Pac. 48 (Or. 1931).....16

City of Tempe v. Ariz. Bd. of Regents,
461 P.2d 503 (Ariz. App. 1969).....16

De Falco v. City of Hallandale Beach,
18 So. 3d 1126 (Fla. App. 2009).....43

Marin Municipal Water Dist. v. Chenu, 207 Pac. 251 (Cal. 1922)16

Newton v. City of Atlanta, 6 S.E.2d 61 (Ga. 1939).....16

Northwest Natural Gas Co. v. City of Gresham,
374 P.3d 829 (Or. 2016)16

Sacramento Municipal Utility Dist. v. County of Solano,
63 Cal. Rptr. 2d 286 (Cal. App. 1997).....16

Salt River Project Agric. Improvement and Power Dist. v.
City of Phoenix, 631 P.2d 553 (Ariz. App. 1981).....22

Twp. of Wash., Cty. of Bergen v. Village of Ridgewood,
141 A.2d 308 (N.J. 1958)25

Village of Willoughby Hills v. Bd. of Park Comm’rs of Cleveland
Metro. Park Dist., 209 N.E.2d 162 (Ohio 1965)22

Statutes

RCW 4.96.010	6
RCW 4.96.050	6
RCW 35.13B.010.....	18, 20
RCW 35.22.280(32).....	19
RCW 35.23.440	18
RCW 35A.11.020.....	17
RCW 35A.11.050.....	17
RCW 35A.82.020.....	<i>passim</i>
RCW 36.70A.....	36
RCW 36.70A.030(18).....	36
RCW 36.70A.200(1).....	36
RCW 36.94.100	19
RCW 39.34	7
RCW 39.34.210	5
RCW 39.106	7
RCW 42.30.020(1)(b).....	7
RCW 42.23	7
RCW 42.56	6
RCW 42.56.010(1).....	7
RCW 43.09	7
RCW 43.20.050(2).....	38
RCW 43.20.050(2)(c).....	39
RCW 43.20.050(3).....	39
RCW 43.20.050(4).....	39
RCW 43.20.260	32, 40
RCW 49.60	54
RCW 52.18.010	10
RCW 53.08.043	10
RCW 54.16.030	10
RCW 54.16.040	10
RCW 54.28.070	19
RCW 57.02.030	30
RCW 57.04.030	30
RCW 57.04.030(2).....	6
RCW 57.04.050	30
RCW 57.08.005(1).....	6
RCW 57.08.005(3).....	4, 6
RCW 57.08.005(5).....	6, 38
RCW 57.08.005(9).....	31

RCW 57.08.005(10).....	5
RCW 57.08.005(18).....	6
RCW 57.08.005(20).....	5
RCW 57.08.005(22).....	30
RCW 57.08.009	4
RCW 57.08.012	4
RCW 57.08.081(2).....	5
RCW 57.08.190	5
RCW 57.12.030	30
RCW 57.20.010	6
RCW 57.20.018	6
RCW 70.95.030(22).....	5
RCW 70.146	5
RCW 82.04.030	18, 19
RCW 90.46.005	4

Constitutions

Wash. Const. art. I, § 1.....	<i>passim</i>
Wash. Const. art. VII, § 1	16, 49, 54, 55
Wash. Const. art. VII, § 9	11, 14, 50
Wash. Const. art. XI, § 12.....	11, 14

Codes, Rules and Regulations

CR 56(c).....	13
FWRC 3.10.020	45
FWRC 3.10.040	45
FWRC 3.10.040(9).....	45
FWRC 3.10.040(10).....	45
FWRC 3.10.190	48
FWRC 19.05.050	5
WAC 173-304-100(73).....	5
WAC 197-11-762.....	7
WAC Ch. 246-272A	39
WAC 365-196-550.....	36

Other Authorities

2 E. McQuillin, <i>Municipal Corporations</i> § 10.09 (3d ed. 1979).....	13
23 <i>Wash. Practice Environmental Law and Practice</i> § 7.88 (2d ed.)	38

AGO 1949-51 No. 246.....	35
AGO 1990 No. 3	22
AGO 2018 No. 7, 2018 WL 4492839.....	19
https://www.cdc.gov/features/drinkingwater/index.html	38
Hugh D. Spitzer, <i>Realigning the Governmental/Proprietary Distinction in Municipal Law</i> , 40 Seattle U. L. Rev. 173 (2016)	28
Johnathan Thompson, <i>The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation?</i> , 69 Temp. L. Rev. 1247 (1996).....	51
P. Andrew Rorholm Zellers, <i>Independence for Washington State’s Privileges and Immunities Clause</i> , 87 Wash. L. Rev. 331 (2012).....	51
Philip A. Talmadge <i>Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems</i> , 22 Sea. U. L. Rev. 695 (1999).....	20

A. INTRODUCTION

Pressed for new sources of additional revenue, the City of Federal Way (“City”) imposed its utility tax on other local governments providing water and/or sewage services despite the lack of express legislative authority to levy such a tax on another arm of the State.

The trial court erred in failing to rule that the City’s utility tax violates the governmental immunity doctrine, long recognized in Washington and other states to prohibit the imposition of a tax by one unit of government on another without express legislative authorization. The trial court concluded that the doctrine does not apply to allegedly proprietary services in this case, services that were directly billed to customers. However, while conceding that not all services are proprietary (e.g. water for fire suppression), it declined to define how, or which of, the sewer and water services provided by the three water/sewer districts organized under Title 57 RCW (“Districts”) were “proprietary” in nature. If the Court were to agree that the City had authority to tax “proprietary” services, the City’s tax is inapplicable to the vital governmental services – the provision of potable water and the collection, treatment, and disposal of sewage – the Districts provide.

If the Court were to agree with the trial court’s truncation of the governmental immunity doctrine, and it should not, then it should recognize

that the City's tax is unconstitutional. The City's tax violates due process because it is vague in how the tax is to be applied; it has nowhere defined "government" or "proprietary" services, and the implementation of the tax is left to the arbitrary decision-making of one official, its finance director, who, in addition to being possessed of no experience applying an excise tax to water and sewer service provided by a government agency, is interested in *increasing* City revenues. Moreover, the City's utility tax violates article I, § 12 of our Constitution in that it favors the City of Tacoma ("Tacoma"), likewise a municipal corporation, with a tax exemption nowhere expressly allowed in statute or in the City's municipal code.

This Court should invalidate the imposition of the City's utility tax on the Districts.

B. ASSIGNMENT OF ERROR

(1) Assignment of Error

1. The trial court erred in entering its order granting the City's motion for summary judgment and denying the Districts' motion for summary judgment on October 30, 2018.

(2) Issues Pertaining to Assignment of Error

1. Did the trial court err in concluding that the governmental immunity doctrine applies only to "governmental," as opposed to "proprietary," acts of governments where this Court has never so limited the doctrine's scope, and the Legislature has

expressly denied cities the authority to impose a utility tax on other governments? (Assignment of Error Number 1)

2. If the trial court is correct in limiting the governmental immunity doctrine, did the trial court err in concluding that directly billed services, such as the collection, treatment, and disposal of sewage, and the provision of potable water are proprietary, rather than governmental, services? (Assignment of Error Number 1)

3. Is the City's utility tax constitutionally vague because it lacks a definition in its municipal code and regulations of what precisely constitute proprietary/governmental services and it entrusts any decision about what is a proprietary or governmental service to the whim of a single official who is not constrained by definitions in City ordinance or regulation? (Assignment of Error Number 1)

4. Does the City's utility tax violate article I, § 12's anti-favoritism policy where the City provides a tax exemption to another municipality nowhere set forth in the City's utility tax ordinance specifically or in its municipal code generally? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

The Districts, Lakehaven Water and Sewer District ("Lakehaven"), Highline Water District ("Highline"), and Midway Sewer District ("Midway") (collectively, the "Districts"), are municipal corporations formed and organized under Title 57 RCW and, as such, are political subdivisions of the State providing water and/or sewer services to citizens and businesses located within, and without, the City's corporate limits. CP

53-54.¹ The City is also a municipal corporation and a political subdivision of the State. CP 53, 58.

Title 57 water/sewer districts like the Districts provide essential public services. They provide potable water, test water quality, convert wastewater to reclaimed water for reuse;² decide whether to fluoridate water;³ maintain parks for public use;⁴ conduct inspections;⁵ provide sewage collection; collect, treat, and dispose of sewage (including sewage

¹ As its name indicates, Highline only provides water, and not sewer, services. Conversely, Midway only provides sewer services. CP 1254-57.

² RCW 90.46.005; *Cedar River Water and Sewer Dist. v. King Cty.*, 178 Wn.2d 763, 793, 315 P.3d 1065 (2013) (operation of sewer system necessarily includes distribution of reclaimed water).

³ RCW 57.08.012 specifically empowers the Districts to fluoridate water and RCW 57.08.005(3) specifically gives the Districts “full authority to regulate and control the ... content” of the water it supplies. Both Highline and Lakehaven provide fluoridated water. CP 652, 1255.

⁴ RCW 57.08.009 authorizes the Districts to maintain/operate parks and recreational facilities. Maintenance of a park is a governmental function. *Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 165 Wn.2d 679, 690, 202 P.3d 924 (2009) (“This court has held in sovereign immunity cases that a municipal corporation's improvements, construction, or maintenance of public parks, swimming pools, or merry-go-rounds for public recreation involve sovereign governmental functions.”); *Nelson v. City of Spokane*, 104 Wash. 219, 220, 176 Pac. 149 (1918) (“Here again we are committed by the decisions of this court to the doctrine that the operation or improvement of a park not for profit is the exercise of a governmental function.”). Lakehaven operates French Lake Dog Park, for example.

⁵ Inspection activities are governmental in nature. *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 164-65, 759 P.2d 447 (1988) (building inspections); *Sunshine Heifers, Ltd. v. Wash. State Dep't of Agriculture*, 188 Wn. App. 960, 967-68, 355 P.3d 1204 (2015) (cattle inspections); *Loger v. Wash Timber Prods., Inc.*, 8 Wn. App. 921, 931, 509 P.2d 1009, review denied, 82 Wn.2d 1011 (1973) (safety inspections).

sludge – a type of solid waste akin to garbage);⁶ participate in regional pollution control planning and funding;⁷ participate in regional water planning;⁸ participate in watershed management;⁹ and provide street lights;¹⁰ all of which are essential to the health, safety, and welfare of the

⁶ RCW 70.95.030(22) (“‘Solid waste’ or ‘wastes’ means all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, *sewage sludge*, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials.”) (emphasis added); WAC 173-304-100(73) (“Solid waste includes but is not limited to sludge from wastewater treatment plants and septage, from septic tanks, woodwaste, dangerous waste, and problem wastes.”). The City acknowledges that the operation of a solid waste transfer station is a governmental function immune from taxation, CP 480, and that sewage treatment plants are essential public facilities. FWRC 19.05.050 (identifying “Sewage treatment plants” as qualifying as essential public facilities under certain circumstances). Lakehaven operates two sewage treatment plants, the Redondo Wastewater Treatment Plant and the Lakota Wastewater Treatment Plant. CP 1245-46. Midway Sewer District operates one sewage treatment plant, the Des Moines Creek Treatment Plant. CP 1263.

⁷ Districts are empowered, when near bodies of water or groundwater “to provide for the reduction, minimization, or elimination of pollutants from those waters in accordance with the district's comprehensive plan[.]” RCW 57.08.005(10). They also participate in water pollution control facility funding. RCW 70.146.

⁸ RCW 57.08.081(2) authorizes Districts to consider “the achievement of water conservation goals and the discouragement of wasteful practices” in setting rates. In addition, Lakehaven has a permit from the Department of Ecology to store water underground, which is intended to provide a source of water on a regional basis consistent with Lakehaven’s comprehensive plan. CP 114-15.

⁹ RCW 57.08.190 authorizes the Districts to “participate in and expend revenue on cooperative watershed management actions, including watershed management partnerships under RCW 39.34.210 and other intergovernmental agreements, for purposes of water supply, water quality, and water resource and habitat protection and management.” Lakehaven participates in and expends revenue on the Washington Water Utility Council, the Regional Water Supply System Partnership, the Coalition for Clean Water, and the Metropolitan Water Pollution Abatement Advisory Committee, and previously participated in the South King County Groundwater Advisory Committee (which advised King County on the creation of a regional water plan). CP 644.

¹⁰ RCW 57.08.005(20) empowers the Districts to provide street lighting systems, a governmental function.

public.¹¹ As not-for-profit governmental entities lacking shareholders or others possessing private interests, all of the revenue collected by the Districts, including the Districts' water and sewer service charges (utility rates), goes to cover these essential public/governmental functions. CP 407-12, 1243, 1253, 1262.

Additionally, the Districts are governments established by the Legislature and vested with all of the usual attributes and indicia of governments. They expend publicly collected revenues. They are required to adopt comprehensive plans as a condition of implementing system improvements. CP 114, 1253, 1262. They possess the power to tax, RCW 57.08.005(18),¹² issue both tax-exempt general obligation and revenue bonds, RCW 57.20.010; RCW 57.20.018, and exercise the power of eminent domain, RCW 57.08.005(1), (3), (5). They serve large populations; Lakehaven alone serves 120,000 people within its service area. CP 113.

Moreover, if the Districts are sued, they are subject to government tort claim statutes and are not required, like any government, to post supersedeas bonds on appeal. RCW 4.96.010, RCW 4.96.050. The Districts are subject to the Public Records Act, RCW 42.56, like other

¹¹ The Legislature specifically authorized the creation of Title 57 water/sewer districts by a county health officer to address public health and safety. RCW 57.04.030(2).

¹² Taxation is an obvious and uniquely governmental function. *Fabre v. Town of Ruston*, 180 Wn. App. 150, 160-61, 321 P.3d 1208 (2014).

governments. RCW 42.56.010(1). They are subject to the Open Public Meetings Act. RCW 42.30.020(1)(b). They may enter into interlocal agreements with other governments, RCW 39.34, and joint municipal utility services agreements, RCW 39.106. They may serve as “lead agencies” under the State Environmental Protection Act. WAC 197-11-762. They may receive loans from the Public Works Trust Fund, loans available only to governments. CP 1246. Their employees belong to the Public Employee Retirement System and are eligible for health benefits through the State Health Care Authority. CP 1245. Their staff is subject to the Code of Ethics for Municipal Officers, RCW 42.23, and the Districts’ financial statements and actions are subject to State Auditor review. RCW 43.09. CP 1253, 1262.

Although Lakehaven entered into a franchise agreement with the City in 2016, pursuant to which it pays the City 3.6% of defined rate revenues from water and sewer operations within the City in consideration for contractual benefits it receives from the City under the franchise, CP 1, 13-38, on March 20, 2018, the City Council enacted Ordinance 18-847 to levy a 7.75% excise tax on the Districts’ “gross income” from the provision of utility services. CP 325-31. In its ordinance, the City asserted that it has authority from RCW 35A.82.020 to impose the tax. CP 325. That ordinance amended a section of the Federal Way Revised Code (“FWRC”)

relating to excise taxes previously imposed only on its own storm water utility and on private companies providing services. CP 327-28. The City's ordinance purported to levy a 7.75% tax upon "everyone" selling or furnishing water/sewer services. CP 328.¹³

The Districts filed the present action in the King County Superior Court on April 4, 2018, asserting that the City lacked express statutory authority to tax the Districts and that, if it did possess such authority, its utility tax on the Districts violated due process as it was vague and also violated the anti-favoritism policy of Washington's Constitution article I, § 12. CP 1-4, 53-57. The City claimed that it had legislative authority to tax the District's proprietary services. CP 58-64. The case was assigned to the Honorable John McHale.

The Districts and the City filed motions for summary judgment. CP 444-94. Ultimately, on October 30, 2018, the trial court granted the City's motion for summary judgment and denied the Districts' motion. CP 1524-30. In doing so, the court concluded that the City could tax the Districts' revenues derived from "proprietary purposes." CP 1526-27. It asserted that

¹³ The City admitted below that it "is not aware of any limitation under state law regarding the tax rate for a utility tax imposed on water and sewer utilities." CP 1226. Thus, if the Court concludes the City's tax on the Districts is lawful, there is no limit on the tax rate the City may charge the Districts or other governments providing such services under the statute at issue; the tax could potentially severely impair the ability of the Districts' ratepayers to bear the cost of the essential public/governmental services the Legislature directed water/sewer districts to provide. Below, the City's own evidence documented tax rates as high as 36% on utility services. CP 389, 646.

“Proprietary function is seen in the provision of water and sewer services to benefit directly billed customers who requested the services and governmental function is seen in the provision of services that protect the health, safety and welfare of the general public.” CP 1527. The court made no effort to address whether these criteria are necessarily mutually exclusive nor how its perceived distinction would be applied as to the Districts.¹⁴ Further, by failing to address where the distinctions applied, or, just as importantly, whether, and where, water and sewer services could be both governmental *and* proprietary in nature; the court’s analysis left the Districts and City with no direction as to how the tax should be implemented. Notably, the court did not hide the fact that it “punted” on this guidance when it acknowledged, “specific determination of what is proprietary or governmental generated income for purposes of taxation may be the subject of future litigation...” CP 1529. But the court’s decision made the need to clearly articulate the differences quite pressing as

¹⁴ For example, as this Court determined in *King County v. City of Algona*, 101 Wn.2d 789, 794, 681 P.2d 1281 (1984), the operation of a solid waste disposal facility is a public or governmental function. Lakehaven and Midway operate sewage treatment facilities, activities that are functionally the same as collecting solid waste for disposal (in fact, as noted in n.6, the sewage sludge they handle is a solid waste such that there really is no way to distinguish the waste handled by the solid waste disposal facility in *Algona* and Lakehaven and Midway’s sewage treatment facilities).

water/sewer districts, and other governments¹⁵ subject to this tax need to know what services they provide are “governmental” or “proprietary” and subject to taxation. Future litigation will be unnecessary if the Court rules the tax to be unlawful. CP 1527.

The court also ruled that the Districts had standing to raise constitutional challenges to the City’s utility tax, CP 1527-28, but concluded that those challenges were not sustained. CP 1528-29. For example, it concluded the City’s ordinance was not vague even though it failed to define governmental/proprietary services, Washington law on that question is not a picture of clarity, and a single City official, with no legislative or regulatory guidance, may arbitrarily decide if the tax applies. CP 1528-29. It concluded that the Districts did not sustain their article I, § 12 challenge. CP 1528. This timely appeal ensued. CP 1531-40.

D. SUMMARY OF ARGUMENT

¹⁵ The City’s utility tax ordinance will likely be replicated by other cities. Moreover, a variety of Washington local governments provide utility-type services that would be subject to such taxation. Counties, for example, provide a broad array of utility-type services including ambulances, solid waste collection and disposal, transit, hospitals, sewage collection and disposal, drainage, and water. Public utility districts provide electricity, RCW 54.16.040, and water services. RCW 54.16.030. Fire protection districts may charge fees for their services. RCW 52.18.010. Port districts may provide water services. RCW 53.08.043. The trial court’s decision is not confined to water/sewer districts, and, given the array of local governments and the services they provide that are affected, it is clear that such a profound change in the law is one for the Legislature to make.

The Washington Constitution, article VII, § 9 and article XI, § 12, authorizes the Legislature to delegate taxing authority to cities, but that constitutional power is not self-executing. The Legislature must expressly authorize a city to impose a tax. More specifically, in order for a city to tax other governments, under the governmental immunity doctrine adopted by this Court, the Legislature must expressly grant such taxing authority to a city to tax another political subdivision of the State.

The Legislature has not expressly authorized cities to impose a utility tax on other governments. In fact, over the years, it has expressly denied such authority to cities. In the one instance where the Legislature allowed for such a tax, the law had a sunset provision and the tax authority was allowed to expire.

The City's imposition of a utility tax upon the Districts violates the governmental immunity doctrine. The statute from which the City claims that it derives taxing authority nowhere draws a distinction between governmental and proprietary services. The City's contention that the Districts' services are proprietary, and taxable, usurps legislative authority and violates separation of powers principles.

The trial court, however, relying upon an erroneously decided Division III decision, determined that the City could apply its utility tax to "proprietary" services provided by the Districts even though the City never

addressed the distinction between “governmental” and “proprietary” services in the Federal Way Revised Code (“FWRC”) or its regulations. The Court should not adopt what amounts to a proprietary services exception to the governmental immunity doctrine where the City did not make this distinction (possibly because it is so inherently perplexing that it could not determine *where* to draw the line) and where the Legislature has steadfastly refused to authorize such a tax. If such a distinction exists, it is up to the Legislature (or the City) to provide a clear-cut definition of what is, and what is not, a “proprietary” service.

Were this Court to agree that the governmental immunity doctrine does not prevent the City’s tax from applying to proprietary services, the very nature of the Districts’ services, (the provision of potable water and the collection, treatment, and disposal of sewage and sewage sludge), should lead this Court to the reasonable conclusion that these are governmental services that may not be taxed by the City.

Only if the Court determines that the City has the authority to tax the Districts must the Court then address the Districts’ constitutional arguments. Because the City’s ordinance fails to define governmental/proprietary services and the City has not adopted defining regulations, it allows a single City official to decide which services are governmental or proprietary, untethered to any definition other than her/his

own whim. The tax is void for vagueness on due process grounds because a reasonable taxpayer cannot know in advance what is taxable, making the opportunity for arbitrary enforcement manifest. The City's tax also violates the anti-favoritism policy of article I, § 12 where certain favored municipal taxpayers that have franchise agreements with the City may escape the tax even though such a tax exemption is neither authorized by statute, the Washington Constitution, nor the FWRC.

The City's tax is illegal and it should not be applied to the Districts.

E. ARGUMENT¹⁶

(1) The City's Power to Tax

As political subdivisions of the State, municipalities 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). *See also*, 2 E. McQuillin, *Municipal Corporations* § 10.09 (3d ed. 1979) (As "creatures of the state,"

¹⁶ Summary judgment is a drastic remedy "appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law," *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). It is appropriate only where a trial would truly be "useless." *Wheeler v. Ronald Sewer Dist.*, 58 Wn.2d 444, 446, 364 P.2d 30 (1961). The City, as the moving party, bore the burden of establishing its right to judgment as a matter of law. In addressing whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the Districts. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

municipal corporations possess only those powers conferred on them by the constitution, statutes, and their charters) (cited by *City of Tacoma v. Taxpayers of the City of Tacoma*, 108 Wn.2d 679, 685-86, 743 P.2d 793 (1987)).

With regard to taxation, our Constitution vests authority in the Legislature to authorize local governments to impose taxes. Wash. Const. art. VII, § 9;¹⁷ Wash. Const. art. XI, § 12.¹⁸ But this Court has unambiguously held that the Legislature must *expressly* delegate taxing power to municipal corporations; municipalities have no inherent right to tax and their constitutional authority is not self-executing.¹⁹ Article VII, § 9 also requires that such taxes “be uniform in respect to persons...within the jurisdiction of the body levying the same.”

¹⁷ Article VII, § 9 states: “The Legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.”

¹⁸ Article XI, § 12 states: “The Legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.”

¹⁹ See, e.g., *City of Spokane v. Horton*, 189 Wn.2d 696, 702, 406 P.3d 638 (2017); *Watson v. City of Seattle*, 189 Wn.2d 149, 165, 401 P.3d 1, 9 (2017); *Arborwood Idaho L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 365-66, 89 P.3d 217 (2004); *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 343, 662 P.2d 845 (1983); *Carkonen v. Williams*, 76 Wn.2d 617, 627, 458 P.2d 280 (1969).

A general delegation of taxing power is not enough to meet the requirement of *express* authority to levy a tax. *Algona*, 101 Wn.2d at 793. *See also*, *City of Seattle v. T-Mobile West Corp.*, 199 Wn. App. 79, 82, 397 P.2d 931, *review denied*, 189 Wn.2d 1018 (2017). “If there is any doubt about a legislative grant of taxing authority to a municipality, it must be denied.” *Okeson v. City of Seattle*, 150 Wn.2d 540, 558, 78 P.3d 1279 (2003); *Arborwood Idaho L.L.C.*, 151 Wn.2d at 374 (same). *See also*, *Pac. First Fed. Sav. & Loan Ass’n v. Pierce Cty.*, 27 Wn.2d 347, 353, 178 P.2d 351 (1947). Further, if a tax statute is ambiguous, the statute must be construed *against* the taxing authority. *Group Health Coop. of Puget Sound, Inc. v. Dep’t of Revenue*, 106 Wn.2d 391, 401, 722 P.2d 787 (1986); *Arborwood Idaho L.L.C.*, 151 Wn.2d at 367.²⁰

As a direct counterpart to the requirement of express taxing authority, this Court has adopted the governmental immunity doctrine, requiring an *express* legislative grant of authority before one unit of

²⁰ Like taxation, other attributes of sovereign power, such as eminent domain, may be delegated by the Legislature to political subdivisions, but the delegation “extends only so far as statutorily authorized.” *Pub. Util. Dist. No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 534, 342 P.3d 308 (2015). For a municipality to have the power to condemn the property of another municipality, the legislative authorization must again be *express*. *King County v. City of Seattle*, 68 Wn.2d 688, 691-92, 414 P.2d 1016 (1966); *Central Puget Sound Regional Transit Authority v. WR-SRI 120th North LLC*, 191 Wn.2d 223, 422 P.3d 891 (2018).

government may tax another.²¹ “The governmental immunity doctrine provides that one municipality may not impose a tax on another without *express statutory authorization.*” *Algona*, 101 Wn.2d at 793 (emphasis added). This doctrine is well-understood in municipal law and has been applied in many other states.²² The doctrine has not been limited to taxation of “governmental” services. *See Algona*, 101 Wn.2d at 793.

(2) The City May Not Tax the Districts

²¹ The aversion to allowing one municipality to tax another finds root in our Constitution in relation to property taxes: “Property of the United States and of the state, counties, school districts and other municipal corporations...shall be exempt from taxation.” Article VII, § 1. This language was added by the 14th Amendment to the Washington Constitution, enacted by the voters in 1930. *See, e.g., City of Kennewick v. Benton Cty.*, 131 Wn.2d 768, 935 P.2d 606 (1997) (city’s 49% beneficial interest in stadium was exempt); *Spokane Research & Defense Fund v. Spokane Cty.*, 139 Wn. App 450, 160 P.3d 1096 (2007) (garage exempt).

²² The Oregon Supreme Court has determined that the taxation of public property devoted to public use is against public policy, making no distinction between a “governmental” or “proprietary” public use. *City of Portland v. Multnomah Cty.*, 296 Pac. 48 (Or. 1931). The court noted that such a tax would “be analogous to taking money out of one pocket and putting it into another.” *Id.* at 49. Thus, the State or its subdivisions could only tax other governments if there was a clear legislative declaration of such authority. *Accord, Northwest Natural Gas Co. v. City of Gresham*, 374 P.3d 829 (Or. 2016). *See also, Marin Municipal Water Dist. v. Chenu*, 207 Pac. 251 (Cal. 1922) (no motor vehicle license tax could be charged to district); *Sacramento Municipal Utility Dist. v. County of Solano*, 63 Cal. Rptr. 2d 286 (Cal. App. 1997) (county utility tax inapplicable to district under governmental immunity principle); *Newton v. City of Atlanta*, 6 S.E.2d 61, 63 (Ga. 1939) (court prohibited taxation of merchants at state-authorized farmer’s market, noting: “The State’s properties and instrumentalities are thus exempt from taxation, in the absence of express legislative authority.”); *City of Tempe v. Ariz. Bd. of Regents*, 461 P.2d 503 (Ariz. App. 1969) (municipality may not tax State or its subdivisions).

Indeed, this principle was the basis for Chief Justice John Marshall’s observation that the power to tax is the power to destroy in *M’Culloch v. Maryland*, 17 U.S. 316, 426-27, 4 L. Ed. 579 (1819), a case in which the Court held that a state may not tax an instrumentality of the federal government. *Accord, Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 116-17, 74 S. Ct. 403, 98 L. Ed. 546 (1954).

(a) The City Lacks Express Statutory Authority to Tax the Districts

The only authority the City cited below to support its utility tax was RCW 35A.82.020, CP 325, 1227; the City admitted that it lacks the “authority to tax governmental functions of the Districts related to sewer and water,” but denied “that it lacks authority to tax the Districts’ proprietary functions including the business of providing water or sewer services for commercial, industrial, or domestic use or purpose[.]” CP 1211. But RCW 35A.82.020 does not authorize the City to impose utility taxes generally, nor upon other governments specifically. Instead, the statute merely authorizes code cites to “license and revoke the same for cause, to regulate, make inspections and to impose excises for regulation or revenue in regard to all places and kinds of business, production, commerce, entertainment, exhibition, and upon all occupations, trades and professions and any other lawful activity[.]”

This Court in *Algona* declined to find that statutes broadly conferring taxing authority upon cities, including RCW 35A.11.020, RCW 35A.11.050, or RCW 35A.82.020, constituted the requisite *express* authority to tax another government. 101 Wn.2d at 792-93. The Court stated: “The general grant of taxation power on which Algona relies in RCW 35A.11.020 contains no *express* authority to levy a tax on the state or

another municipality. To allow the City to impose the tax in this case would violate the established rule that municipalities must have specific legislative authority.” *Id.* at 793.²³ (Court’s emphasis.)

There is no existing constitutional provision or statute that contains express language permitting a municipal corporation like the City to (1) tax another municipal corporation on (2) revenues from the provision of water or sewer service.²⁴ The City’s utility tax is not authorized by RCW 35A.82.020. This Court should not confer upon the cities a taxing authority the Legislature has expressly declined to give them.

This Court’s decision in *Burba v. City of Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989), does not assist the City. There, the Court held

²³ The *Algona* court’s analysis may also be seen from the cases it cited or overruled. The Court cited *City of Seattle v. State*, 59 Wn.2d 150, 367 P.2d 123 (1961), where the Court held that the State had specific authority in RCW 82.04 to impose an excise tax on Seattle revenues derived from certain park operations. The Court found that the excise tax applied to all “taxable persons” which *explicitly* included “municipal corporations” in the definition. RCW 82.04.030. The Court indicated that the statute itself authorized the excise tax against the municipality and did not make a distinction as to the type of activity (proprietary or governmental). By contrast, the *Algona* court overruled, in part, *City of Bellevue v. Patterson*, 16 Wn. App. 386, 556 P.2d 944 (1976), *review denied*, 89 Wn.2d 1004 (1977), where the Court of Appeals mistakenly held that RCW 35.23.440 authorizing license taxes on “all occupations and trades ... and every kind of business authorized by the law” was a sufficient grant of authority to authorize Bellevue to tax another municipality, a water district. RCW 35.23.440, like RCW 35A.82.020, was a grant of general tax authority applicable to all businesses. The *Algona* court noted that the *Bellevue* court’s use of the *Seattle* case to authorize a tax on two governments operating within Bellevue’s city limits was incorrect because RCW 82.04.030 *expressly* authorized a tax by one government on another.

²⁴ In the single instance where the Legislature allowed for such a tax, the law had a sunset provision and the taxing authority expired. RCW 35.13B.010. *See infra*.

that a city could constitutionally impose a utility tax on the services provided by its own municipal utility, but that case says nothing about the ability of a city to tax another government. While cities and counties may impose excise taxes on their own residents when they operate their own utilities,²⁵ and, in fact, impose such a tax on their own citizens, CP 1464-66, that does not mean that those governments may tax other governmental subdivisions of the State.

The Districts' contention that the City lacked express statutory authority to tax them is further reinforced by the fact that Washington's cities have historically believed they needed express legislative authorization for such taxing power and the Legislature has jealously guarded its power to provide it; the Legislature has *repeatedly* denied that authority to the cities in the 34 years since this Court's *Algona* ruling. In 2009, HB 2249 would have authorized cities (in King County) to impose a utility tax on RCW Title 57 water/sewer districts, but the bill did not pass from committee. The next year, in 2010, HB 2637 and 2749 would have

²⁵ Plainly, the Legislature knows how to grant authority to a government to tax another. For example, counties may levy the utility tax on other counties. RCW 36.94.100. The Legislature included municipalities in the definition of businesses to which the state's B&O tax applies. RCW 82.04.030. Cities gained the express authority to tax electric service revenues of PUDs in 1941. RCW 54.28.070. In AGO 2018 No. 7, 2018 WL 4492839, the Attorney General recently distinguished between a city's power to tax utility services generally under RCW 35.22.280(32) and the authority conferred in RCW 54.28.070.

authorized cities to impose a utility tax on water/sewer districts. These proposed statutes were not limited to King County and would have applied everywhere in the State. They also failed. In 2010, the Legislature enacted RCW 35.13B.010, authorizing Renton to impose a utility tax and included a sunset provision. That statutory taxation authority expired in January 2015 and has never been re-authorized. Implicit in its enactment of RCW 35.13B.010 was the Legislature's view that, without this statutory authority, a city could not tax a district's water service revenues. No specific bills authorizing cities to impose utility taxes on other governments have been introduced since 2010.

In sum, no statute *expressly* confers authority upon the City to impose a utility tax on the Districts. Under the governmental immunity doctrine analysis in *Algona*, this fact alone should end this Court's analysis. It need go no farther.²⁶

(b) The Governmental Immunity Doctrine Is Not Confined to "Governmental Services"

²⁶ This result would be appropriate, given this Court's jurisprudence on the need for cities to have express authority from the Legislature. The City is not without practical recourse. It can go to the Legislature for statutory authorization to impose its utility tax on other governments. This is properly a political question for the Legislature. Philip A. Talmadge *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 *Sea. U. L. Rev.* 695, 713-15 (1999). This result would also comport with principles of appropriate constitutional deference by this Court to the Legislature as a separate branch of government with constitutionally-mandated authority to set the bounds of local government taxing authority. *Id.* at 733-36.

To circumvent its lack of express legislative authority to tax the Districts, the City contended below, CP 478-82, that it could tax what it characterizes (but neglects to define)²⁷ as the Districts’ “proprietary” services, based on Division III’s decision in *City of Wenatchee v. Chelan County Pub. Util. Dist. No. 1*, 181 Wn. App. 326, 325 P.3d 419 (2014), a case addressing water services provided by a PUD within the City of Wenatchee’s boundaries. The trial court adopted the City’s analysis believing it was bound by *Wenatchee*. CP 1526-27. However, Division III did not cite authority from Washington or any other jurisdiction in its opinion that confined the governmental immunity doctrine solely to

²⁷ Neither the Federal Way City Council nor the trial court did this Court any favors by failing to address what are “governmental,” as opposed to “proprietary” services. Ordinance 18-847 and the FWRC do not purport to define either term; neither exempts the taxation of “governmental” services. In response to the Districts’ requests for admission that the FWRC definition of gross income does not exclude income derived from the Districts’ governmental functions, the City offered only what can be charitably described as gobbledygook. CP 1211-12. The City’s finance director could not even articulate what was a governmental service in his CR 30(b)(6) deposition. CP 686-96. However, after that deposition, without articulating *any basis* for doing so, he determined certain District revenues were “governmental.” CP 1511.

The City’s utility tax ordinance is indiscriminate in taxing both the Districts’ “proprietary” services *and* what the City has acknowledged are *governmental* services. The City is seemingly content to allow for the possible application of its tax to what it admits to be exempt “governmental” services. Such a willingness documents the City’s bad faith. *See Dep’t of Revenue v. March*, 25 Wn. App. 314, 319, 610 P.2d 916 (1979) (government’s power to conduct tax audits must be exercised in good faith). *See also, Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997), *review denied*, 140 Wn.2d 1021 (2000) (City’s deliberate imposition of tenant relocation fees previously declared to be illegal tax constituted violation of developer’s substantive due process rights); *Patel v. City of San Bernardino*, 310 F.3d 1138 (9th Cir. 2002) (City continued to collect transient occupancy tax although it had previously been declared unconstitutional).

“governmental” services, however that concept is defined. Moreover, the *Wenatchee* court did not address the crucial legislative history denying city efforts to obtain legislative authority to impose the utility tax on other governments, nor did it attempt to address how to distinguish a “governmental” from a “proprietary” service, apart from a footnote *conceding* that Judge Fearing’s concurrence on that topic may be correct. *Id.* at 343 n.1.²⁸

The *Algona* court did not confine the governmental immunity doctrine to “governmental” services.²⁹ In fact, in *Salt River Project Agric. Improvement and Power Dist. v. City of Phoenix*, 631 P.2d 553 (Ariz. App. 1981), cited by the *Algona* court in support of its analysis of governmental immunity, 101 Wn.2d at 794, the Arizona court applied the doctrine to taxation of the district’s surplus electrical sales made in its *proprietary capacity*. In *Village of Willoughby Hills v. Bd. of Park Comm’rs of Cleveland Metro. Park Dist.*, 209 N.E.2d 162 (Ohio 1965), another case

²⁸ No party in that case petitioned this Court for review.

²⁹ Relying on *Algona*, the Attorney General has opined that a city does not have the authority to impose a tax on the utility of another municipality. That AGO did not confine the governmental immunity doctrine to “governmental” services. The Attorney General closely analyzed *Algona*, and opined that the starting premise for analysis is that there must be specific legislative authority to levy a particular tax on another municipality. AGO 1990 No. 3. The Attorney General noted that *Algona* “held that the city lacked the requisite express authority to levy a tax on the state, or another municipality,” despite RCW 35A.82.020. *Id.* at 5.

cited by the *Algona* court, a village's attempt to tax golf course green fees of a park district, clearly proprietary services, was barred by the governmental immunity doctrine. Thus, the *Algona* court relied on authority that applied the government immunity doctrine to proprietary services. Hence, it should not be surprising that *Algona* focused on whether the party being taxed was a municipal corporation and not the character of the functions being taxed. See 101 Wn.2d at 793 (“Neither Bellevue in *Bellevue v. Patterson*, *supra* nor *Algona* had express legislative authority to tax functions of other municipal corporations.”). *Wenatchee* was wrongly decided by Division III.

The City will likely attempt to argue that this Court impliedly limited the reach of the governmental immunity doctrine in *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007), but the City finds more meaning than it should in the Court's *dicta* in that case. That case addressed the question of whether Seattle City Light could enter into a franchise agreement with other cities where it would pay them a portion of revenues collected in those cities for electrical utility services in exchange for the cities agreeing not to establish their own utilities. The plaintiffs contended such agreements were for an illegal purpose – to allow the cities to circumvent both their lack of statutory authority to impose a franchise fee on an electrical utility and the governmental immunity doctrine that barred

them from imposing a utility tax on City Light. The Court's majority suggested in *dicta* that the governmental immunity doctrine might not apply as to electrical services, but expressly declined to decide the issue, noting only that it was "an unresolved question of law." *Id.* at 160.³⁰

Despite the trial court's belief that the *Wenatchee* court correctly adopted the government/proprietary distinction, CP 1526-27, the court erred.³¹ In order to resolve the issues in this case, were this Court to agree with Division III and the trial court,³² this Court would need to differentiate

³⁰ The Court's majority did not address the pertinent legislative history denying cities taxing authority as to the other political subdivisions of the State providing utility-type services anywhere in its opinion. This may well be because the parties did not brief the issue where the "court granted review solely as to trial court's grant of summary judgment for the Cities regarding the alleged violation of RCW 35.21.860(1)." 161 Wn.2d at 167 (J.M. Johnson, dissenting).

³¹ The trial court acknowledged that there are six different tests in Washington law for differentiating a "governmental" from a "proprietary" service. CP 1528-29. It appeared to suggest that a water/sewer district could provide both governmental and proprietary services in addressing water and sewage, stating: "Proprietary function is seen in the provision of water and sewer services to benefit directly billed customers who requested the services and governmental function is seen in the provision of services that protect the health, safety and welfare of the general public." CP 1527. But then it declined to address how any of these "definitions" applied in the real world to the Districts, punting the question, in effect, to this Court, when it vaguely stated that this issue would be resolved in "future litigation." Obviously, as taxpayers, the Districts need to know what revenue they receive is subject to taxation.

³² However, if this Court simply holds that the governmental immunity doctrine applies to any function of governments. *See Algona*, 101 Wn.2d at 793 ("Neither Bellevue in *Bellevue v. Patterson*, *supra* nor Algona had express legislative authority to tax *functions* of other municipal corporations.") (emphasis added), not only does it accord appropriate deference to the Legislature's constitutional authority to set the bounds of local government taxing authority, it avoids entering what only can be charitably described as the thicket of the governmental/proprietary service distinction.

“governmental” from “proprietary” services where the City has studiously refused to do so, particularly to address the Districts’ due process arguments *infra*. CP 1529.

The hazy distinction between governmental and proprietary services is archaic as applied to water/sewer services and bears virtually no resemblance to the real world in which Washington citizens live and in which Washington local governments operate.³³ To say that essentially all the water/sewer services the Districts provide and the many other activities undertaken by the Districts are “proprietary” and not governmental simply because they are billed directly to customers, as the trial court seemingly believed, is simply untrue.

This Court should not adopt such a distinction for the governmental immunity doctrine³⁴ and it should overrule *Wenatchee*.

³³ Judge Fearing noted in his concurrence in *Wenatchee* that “. . . I consider current distinctions between a proprietary function and a governmental function, particularly in the context of domestic water service, to be outdated. If I could decide the case without weight of precedence, I would consider the distribution of drinking water to be a quintessential governmental function that should not be taxed.” *Wenatchee, supra* at 351.

³⁴ The United States Supreme Court has declined to employ this distinction. *See, e.g., New York v. United States*, 326 U.S. 572, 584, 66 S. Ct. 310, 90 L. Ed. 326 (1946) (abandoning the distinction as “untenable” for purposes of determining immunity of state activities from federal taxation). Other courts have also declined to do so. *See, e.g., Twp. of Wash., Cty. of Bergen v. Village of Ridgewood*, 141 A.2d 308, 311 (N.J. 1958) (“The distinction is illusory; whatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur.”). *Accord, City and County of Denver v. Mountain States, Tel. and Tel. Co.*, 754 P.2d 1172, 1175-76 (Colo. 1988).

(c) If the Court Chooses to Apply the Governmental/Proprietary Services Distinction, the Districts' Services Are Governmental

If the Court were to agree with the trial court that the City may tax “proprietary” services of other governments, such a determination is fraught with vexatious practical and legal problems. The trial court drew a distinction between water/sewer services requested by and billed to customers and water/sewer services that protect the health, safety, and welfare of all. But that distinction is unworkable as the two aspects of such services – billed to customers/benefit to the public – are not mutually exclusive. For example, a school or hospital wants to connect to public water and sewer systems for which it will be directly billed. The *public benefit* is plain. Similarly, a supermarket needing clean water to wash the produce it sells wants to be connected to a public water system. Clean water is essential to ensure that its produce is washed and safe for public consumption. The trial court’s “compartmentalized” conception of connection that water or sewer services directly billed to customers are proprietary services simply by virtue of such billing lacks an appreciation for the critical public health benefits these services provide and is simply wrong.

The government/proprietary distinction makes little rational sense as Judge Fearing’s concurrence in *Wenatchee* amply documents. 181 Wn.

App. at 351-56.³⁵ He noted that there are at least *six tests* for separating proprietary from governmental functions in the case law, 181 Wn. App. at 352-53, and that “[t]he six tests ... lead to some razor thin, if not, silly, distinctions, even outside the context of domestic water[.]” *Id.* at 353. He observed that case law is seriously split as to whether particular functions are governmental or proprietary. *Id.* at 354. He suggested that the government/proprietary notion is perhaps “specious,” and “illusory,” *id.* at 356, a point with which the *Wenatchee* majority did not entirely disagree. *Id.* at 343 n.1. He believed that a Title 54 RCW public utility district (“PUD”) provided a governmental service when it provided potable water. “Potable water is provided by a municipal corporation not for its own profit. The PUD is not a for-profit organization. The PUD provides water for the common good. Water is essential to human life.... [T]he provision of domestic water should be considered a governmental function.” *Id.* He further observed, “I see no relevant distinction between operating a solid waste plant [*Algona*] and operating a potable water delivery system.” 181 Wn. App. at 354.³⁶ Although addressing only water services the PUD

³⁵ The City largely ignored that concurrence in its briefing below, as did the trial court in its ruling.

³⁶ The City cited to Professor Hugh Spitzer’s Seattle University law review article on this distinction as support for its position, CP 485, but that article only confirms Judge Fearing’s sense of the government/proprietary distinction as a half-baked hash of

provided, Judge Fearing’s analysis applies with compelling force to the furnishing of sewer services (particularly the disposal of sewage sludge, a form of solid waste), where public health considerations so obviously attend the provision of such a service.

If, however, this Court is determined to adopt the governmental/proprietary distinction for purposes of the governmental immunity doctrine, it should conclude that the services the Districts provide are governmental in nature.

Our Constitution *nowhere* recognizes the governmental/proprietary distinction.³⁷ In *Wash. State Major League Baseball Stadium Pub. Facilities Dist.*, *supra*, this Court was compelled to discuss the governmental/proprietary distinction in the context of statutes of limitations and exemptions from them for actions benefitting the State, concluding that providing public recreational benefits was a sovereign or governmental

conflicting concepts. Professor Spitzer noted at the outset of his article: “The classification of local government powers into ‘governmental’ and ‘proprietary’ categories causes more confusion than perhaps any other distinction in municipal law.” Spitzer quoted a former Cincinnati mayor, a recognized scholar on municipal law, who stated the rules for whether a service was governmental or proprietary “‘are as logical as those governing French irregular verbs.’” Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 *Seattle U. L. Rev.* 173, 175 (2016).

³⁷ As early as 1909, this Court recognized that municipal corporations have governmental and proprietary powers. *City of Seattle v. Stirrat*, 55 Wash. 560, 564-66, 104 Pac. 834 (1909). The Court’s sense expressed there that governmental powers are an attribute of sovereignty, while true, offers very little practical guidance. The hodge podge of law on the governmental/proprietary distinction since that decision attests to this fact.

function. *Id.* at 693-94. Such a conclusion seems at odds with the notion that water and sewer services, so essential for public health and safety, are mere proprietary services. In specific, this Court stated:

In determining whether an action is sovereign or proprietary, we may look to constitutional or statutory provisions indicating the sovereign nature of the power and may also consider traditional notions of powers that are inherent in the sovereign. Relevant to this analysis are the general powers and duties under which the municipality acted, the purpose of those powers, and whether the activity or its purpose is normally associated with private or sovereign acts. The distribution of benefits is irrelevant.

The principal test for determining whether a municipal act involves a sovereign or proprietary function is whether the act is for the common good or whether it is for the specific benefit or profit of the corporate entity.

Id. at 687 (citations omitted). A proprietary function involves “business-like activities that are normally performed by private enterprise.” *Steifel v. City of Kent*, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006).

Because water/sewer districts are governments, the Districts are clearly subdivisions of the state, exercising sovereign powers, and their services are provided for the “common good.” Those services are not “business-like” and any notion that they are performed for the “specific benefit or profit” of the Districts belies the fact that the Districts do not uniquely “benefit” or “profit” from the vital public services they provide.

First, the Districts are, in fact, *governments* authorized by the Legislature to be created by the people in their localities or county public health authorities. *See, e.g.*, RCW 57.04.030 (describing how the people may petition county government to create a district and requiring County legislative authority to certify that the district’s creation “will be conducive to the public health, convenience, and welfare and will be of benefit to the property included in the district,” or the county public health officer can certify that existing facilities are inadequate and a district is necessary for “public health and safety”); RCW 57.04.050 (voters in district must approve district). Their boards of commissioners are *elected*. RCW 57.12.030.

As noted *supra*, water/sewer districts created under Title 57 RCW, like the Districts, enjoy expansive governmental powers, including the power to tax.³⁸ The Districts possess authority on a par with that of general purpose governments – “[t]o exercise any of the powers granted to cities and counties with respect to the acquisition, construction, maintenance, operation of, and fixing rates and charges for waterworks and systems of sewerage and drainage.” RCW 57.08.005(22). That would include the police power contained in 35.67 RCW. *See Teter v. Clark County*, 104

³⁸ Cities commonly denigrate the governmental nature of Title 57 RCW districts, but the Legislature has conferred broad governmental powers on them, as noted *supra*, and this authority must be *liberally construed*. RCW 57.02.030.

Wn.2d 227, 230-31, 704 P.2d 1171 (1985). Their central reason to exist as *governments* is to provide water/sewer services.

Second, the services provided by the Districts – water/sewer services – generally cannot be obtained from private concerns. At one time, private water companies might have been a main source of water service in Washington, but the vast majority of Washington citizens now receive such services from governments. Judge Fearing indicated that government provides 85% of water needs. *Wenatchee*, 181 Wn. App. at 353.³⁹ District citizens cannot buy private sewer services at their local hardware store. In fact, the Districts have authority to compel property owners to connect private drain or sewer systems to their systems and may even enter onto the property owner’s premises to make the connection if the owner refuses. RCW 57.08.005(9). CP 1245. Moreover, a business-type service connotes one that the entity may choose *not* to provide to customers as a matter of its business judgment. Water/sewer districts have no such discretion. By statute and regulation, they are *obligated* by statute and case law to provide

³⁹ District residents may have septic systems, but those systems are discouraged, given their potential adverse environmental effects. CP 116, 1245, 1264. Similarly, private wells are a theoretical possibility, but those wells create adverse impacts on the groundwater. CP 1256. As Lakehaven’s John Bowman testified: “I am not aware of any private ‘for profit’ water or wastewater service providers operating within the District’s service area.” CP 113. This Court’s decision in *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016) that held under the GMA water must be both factually and legally available before building permits could be issued also impacts the availability of private wells as a water source.

water or sewer services to anyone within their boundaries. CP 1245; RCW 43.20.260 (provision of water service); *Boyer v. City of Tacoma*, 156 Wash. 280, 287-88, 286 Pac. 659 (1930) (sewer services); *Nolte v. City of Olympia*, 96 Wn. App. 944, 958, 982 P.2d 659 (1999) (water/sewer services).

Just as Judge Fearing noted in *Wenatchee*, the provision of potable water is a vital public service – it is a *governmental* service. This Court implicitly recognized that water/sewer districts are governments providing governmental services when they provide water to their citizens. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433-34, 90 P.3d 37 (2004) (board of health regulation on fluoridation detracted from *governmental* authority of water districts and was invalid).⁴⁰

This Court need look no farther than its treatment of fire hydrants and fire flow to understand that the government/proprietary distinction is nonsensical, particularly as to water services. In *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008), this Court held that the provision of hydrants and water for fire flow is governmental in nature. *See also, City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012).⁴¹

⁴⁰ Highline purchases fluoridated water from Seattle and it fluoridates its own water from wells; Lakehaven obtains water from other governments that has already been fluoridated. CP 652, 1255.

⁴¹ In their responses to the Districts' requests for admission, the City *admitted* that it lacks the authority to tax the Districts' governmental functions generally, CP 143,

The Districts' water systems are designed to provide potable water for domestic use, and water for fire hydrants and fire flow. For example, hydrants are used often to flush the potable water system, and are also used for fire suppression in fires. It is simply not possible to segregate a particular part of the water system, whether it be the source of supply or the storage or distribution systems, between fire flow and domestic use. *Id.* at 17 (“[M]unicipalities must have hydrants in their jurisdictions and water flow to those hydrants to make them useful. Therefore, any discussion of a ‘water system’ by a public utility most likely includes hydrants by default.”). This is true of Lakehaven’s and Highline’s water systems. The reservoirs and pipe systems are sized for the larger capacity needed to provide fire flow, with the capacity for domestic service being a smaller, if not incidental, component of the overall system. CP 115.

Lane and Bonney Lake make clear that the provision of hydrants and water for fire flow is the duty of the general government in the area – here, the City. If the City’s utility tax is appropriate, then the City will be taxing the District and its water customers, at least in part, for a *governmental*

but it was less than opaque as to what it deems to be a non-taxable “governmental” service. In its responses to whether specific District revenue sources or expenditures were “governmental” in nature, the City was also less than clear. CP 124-43, 1194-1212; 1493-98. In its responses, the City also claimed that whether its definition of “gross income” in the FWRC constituted a matter of “legal opinion,” and the term “definition of Gross Income” was “vague and ambiguous,” CP 143, an important admission in connection with the Districts’ due process argument *supra*.

service that the District is providing (fire flow and fire hydrants) to City residents. The *Lane* decision illustrates that whether the service is governmental or proprietary makes little sense in the taxation setting.

Just as the provision of water services is a governmental function, the collection, treatment, and disposal of sewage is a governmental function. Washington law recognizes that the collection and disposal of solid waste is a governmental function. *City of Spokane v. Carlson*, 73 Wn.2d 76, 81, 436 P.2d 454 (1968).⁴² It is no different, if the “solid waste” is organic, rather than inorganic. Instead, the *Carlson* court emphasized that the disposal of refuse, both organic and inorganic, “was a matter of serious public concern, affecting the public health and well-being...” *Id.* at 81. The Court stated in a footnote:

See E. Hopkins & W. Schulze, *the Practice of Sanitation* (3d ed. 1958). On p. 196 the authors say: Municipal wastes include garbage, ashes, street sweepings, dead animals, rubbish, and trade wastes. *** Rubbish includes papers, boxes, boilers, abandoned automobiles, and scrap iron; trade waste includes all of the above as well as waste building materials and factory products. *The disposal of wastes is a governmental function and a service demanded in every urban community.* *** See, also, W. Hobson, *The Theory and Practice of Public Health* (2d ed. 1965), wherein it is said, at 80: *The safe disposal of domestic and trade refuse is of comparable public health importance to the safe disposal of sewage.* Moist organic refuse encourages the breeding of flies and rats and can be indirectly responsible

⁴² The *Algona* court, of course, held that King County’s operation of a solid waste transfer facility was a government function.

for the dissemination of many diseases. For aesthetic reasons also, prompt removal of refuse from the vicinity of dwellings is essential.

Id. at n.2 (emphasis added).

While courts have treated the operation of sewer systems as a proprietary function in rare circumstances, *Hayes v. City of Vancouver*, 61 Wash. 536, 112 Pac. 498 (1911) (in a sovereign immunity case, Court held that city's pumping of water into a sewer to remove an obstruction was a proprietary act), this Court has also held that a municipality operates a sewage system as a governmental function in the eminent domain setting. *Town of Steilacoom v. Thompson*, 69 Wn.2d 705, 709, 419 P.2d 989 (1966); *State ex rel. Church v. Superior Court*, 40 Wn.2d 90, 91, 240 P.2d 1208 (1952); *Snavely v. City of Goldendale*, 10 Wn.2d 453, 457, 117 P.2d 221 (1941) (municipalities have right to condemn in furtherance of their governmental function of disposing of garbage and sewage).

Apart from a judicial analysis of the issue, the other branches of our government have found water/sewer services to be governmental in nature. The Attorney General has opined that the provision of sewer services by a sewer district is governmental. AGO 1949-51 No. 246 ("the activities of a sewer district are governmental rather than proprietary...").

In the planning context, the Legislature has determined that water/sewer services are governmental in nature. Consistent with the

requirement of the Growth Management Act, RCW 36.70A (“GMA”), regarding planning, the City’s own comprehensive plan (which incorporates Lakehaven’s comprehensive plan) identifies water/sewer services as core governmental functions. Such services are urban *governmental* services. RCW 36.70A.030(18) (defining “urban governmental services” to include “sanitary sewer systems” and “domestic water systems”). Indeed, sewage treatment facilities, and to a lesser extent water plants, are essential public facilities within the meaning of RCW 36.70A.200(1)/WAC 365-196-550 for which special planning efforts must be undertaken by local planning jurisdictions like the City. Because siting such essential facilities is often controversial, the Legislature has mandated that they be part of critical planning efforts. *See, e.g., Cedar River Water & Sewer Dist., supra. See also, Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 9-11, 57 P.3d 1156 (2002) (extension of a sewer line was an expansion of an urban *governmental* service under GMA).

The GMA definition reflects the modern, practical reality that these services provided by the Districts as governments for the common good should not be provided by private concerns. Chapter 6 of the City’s capital facilities plan directs that all residents have access to safe drinking water and that everyone within the City’s Urban Growth Area must be connected to *public* sewer systems. That plan also notes that its local fire district

depends upon the Districts to ensure that it has adequate water pressure in hydrants to extinguish fires:

The fire department also depends on having adequate water pressure available in fire hydrants to extinguish fires. The department works with the Lakehaven Water and Sewer District, Highline Water District (in the City of Des Moines), and other water utilities within its corporate limits to ensure that adequate “fire flow” is always available. Lakehaven Water and Sewer District’s Water System Plan analyzes “fire flow” rates available at different points in its water system, and programs improvements to the water system to ensure that sufficient water is available for fire suppression.

CP 215.

Ultimately, perhaps the most compelling argument concerning water/sewer services is the vital importance such services play in the day-to-day lives of Washington citizens. CP 115-16. Not to be flip about this point, water and sewer services are far more essential to the public and are more in the nature of critical governmental services than is a baseball stadium, a service this Court determined was governmental in *Wash. St. Major League Baseball Stadium Pub. Facilities Dist.*, *supra*.

Water services are essential to human existence.⁴³ Providing both clean drinking water for human consumption and a supply of water in

⁴³ Evidencing their importance to the common good, our courts have recognized that these districts “have authority to take major actions significantly affecting the quality of the environment.” *Carpenter v. Island County*, 14 Wn. App. 843, 844, 545 P.2d 1218 (1976), *aff’d*, 89 Wn.2d 881, 577 P.2d 575 (1978). As the Federal Centers for Disease Control has cogently observed: “Over the last 100 years, many improvements in the health,

adequate quantity and pressure for fire suppression purposes, as the City has admitted, are vital to public health and safety. A public water supply system, which will utilize better health practices and a more coordinated approach to resource management than would be found in areas where private wells proliferate, also presents significant environmental benefits to those who are not connected to the system. CP 115, 1256. *See also*, RCW 43.20.050(2) (conferring jurisdiction over public water systems upon State Board of Health).

Similarly, sewer services are essential to public health and the protection of our environment. Because sanitary sewer systems offer a more environmentally efficient and reliable means of collecting, treating, and disposing of wastewater than septic systems, Washington's citizens derive a benefit from sewer service regardless of whether their individual property is actually connected to the wastewater system. CP 116, 1264.⁴⁴

success, and lifespan of the U.S. population can be linked to improvements in water quality. Providing safe drinking water was one of the most important public health achievements of the 20th Century.” As the CDC noted, this was accomplished by government regulation. <https://www.cdc.gov/features/drinkingwater/index.html>. Water-sewer districts are specifically empowered to regulate the content of the water they provide. RCW 57.08.005(3); *Parkland Light & Water Co.*, 151 Wn.2d at 433-34 (board of health regulation on fluoridation detracted from authority of water districts and was invalid).

⁴⁴ There is little question that the leaching of wastewater into the groundwater in our State is a serious environmental concern. As noted in 23 *Wash. Practice Environmental Law and Practice* § 7.88 (2d ed.), “failing on-site septic sewage systems may discharge bacteria and pathogens, nutrients and household chemicals to both streams and groundwater.” Accordingly, the Legislature has delegated the responsibility for addressing septic systems standards to ensure public health to the State Board of Health.

Indeed, these service systems are often interconnected between municipal service providers, formulating a part of a larger governmental system for providing water, and moving sewage to proper treatment facilities operated by separate governmental agencies. These services are so essential, so fundamental, that they are governmental in nature.

The Districts' water/sewer services in this case are *de facto* governmental services regardless of how such services might have been provided to customers decades ago and characterized in cases decided years ago. Cases determining that certain water/sewer services were proprietary must be read in the context of the era in which they were decided.⁴⁵ Water/sewer services are governmental in nature because of their health, safety, environmental, and development significance and because the Districts have no discretion in denying them to anyone residing in their

RCW 43.20.050(2)(c), (3). The Board has adopted rules for septic systems. WAC Ch. 246-272A. Those rules are enforced by local boards of health and health officials, among others. RCW 43.20.050(4).

⁴⁵ There are few, if any, instances left in Washington where private companies are providing sewer services to customers. CP 1262. The provision of domestic water service by governments such as cities, PUDs, and water districts far outweighs the provision of such services by private entities. Again, Judge Fearing estimated that governments provide 85% of the water needs of Washington citizens. *Wenatchee*, 181 Wn. App. at 353.

service areas. The Districts have an overarching *public* duty to provide such services.⁴⁶

(d) The City May Not Tax District Revenues Devoted to Pay for Governmental Services

A final real world problem with the governmental/proprietary distinction advocated by the City and adopted by the trial court is in the City's apparent willingness to tax revenue that will be used by the Districts to provide what are undeniably governmental services.⁴⁷

The City contended below that the taxability of "gross income" was not affected by what the collected revenue is spent on by the Districts. The City's Finance Director, Ari Ariwoola, was unabashed in admitting that the City only intended to exempt revenue derived from the Districts' governmental services and not revenue generally derived from all of the

⁴⁶ See, e.g., RCW 43.20.260 which imposes a "duty" on municipal water suppliers, like Highline and Lakehaven, to provide water service in a "timely and reasonable manner."

⁴⁷ The City admitted below that the following revenue collected by Lakehaven is not taxable under the Ordinance because "[t]hese sources relate to governmental functions and/or are not gross income from the business of selling or furnishing water services or furnishing sewer services in the City for commercial, industrial, or domestic use or purpose" – "Street Lights; Permit Charges, to the extent those charges are collected on behalf of other permitting agencies or charged for permits issued by Lakehaven; Developer Extension Warranty Fees; Interest Income; Tanksite Antenna Rental Income; Document Copies; Donations; Hydrant Maintenance; Metal Recycling; PSE Grants; Procurement Card Rebates; Refunds; and Wash DES Rebates." CP 1171. Of these charges, the City admitted that the following revenue relates to governmental functions: Permit Charges, Developer Extension Warranty Fees, charges for Document Copies received in responding to Public Records Act requests, and Hydrant Maintenance revenue. CP 1195-1208. However, the City's tax, of course, *nowhere* reflects that this District revenue is not subject to its tax.

Districts' revenue sources and spent on governmental services. CP 730 (“Actually, your word pay, the word pay that you used suggests expenditure. What the tax is based on is gross income, which is referred to as received, not payment. So it’s all gross income generated. It doesn’t really matter what you use them for, what you paid for. It’s what you – the source that you receive it from.”); CP 1511. However, in *Okeson*, this Court found that a Seattle ordinance that proposed to transfer responsibility for paying for City streetlights from the City’s general fund to ratepayers at Seattle City Light (including ratepayers living outside of Seattle) was a tax that violated our Constitution. This Court specifically held that the provision of streetlights was a governmental function and that, in considering the legality of any revenue source to sustain such services, a court must engage in a nuanced analysis. In other words, whether the revenue raised is designed to support such government services is crucial. “It is a misnomer to simply ask whether the charges raise revenue, because both taxes and regulatory fees raise revenue. What is important is the purpose behind the money raised...” 150 Wn.2d at 552-53. Thus, if the City’s utility tax applies to District revenues (from whatever source) devoted to what are governmental purposes, those revenues are not taxable by the City.

The trial court did not address this critical issue in its ruling. CP 1524-30.

In order to appropriately address the governmental/proprietary distinction, this Court should reaffirm its decision in *Okeson* and hold that the Districts' revenue devoted to sustaining what are governmental services is not subject to the City's utility tax. In the absence of such a holding, the Districts (and water/sewer districts across Washington) would be compelled to radically restructure their rates (their principal revenue source) to associate components of these rates with the funding of specific District governmental services, as defined by this Court, to appropriately avoid the City's improper taxation of governmental services.⁴⁸

.....

In sum, the governmental/proprietary distinction adopted in *Wenatchee* is unworkable, unrealistic, and, particularly in the context of taxation, leads those responsible to implement the distinction to more confusion than clarity. It should not be applied by this Court in light of *Algona*. *Wenatchee* should be overruled. If a government is to tax another government, the Legislature must expressly authorize it to do so.

⁴⁸ This is not a hypothetical outcome. For example, after the *Lane* decision, Seattle allocated 47% of the cost of its water system for fire suppression, a governmental function. CP 119, 316.

Alternatively, if the Court believes the government/proprietary distinction is viable, it should conclude that the provision of water services, and the collection, treatment, and disposal of sewage are untaxable governmental services. In light of their very nature and the work of modern water/sewer districts, the Districts' services are "governmental" in nature. Their functions are "for the common good of all," and not merely "for the special benefit of the corporate entity." *Okeson*, 150 Wn.2d at 550.

(3) The City's Tax Is Unconstitutional on Its Face and As Applied to the Districts⁴⁹

The Districts contended below that the City's utility tax was unconstitutional on its face and as applied to them on both state and federal constitutional grounds. That tax is unconstitutional on its face, because there is "no set of circumstances ... in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). A statute that is unconstitutional on its face

⁴⁹ The City briefly argued below that the Districts lack standing to raise state and federal constitutional issues. CP 486. But the trial court disagreed. CP 1257-58. The trial court did not err. If there is any question about standing, the City's central argument in this case hoists it by its petard. If the Districts are corporate *taxpayers* subject to the Ordinance, and the City has, in fact, argued that the Districts' services at issue are not governmental in nature but proprietary, *i.e.*, services like those provided by any other Washington business, then, like those other Washington corporations, the Districts have the right to assert state and federal constitutional rights. *See, e.g., De Falco v. City of Hallandale Beach*, 18 So. 3d 1126, 1129 (Fla. App. 2009) (When a municipality acts in its proprietary capacity, it may exercise the same rights as a private corporation).

is rendered “totally inoperative.” *Id.* at 669. The ordinance is unconstitutional on its face because it is so vague as to be incapable of enforcement.⁵⁰

The tax is also unconstitutional as applied to the Districts because the “adaption of the statute in the specific context of the party’s actions or intended actions is unconstitutional.” *Id.* In contrast with a statute that is unconstitutional on its face, a statute that is unconstitutional as applied prohibits only “future application of the statute in a similar context, but the statute is not totally invalidated.” *Id.* The tax is unconstitutional as applied to the Districts, given the special treatment of other taxpayers like Tacoma. This Court reviews these constitutional issues *de novo*. *Id.* at 668.

(a) The City’s Tax Violates the Districts’ Due Process Rights Because It Is Void for Vagueness

A statute can be impermissibly vague for either of two independent reasons: first, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what it prohibits; or, second, if it authorizes or even encourages arbitrary and discriminatory enforcement.⁵¹ *Morales*, 527 U.S. at 56 (Prosecution under a loitering ordinance held

⁵⁰ Claims that statutes are unconstitutionally vague in violation of due process principles are particularly appropriate for facial challenges. *City of Chicago v. Morales*, 527 U.S. 41, 55, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).

⁵¹ “Vague laws invite arbitrary power.” *Sessions v. Dimaya*, ___ U.S. ___, 138 S. Ct. 1204, 1223, 200 L. Ed. 2d 549 (2018) (Gorsuch, J. concurring).

invalid); *see also*, *State v. Murray*, 190 Wn.2d 727, 416 P.3d 1225 (2018) (affirming the void for vagueness analysis and upholding statute relating to conditions for sex offender’s release). Both facets of the *Morales* void-for-vagueness analysis are implicated here.

The City’s utility tax ordinance cannot be readily applied by persons of common intelligence. In *Voter Educ. Committee v. Wash. State Pub. Disclosure Comm’n*, 161 Wn.2d 470, 484-85, 166 P.3d 1174 (2007), *cert. denied*, 553 U.S. 1079 (2008), this Court affirmed that statutes are unenforceable on due process grounds under the Fourteenth Amendment if persons of common intelligence differ at their application or must guess at their meaning. FWRC § 3.10.040 purports to tax business activities in the City. (“There are levied upon and shall be collected from everyone, including the city, on account of certain business activities engaged in or carried on in the city, occupation taxes in the amount to be determined by the application of rates given against gross income...”). Subsections (9) and (10) set the rate at 7.75% for water and sewer services.⁵²

FWRC § 3.10.020 defines “Gross Income” as:⁵³

⁵² In reality, however, given the trial court’s ruling, the court, in effect, excepted from FWRC § 3.10.040(9), (10), gross income derived from “governmental” activities.

⁵³ While the City/Lakehaven franchise agreement has defined the revenue on which the assessment it pays to the City is based, that agreement’s definition is different than that in the City’s tax.

the value proceeding or accruing from the sale of tangible property or services, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees, or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like), and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without deduction on account of losses, including the amount of credit losses actually sustained by the taxpayer whose regular books or accounts are kept upon an accrual basis.⁵⁴

The Districts receive revenues from a myriad of transactions and functions in the normal execution of their governmental functions, including, among others: utility service rates, hydrant services, connection charges, meter installations, proceeds from bond sales, grants, interest earnings, investments, rental income, interest, street lighting, metal recycling, late charges, penalties, and other charges. CP 407-12. It is unclear which of these revenue sources the City unilaterally will decide is “value proceeding or accruing from the sale of utility services or investment

⁵⁴ But the City itself has waffled on what constitutes gross income for purposes of a utility tax. In 2007 in Ordinance 07-562, CP 1512, the City amended the definition of gross income to parallel that used in the State’s public utility tax. It allowed a deduction from gross income from government grants. *Id.* In 2009, in Ordinance 09-600, the City returned to the present definition. *Id.*

in capital,” particularly where it has not adopted any clarifying regulations.⁵⁵

No one, certainly not the Districts, their finance directors, or their financial staffs, could readily comprehend what District revenue was taxable;⁵⁶ they cannot have a clear sense as to which District revenue sources fall within the ambit of the City’s tax, particularly given the ambiguities in the law regarding government/proprietary functions.⁵⁷ The

⁵⁵ In fact, the United States Supreme Court, in a case reviewing a substantially similar statutory definition of “gross income,” specifically noted that the definition “is not free from ambiguities or difficulties of construction,” although it refused to rule on the issue because the ordinance at issue provided for “interpretive rules and regulations” and the preparation of a form. *Pacific Tel. & Tel. Co. v. City of Seattle*, 291 U.S. 300, 303, 54 S. Ct. 383, 78 L. Ed. 810 (1934). Only after a form was issued and “a practical construction [was] given to the ordinance by an administrative officer competent to give it” did the Court uphold the definition. *Puget Sound Power and Light Co. v. City of Seattle*, 291 U.S. 619, 626-27, 54 S. Ct. 542, 78 L. Ed. 1925 (1934). The City’s ordinance has no provisions for administrative guidance and the City has not issued any regulations on its application. The City has not commenced rulemaking, and has no intention of doing so, as Ariwoola testified in his deposition. CP 748 (“We do not have any plan to redefine how we’ve defined it in that ordinance.”).

⁵⁶ For example, Highline’s Administrative Manager, Debbie Prior, testified that she lacked any guidance on what constituted taxable gross income from the City, and lacking such guidance, “I have been unable to determine with any certainty, what revenues of the District are subject to, or excluded from, the City’s tax.” CP 1249. *See also*, CP 412 (similar testimony from Morgan Dennis, Lakehaven’s Finance Director); CP 1258 (similar testimony from Cordelia Ford, Midway’s District Office Manager).

⁵⁷ Conceivably, the City’s definition extends to District income from the provision of fire hydrants to the City, indisputably a governmental function that may not be taxed under *Algona*. Lakehaven charges the City a fire hydrant fee, but any shortfall in the fee receipts necessary to sustain expenditures for hydrants would be made up by the rates paid by all ratepayers.

Districts are left to the whim of the City in relation to which of their revenue sources are taxable and which are not.

The FWRC *nowhere* defines “government” or “proprietary” services, and its Finance Director testified that he alone determines whether a service is taxable. CP 688 (“Who’s responsible for interpreting what activities the utility tax applies to? A: I would be.”); CP 695. Ariwoola *repeatedly* refused to say whether rates paid for the collection, treatment, and disposal of sewage effluent by the Districts was taxable. CP 688-93. Ariwoola arbitrarily and unilaterally determined that certain District revenue sources “relate to the Districts’ governmental activities and exempted them from taxation.” CP 1511. The Districts lack a clear basis *in advance* for knowing what is taxable.⁵⁸

Regarding the potential for arbitrary enforcement, the very lack of precision referenced above, particularly in the absence of construing regulations, opens the door to arbitrary enforcement. The City may, at its whim, apply the tax to governmental services. Moreover, the City has essentially proved that the City’s tax is arbitrarily enforced by its

⁵⁸ The City asserted below that its finance director was not the “sole” decisionmaker on the task because taxpayers had a right to administrative appeals. CP 1304-05. But the existence of a City administrative process to appeal Ariwoola’s unilateral governmental/proprietary decision is cold consolation. The taxpayer bears the burden of proof and the finance director’s decision is presumptively correct; the taxpayer must incur expenses such as staff time and attorney fees to appeal an adverse decision, and face penalties and interest as well. FWRC § 3.10.190.

determination to (1) afford Tacoma an exemption from it *nowhere* authorized in the Ordinance or otherwise in the FWRC, and (2) imposing the tax on what it has admitted are governmental services by failing to specifically exempt hydrant charges and amounts charged in relation to the collection, treatment, and disposal of sewage sludge (a solid waste) from its reach.

The City's utility tax is unconstitutionally vague and unenforceable under due process principles.

(b) The City's Tax Is Unconstitutional under Article I, § 12 Because the City Gave Tacoma Special Treatment in Exempting It from Its Utility Tax

The City exempted Tacoma from its tax, something it was barred by our Constitution from doing. Article VII, § 1 states: "The power of taxation shall never be suspended, surrendered, or contracted away." Indeed, in *City of Spokane, supra*, this Court invalidated a local ordinance that purported to grant a property tax exemption to seniors and disabled veterans. The Court concluded that, like the authority to tax, the authority to grant exemptions must be *expressly* conferred on local governments by the Legislature. 189 Wn.2d at 707. As in *City of Spokane*, the statute upon which the City relies for its taxing authority, RCW 35A.82.020, *nowhere* confers express authority upon the City to exempt a municipal taxpayer like Tacoma, such

that the City's franchise agreement with Tacoma is contrary to the Constitution.

The City claimed below that it applied the utility tax to *all* entities providing water/sewer services, CP 487 ("The Ordinance, on its face, applies to all private and public utilities alike."), but that is a false statement *in practice*. Without a specific exemption for utility taxpayers having franchise agreements, in the Ordinance itself, the City favors Tacoma over Lakehaven, both of whom having franchise agreements with it. The impact of that decision is that the Districts may pay added utility taxes to make up for the revenue the City fails to generate from Tacoma.

Despite the language of the City's tax that its tax must be assessed on "everyone" providing water/sewer services and the mandate of article VII, § 9 that local taxation on persons be uniform, the City purports to exempt Tacoma even though Tacoma provides utility services within the City's boundaries. The FWRC nowhere exempts Tacoma from the utility tax. Although the City has a pre-existing franchise agreement with Tacoma, it also has a pre-existing franchise agreement with Lakehaven, and yet it seeks to apply the tax to Lakehaven but not Tacoma. As such, the ordinance violates article I, § 12 that prohibits the granting of privileges or immunities unless they "equally belong to all citizens, or corporations." The trial court

erred in ruling that the City's utility tax did not violate article I, § 12. CP 1528.

This Court has concluded that article I, § 12 was designed to foreclose special favoritism by government toward particular entities; the clause was adopted during a period of distrust towards laws that served special interests and was “to limit the sort of favoritism that ran rampant during the territorial period.” *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 775, 317 P.3d 1009 (2014) (internal citation omitted). “[A]rticle 1, section 12 was intended to prevent favoritism and special treatment for a few, to the disadvantage of others.” *Id.* (internal citation omitted).⁵⁹

This Court has applied a straightforward two-part test for determining if an article I, § 12 violation is present. First, a court must

⁵⁹ Article I, § 12 was modeled on a counterpart provision in the Oregon Constitution. It was enacted to curb corporate influences over state and local governments. P. Andrew Rorholm Zellers, *Independence for Washington State's Privileges and Immunities Clause*, 87 Wash. L. Rev. 331, 334-37 (2012). Article I, § 12 is distinct in perspective from the Equal Protection Clause of the Fourteenth Amendment. “Our framers’ concern with avoiding favoritism toward the wealthy clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves.” *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 808, 83 P.3d 419 (2004) (internal citation omitted). Put another way, “the federal constitution is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.” *Id.* at 806-07. See also, Johnathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1251 (1996).

determine if the government has conferred a distinct benefit with respect to a fundamental right upon a favored entity. Next, a court must determine if there is a reasonable explanation for such favored treatment. *Ockletree*, 179 Wn.2d at 775-76.

The City's special treatment of Tacoma, exempting it from the tax its ordinance created, represents the type of favoritism barred by article I, § 12. No other taxpayer receives the special treatment Tacoma does from the City. An exemption from taxation, as here, is special treatment involving a fundamental right; as long ago as 1902, this Court noted that "the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from" is a fundamental right belonging to all citizens by reason of their citizenship. *State v. Vance*, 29 Wash. 435, 458, 70 Pac. 34 (1902). Citing *Vance*, this Court has determined that a privilege is present when a business is exempted from a regulatory scheme benefitting it at the expense of other businesses. *Assoc. of Wash. Spirits and Wine Distributors v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 360, 340 P.3d 849 (2015). A "special privilege" has been found in numerous settings historically.⁶⁰ The *Ockletree* court concluded

⁶⁰ *E.g., Ex parte Camp*, 38 Wash. 393, 397, 80 Pac. 547 (1905) (holding that city ordinance prohibiting any one from peddling fruits and vegetables within city, but exempting farmers who grew produce themselves violated article I, § 12 as granting privilege to class of citizens); *City of Spokane v. Macho*, 51 Wash. 322, 323-26, 98 Pac.

that a fundamental right was implicated by a religious employer exemption from the Washington Law Against Discrimination. The right to be free from discriminatory practices is a fundamental right. 179 Wn.2d at 794-97.

A privilege and a fundamental right are at issue here – the government’s proper application of a tax and any exemptions to it. In *Grant Cty.*, this Court cited *Vance*’s identification of tax exemptions as falling within the array of fundamental rights with approval. 150 Wn.2d at 813 (“the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from”). The City’s exemption of Tacoma from its tax implicated a fundamental right.

Exacerbating the potential for arbitrary awards of tax exemption to favored taxpayers, the City does not have a process by which other taxpayers (Lakehaven, for example, has a franchise agreement with the City) might go about qualifying for such an exemption and appears to assert that it can simply grant exemptions by contracting with favored persons and

755 (1909) (holding ordinance regulating employment agencies unconstitutional because it imposed criminal penalties upon one party, but imposed no penalties for others in like circumstances); *City of Seattle v. Dencker*, 58 Wash. 501, 504, 108 Pac. 1086 (1910) (invalidating ordinance as unconstitutional under article I, § 12 because it imposed tax upon sale of goods by automatic devices that was not imposed upon merchants selling same class of goods); *State v. W.W. Robinson Co.*, 84 Wash. 246, 249-50, 146 Pac. 628 (1915) (invalidating statutes that exempted cereal and flouring mills from act imposing onerous conditions on other similarly situated persons and corporations).

entities. This is precisely the type of favoritism article I, § 12 was designed to forestall.

The Districts meet the first element of the article I, § 12 analysis because this case goes to the core of article I, § 12's anti-favoritism policy; the Districts have a fundamental right to the same taxes or burdens as other similarly situated Washington municipal corporate taxpayers.

In *Ockletree*, this Court discussed the second facet of the article I, § 12 test at length, concluding that there were no rational economic or regulatory grounds for distinguishing between religious and secular entities in the application of the anti-discrimination policies of RCW 49.60. 179 Wn.2d at 794-804. Similarly, there is no justification for allowing Tacoma, unlike any other utility provider, to escape the City's tax, particularly given the admonition in article VII, § 1. If the City's rationale for Tacoma's special treatment is the existence of a franchise agreement, Lakehaven likewise has a franchise agreement with the City, CP 1, 13-38, but not the tax exemption Tacoma enjoys.⁶¹ There is no legal justification for the City

⁶¹ The City argued below that the existence of a franchise agreement allows it to exempt Tacoma from the utility tax. CP 488, 1302-03. While a party may contract with a government to forego payment of a fee, *Housing Authority of City of Seattle v. City of Seattle*, 56 Wn.2d 10, 15, 351 P.2d 117 (1960), the City has never cited authority allowing a government to contractually exempt a taxpayer from paying a legislatively-levied tax. Just as the City could not enter into a contract with a taxpayer to exempt it from the sales or B&O taxes, absent legislative authorization as in *King County Fire Protection Dists. #16, 36, 40 v. Housing Authority of King County*, 123 Wn.2d 819, 822, 872 P.2d 516 (1994), the City lacked the authority to confer a special contractual tax exemption on Tacoma.

to give Tacoma a free pass on the tax here, favoritism shown no other utility. Moreover, there is every reason not to allow a municipality to exempt favored persons or entities from taxes extra-legislatively, i.e. by contract. *See* Art. VII, § 1.

The City's special tax exemption violates article I, § 12.

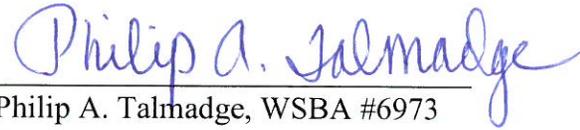
F. CONCLUSION

The City lacks express statutory authority to apply its utility tax to the Districts when the Legislature denied cities such authority. This Court should hold that the Districts are immune from the City's utility tax under the governmental immunity doctrine or because the water/sewer services they provide are governmental in nature. Alternatively, the ordinance violates the Districts' constitutional rights under the Washington and United States Constitutions. The Court should hold that the City's tax is unconstitutionally vague and/or violates article I, § 12.

The Court should reverse the trial court's order and direct the trial court to grant summary judgment to the Districts. Costs on appeal should be awarded to the Districts.

DATED this 26th day of March, 2019.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

John W. Milne, WSBA #10697
Mark S. Leen, WSBA #35934
Inslee Best Doezie & Ryder PS
10900 NE Fourth Avenue Suite 1500
Bellevue, WA 98004-8345
(425) 455-1234
Attorneys for Appellants

Steven H. Pritchett, WSBA #12792
Lakehaven Water and
Sewer District
PO Box 4249
Federal Way, WA 98063
(253) 941-1516
Attorney for Lakehaven Water and
Sewer District

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LAKEHAVEN WATER AND SEWER
DISTRICT, HIGHLINE WATER
DISTRICT, and MIDWAY SEWER
DISTRICT,

Petitioners,

v.

CITY OF FEDERAL WAY, a municipal
corporation,

Respondent.

No. 18-2-08785-6 KNT

ORDER GRANTING
RESPONDENT CITY OF
FEDERAL WAY'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING PETITIONERS'
MOTION FOR SUMMARY
JUDGMENT

THIS MATTER came before the Court on Respondent City of Federal Way's (the "City's") Motion for Summary Judgment and Petitioners' Motion for Summary Judgment.

The Court considered the following in deciding the respective motions for summary judgment:

1. Respondent City of Federal Way's Motion for Summary Judgment;
2. Declaration of Adè Ariwoola, and the exhibits attached thereto;
3. Declaration of Jamie L. Lisagor in Support of Respondent City of Federal Way's Motion for Summary Judgment, and the exhibits attached thereto;

- 1 4. Petitioners' Motion for Summary Judgment;
- 2 5. Declaration of John Bowman;
- 3 6. Declaration of Mark Leen, and the exhibits attached thereto;
- 4 7. Declaration of Morgan Dennis;
- 5 8. Respondent City of Federal Way's Opposition to Petitioners' Motion for
- 6 Summary Judgment;
- 7 9. Declaration of Jamie L. Lisagor in Support of Respondent City of Federal
- 8 Way's Opposition to Motion for Summary Judgment, and the exhibits
- 9 attached thereto;
- 10 10. Petitioners' Opposition to City's Motion for Summary Judgment;
- 11 11. Declaration of Mark Leen Re: Opposition to City of Federal Way's Motion
- 12 for Summary Judgment, and the exhibits attached thereto;
- 13 12. Second Declaration of John Bowman, and the attachment thereto;
- 14 13. Declaration of Debbie Prior, and the exhibit attached thereto;
- 15 14. Declaration of Matt Everett;
- 16 15. Declaration of Cordelia Ford, and the exhibit attached thereto;
- 17 16. Declaration of Ken J. Kase;
- 18 17. Declaration of Ron Nowicki, and the attachment thereto;
- 19 18. Declaration of Matt J. Albers, and the exhibits attached thereto;
- 20 19. Respondent City of Federal Way's Reply to Motion for Summary
- 21 Judgment;
- 22 20. Supplemental Declaration of Adè Ariwoola, and the exhibit attached
- 23 thereto;
- 24
- 25
- 26
- 27

- 1 21. Declaration of Jamie L. Lisagor in Support of Respondent City of Federal
- 2 Way's Reply to Motion for Summary Judgment, and the exhibits attached
- 3 thereto;
- 4
- 5 22. Petitioners' Reply on Motion for Summary Judgment;
- 6 23. Declaration of Steven H. Pritchett, and the attachment thereto;
- 7 24. Declaration of Morgan Dennis Re: Reply on Motion for Summary
- 8 Judgment;
- 9 25. Declaration of Mark Leen Re: Reply in Support of the Districts' Motion for
- 10 Summary Judgment;
- 11 26. Petitioners' LCR 56(e) Objection to City of Federal Way's Reply;
- 12 27. Respondent City of Federal Way's Response to Petitioners' LCR 56(e)
- 13 Objection;
- 14
- 15 28. The other pleadings and papers on file in this matter;
- 16 29. The argument of counsel; and
- 17 30. A petitioners' provided copy of an article from the Pacifica Law Group
- 18 website regarding *City of Wenatchee v. Chelan County Public Utility*
- 19 *District*, 181 Wn. App. 326, 325 P.3d 419 (2014).
- 20

21 After consideration of the above including argument regarding the doctrine of

22 stare decisis, the Court relies on the decision of Division III of the Washington State

23 Court of Appeals in *City of Wenatchee v. Chelan County Public Utility District*, 181 Wn.

24 App. 326, 325 P.3d 419 (2014) in addressing whether RCW 35A.82.020 authorizes the

25 City of Federal Way through FWMC 3.10.040 to impose the excise tax at issue on other

26 municipal corporations. Division III of our Washington State Court of Appeals in *City of*

27

1 *Wenatchee* sought to “discern the principles” relied on by the Washington State
2 Supreme Court in *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984)
3 in determining whether one municipality may tax the revenue of another municipality
4 based on a general rather than a specific legislative grant of taxing authority. In light of
5 the Division III decision in *City of Wenatchee*, the Court finds that the petitioners as
6 governmental entities act in both proprietary and governmental capacities and that to
7 the extent that income is derived from petitioners’ proprietary functions, the City of
8 Federal Way may through RCW 35A.82.020 impose the excise tax set forth under
9 FWMC 3.10.040. Proprietary function is seen in the provision of water and sewer
10 services to benefit directly billed customers who requested the services and
11 governmental function is seen in the provision of services that protect the health, safety
12 and welfare of the general public.
13
14

15 Beyond the taxing authority issue, as proprietary actors, petitioners have
16 standing to challenge the constitutionality of the imposed tax under FWRC 3.10.040
17 which provides, at relevant part, as follows:

18 **1. 3.10.040 Occupations subject to tax – Amount.**

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

23 (9) Upon everyone engaged in or carrying on the business of selling or
24 furnishing water services for commercial, industrial, or domestic use or
25 purpose, a tax equal to 7.75 percent of the total gross income from such
26 business within the city during the period for which the tax is due; and

27 (10) Upon everyone engaged in or carrying on the business of furnishing
sewer services for commercial, industrial, or domestic use or purpose, a

1 tax equal to 7.75 percent of the total gross income from such business
2 within the city during the period for which the tax is due.

3 Petitioners' challenge the constitutionality of the ordinance on two fronts, (1)
4 under the 14th Amendment to the United States Constitution and Article 1, Section 3 of
5 the Washington State Constitution alleging that the ordinance is unconstitutionally
6 vague and (2) under the 14th Amendment to the United States Constitution and Article
7 1, Section 12 of the Washington State Constitution alleging that the ordinance
8 unconstitutionally favors the City of Tacoma by not imposing the tax on the City of
9 Tacoma per the terms of a franchise agreement that was entered prior to the enactment
10 of the ordinance. In challenging the constitutionality of FWMC 3.10.040 as amended by
11 ordinance 18-848, petitioners carry the burden of proving the ordinance unconstitutional
12 beyond a reasonable doubt.
13

14 The Court does not find that the City of Tacoma was given preferential treatment
15 by the City of Federal Way in FWMC 3.10.040 as amended because language in the
16 franchise agreement between the two cities entered before the amending ordinance
17 was enacted set forth a contractual agreement through which the City of Federal Way
18 received public fire protection and payment of associated costs for public fire protection
19 in exchange for foregoing imposition of the utility tax at issue.
20

21 As to Petitioners' due process, vagueness argument, the Court finds that
22 the definition of "gross income" is not vague in itself, even though there is no
23 direct reference in FWMC 3.10.040 stating that the tax is only on income derived
24 from proprietary acts or distinguishing what conduct is proprietary or
25 governmental for purposes of calculating "total gross income." While there are
26
27

1 at least six different tests for determining whether a function is proprietary or
2 governmental, petitioners have not met the burden of showing beyond a
3 reasonable doubt that the tax as imposed on everyone engaged in or carrying on
4 the business of selling or furnishing water services for commercial, industrial, or
5 domestic use or purpose and the tax imposed on everyone engaged in or
6 carrying out the business of furnishing sewer services for commercial, industrial,
7 or domestic use or purpose is unconstitutionally vague as it applies to taxation of
8 gross income derived from proprietary revenue sources.¹ Specific determination
9 of what is proprietary or governmental generated income for purposes of taxation
10 may be the subject of future litigation, but FWMC 3.10.040 as amended is not
11 unconstitutionally vague.
12

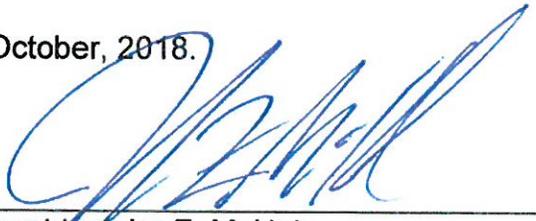
13
14 Based on the foregoing, the Court ORDERS as follows:

- 15 1. The City's Motion for Summary Judgment is GRANTED;
- 16 2. Petitioners' Motion for Summary Judgment is DENIED;
- 17 3. Pursuant to the City's counterclaim for declaratory relief, the Court
18 declares that:
 - 19 a. The City has authority under RCW 35A.82.020 to impose an excise
20 tax on gross income from public utilities' proprietary activities,
21 including furnishing utility services to billed customers; and
 - 22 b. Ordinance No. 18-847 enacted to amend FWMC 3.10.040 properly
23 levies an excise tax on public utilities' total gross income derived
24

25
26 ¹ Judge Fearing referenced six tests employed by Washington courts to separate proprietary from
27 governmental functions in his concurring opinion in *City of Wenatchee*, at 352.

1 from proprietary acts that constitute the business of furnishing
2 water or sewer services within the City for commercial, industrial, or
3 domestic use or purposes.
4

5
6 IT IS SO ORDERED this 30th day of October, 2018.

7
8 
9 _____
10 Honorable John F. McHale
11 King County Superior Court Judge
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellants* in Supreme Court Cause No. 96585-4 to the following parties indicated below:

Jamie L. Lisagor
Jessica A. Skelton
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404

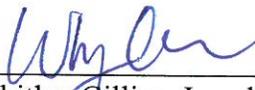
John Milne
Mark S. Leen
Inslee Best Doezie & Ryder PS
10900 NE Fourth Avenue, Suite 1500
Bellevue, WA 98004-8345

Steven Pritchett
Lakehaven Water and Sewer District
PO Box 4249
Federal Way, WA 98063-4249

Original e-filed with:
Washington Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 26, 2019 at Seattle, Washington.



Whitley Gillins, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK/TRIBE

March 26, 2019 - 12:51 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96585-4
Appellate Court Case Title: Lakehaven Water and Sewer District, et al v. City of Federal Way
Superior Court Case Number: 18-2-08785-6

The following documents have been uploaded:

- 965854_Briefs_20190326124808SC567678_1426.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Brief of Appellants 2.pdf
- 965854_Motion_20190326124808SC567678_6875.pdf
This File Contains:
Motion 1 - Overlength Brief
The Original File Name was Mot for Overlength Brief.pdf

A copy of the uploaded files will be sent to:

- Jessica.skelton@pacificalawgroup.com
- assistant@tal-fitzlaw.com
- cindy.bourne@pacificalawgroup.com
- jamie.lisagor@pacificalawgroup.com
- jmilne@insleebest.com
- lalexander@lakehaven.org
- mark.orthmann@cityoffederalway.com
- matt@tal-fitzlaw.com
- mleen@insleebest.com
- ryan.call@cityoffederalway.com
- shae.blood@pacificalawgroup.com
- spritchett@lakehaven.org
- sydney.henderson@pacificalawgroup.com
- tsarazin@insleebest.com

Comments:

Brief of Appellants; Motion for Leave to File Over-length Brief of Appellants

Sender Name: Whitley Gillins - Email: assistant@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20190326124808SC567678