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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Appellants,

v.

CITY OF FEDERAL WAY, a municipal corporation,

Respondent.

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REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

The brief submitted by the City of Federal Way (“City”) in response to the opening brief of the appellant water/sewer districts (“Districts”) is remarkable for its willingness to ignore the plain language of RCW 35A.82.020 to claim that it had express statutory authority to levy a utility tax on other units of local government when that is untrue. Such express authority is mandatory under the governmental immunity doctrine, a principle long recognized by this Court and fundamental to taxation policy across America.

Lacking such express legislative authority, and in the face of clear, contrary legislative history, the City embarks instead upon a labyrinthine analysis, contending that the Legislature authorized it to tax the “proprietary” services of the Districts, without bothering to show any such legislative intent or to precisely define the distinction between allegedly “governmental” and “proprietary” services anywhere in its brief, and certainly nowhere in the Federal Way Municipal Code (“FWMC”). Even employing what definition of “governmental” services the City does provide, it is abundantly clear that sewer and water services are essential governmental services, crucial for the public good in our society. Those services are provided by the Districts, which are governments established in accordance with Title 57 RCW.

This case represents a straight forward matter of taxation policy that is the responsibility of the Legislature under our Constitution. Wash. Const. art. VII, § 9; Wash. Const. art. XI, § 12. If the City is to tax other political subdivisions of the State, then the Legislature must expressly authorize such taxation. It has not expressly given cities the authority to levy utility taxes upon sewer-water districts, and, in fact, it has repeatedly refused to do so. That should end the Court’s analysis. If the City wants such taxing authority, let it go to the Legislature and obtain it.<sup>1</sup>

If, however, the Court believes the government immunity doctrine is limited to “governmental” services, then it should recognize the extreme public importance of these services provided by the Districts and hold that the provision of potable water and the collection, treatment, and disposal of sewage are “governmental” activities.

Moreover, the City’s utility tax as applied to the Districts is unconstitutionally vague in its failure to define in any fashion what are “governmental” services, and who is exempt from its tax, leaving those determinations in the hands of a single official who dodged every effort in his deposition to give a clue about his thinking on what “governmental”

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<sup>1</sup> Local governments often turn to the courts to seek revenue sources denied to them by the Legislature rather than going to Olympia to legitimately secure taxing authority. *See, e.g. King County v. King County Water District No. 20*, (Supreme Court Cause No. 96360-6).

services are. That tax also violates article 1, § 12 in affording certain favored taxpayers an unwritten tax exemption or, as the City asserts, an undefined exemption from the tax's collection.

This Court should reject the City's superficial analysis justifying its illegal utility tax.

B. RESPONSE TO CITY STATEMENT OF THE CASE

The City's so-called Counterstatement of the Case, resp. br. at 4-7, largely does not take issue with the factual/procedural recitation in the Districts' opening brief. App. Br. at 3-10. However, the City's factual recitation contains distractions and misinformation about which this Court should be concerned. First, the City's budget problems are irrelevant to this Court's analysis. Moreover, the City's estimate of \$980,000 in revenue from the tax, resp. br. at 5, was based not on the definition of gross income in the FWMC, but upon the *agreed* definition of revenue in its non-displaced franchise agreement with Lakehaven.<sup>2</sup>

Also, in an apparent attempt to persuade this Court that intergovernmental taxation of utility services is commonplace, the City references an AWC survey of city imposition of utility taxes, resp. br. at 14

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<sup>2</sup> There is considerable irony in the City's claim that its definition of gross income for the tax is easy to understand, resp. br. at 45-46, when it has to fall back on this definition to estimate its tax's fiscal impact. The City even disclaims any guidance from the agreed definition. Resp. Br. at 5 n.1.

n.9, 21, failing to note that the survey revealed that such taxes, with *rare* exception, were imposed on city-owned or private utilities, and *not* other governments like the Districts here. CP 644. The City also omits the fact that the survey revealed cities imposed rates of up to 36%. CP 669-70.

Perhaps the most misleading aspect of the City's Counterstatement is its failure to acknowledge the absence of *any* definition of governmental/proprietary services in the tax ordinance or the FWMC. Instead, it blithely recites its tax procedures. Resp. Br. at 5-6. Ultimately, in the absence of any definition in the FWMC of "governmental" or "proprietary" services, terms that are vital to the City's argument for limiting the scope of the governmental immunity doctrine, a taxpayer is left to *guess* exactly what its single official – the City's Finance Director whose role is to *increase* City revenues – will accept as an exempt "governmental" service. No definition in statute, ordinance, or regulation circumscribes that official's open-ended authority.

The Districts were fully entitled to challenge the City's illegal/unconstitutional imposition of this utility tax imposed without express statutory authority, rather than enduring the expense/delay of the City's so-called "established procedures," resp. br. at 6, that would be nothing more than a futile exercise.

### C. ARGUMENT

(1) RCW 35A.82.020 Does Not Constitute Express Statutory Authority for the City to Levy a Utility Tax on the Districts

The City contends in its brief at 8-12 and 20-25 that a statute giving cities general authority to levy excise taxes gives it the requisite express authority to levy utility taxes on the Districts, who, like the City, are other political subdivisions of the State. The City hopes that by *repeatedly* claiming it has such authority it can overcome the plain fact that *the statute gave it no such express authority*.

Two clear principles control here. First, under our Constitution, Washington cities' power to tax is not self-executing. That is, the Legislature must *expressly* confer taxing authority on cities. *See* App. Br. at 14 n.19. Recently, in *Watson v. City of Seattle*, 189 Wn.2d 149, 166, 401 P.3d 1 (2017), this Court stated unambiguously: "Local taxation must be authorized by a legislative delegation of taxing power."<sup>3</sup> Second, for the City to tax the Districts, under the governmental immunity doctrine, there must be *express* legislative authority to tax other political subdivisions such as the Districts. *King County v. City of Algona*, 101 Wn.2d 789, 793, 681 P.2d 1281 (1984) ("The governmental immunity doctrine provides that one municipality may not impose a tax on another without express statutory

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<sup>3</sup> The City has no real answer to the principles set forth in the Districts' opening brief at 15. Any question or ambiguity as to taxing authority must be construed *against* such authority.

authorization.”). The City’s brief largely ignores the *Algona* court’s clear-cut holding.

The plain language of RCW 35A.82.020 belies the City’s entire argument regarding its alleged authority to tax the Districts. That statute is very general. *See Appendix. Nowhere* does it say a word about conferring authority upon cities to levy taxes on other municipalities. A general grant of taxing authority to cities is not an *express* legislative authorization for a city to tax other governments, as this Court ruled in *Algona*. This Court held there that RCW 35A.82.020’s very general grant of B&O tax authority to cities did not constitute express authority to tax another government. 101 Wn.2d at 792-93.<sup>4</sup>

The City has no real answer to the fact that the Legislature, when it wants to grant the authority to tax other governments, has expressly done

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<sup>4</sup> In addition to the fact that the plain language of RCW 35A.82.020 does not grant the City *express* authority to tax other governments, the City can point to *nothing* in the extensive legislative history of the measure from the 1967 Optional Municipal Code prepared by the Legislature’s Municipal Code Committee that gave cities such *express* authority.

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

so. As the Districts noted in their opening brief at 19 n.25, the Legislature has *expressly* granted the authority to local governments to tax other governments when it saw fit. *See also*, RCW 82.08.010(3) (definition of buyer under the sales tax includes municipal and other governments); RCW 82.14.020(2) (local government sales tax authority follows definitions in state law).

In fact, the example of the statute conferring temporary utility tax authority upon the city of Renton is particularly relevant to this Court's analysis. App. Br. at 20. The legislative history materials on the Renton tax bill specifically noted cities' lack of utility tax authority; the bill's fiscal note stated: "Currently, a city may not charge a tax on water-sewer district's gross revenue generated from providing services within that city." CP 1471. Renton would not have needed this taxing authority<sup>5</sup> if the City's interpretation of RCW 35A.82.020 was even close to correct. The Legislature is presumed by this Court not to engage in vain or useless acts; some significant purpose is regarded to underlie an enactment. *Oak Harbor Sch. Dist. v. Harbor Educ. Ass'n.*, 86 Wn.2d 497, 500, 545 P.2d 1197 (1976). Renton's statutory authority was necessary precisely because cities *lacked authority* to tax other governments in its absence.

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<sup>5</sup> The City misrepresents this statutory authority as relating only to authorization to enter into an interlocal agreement. Resp. Br. at 22. That is *false*. RCW 35.13B.010(1) is *express* authority to levy a utility tax on a water-sewer district operating within Renton.

The City dismisses the legislative history of the cities' failure to gain such power in the Legislature. Resp. Br. at 20-25. But that history *is* relevant. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002) (Court stated that an examination of the context in which a statute exists is critical to the determination of its plain meaning). Moreover, this Court recently held in *Spokane County v. State of Wash. Dep't of Fish & Wildlife* 192 Wn.2d 453, 430 P.3d 655 (2018) that a legislative history of rejection of bills on a topic is relevant to resolve ambiguities in statutory language. Specifically, failed legislation can demonstrate legislative intent as to the interpretation of existing statutes:

Neither bill passed. However, the existence of these bills demonstrates that the legislature understood the Department's permitting authority to include upland activities.

Thus, multiple failed attempts by the legislature to expressly exclude upland activities demonstrate that the legislature knew that the effects test does not, by its plain language or in practice, exclude upland projects.

*Id.* at 463. It is no different here. The failure of bills intending to confer authority upon cities to tax other governments demonstrates that the Legislature understood that cities did not have such authority, it did not grant them such authority by enacting RCW 35A.82.020, and it denied cities such authority generally. Rather, the Legislature has *repeatedly* denied

cities the authority to tax other governments over the 34 years since *Algona* was decided. App. Br. at 19-20.<sup>6</sup>

Finally, the Legislature has acquiesced in the interpretation of RCW 35A.82.020 by the *Algona* court and § 1990 No. 3 that cities lacked the authority to apply a utility tax on other governments *for decades*.<sup>7</sup> While this Court is the “ultimate authority” on interpretation of legislative enactments, not Division III, *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007), AGOs are entitled to deference by courts in interpreting a statute. *City of Seattle v. Dep’t of Labor & Indus.*, 136 Wn.2d 693, 703, 965 P.2d 619 (1998). The Legislature acquiesced in this Court’s decision in *Algona* and AGO 1990 No. 3, denying cities express authority to tax other governments.

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<sup>6</sup> The City would have this Court believe that the cities association lobbied for legislative authorization to levy taxes on other governments merely to avoid what it describes as “costly litigation.” That is nonsense. That association lobbied to secure taxing authority the cities lacked.

<sup>7</sup> Hoping this Court will ultimately disregard the *Algona* court’s holding and the Attorney General’s interpretation of the governmental immunity doctrine, the City instead argues for legislative acquiescence in the decision of an intermediate appellate court in *City of Wenatchee v. Chelan Cty. Public Utility Dist. No. 1*, 181 Wn. App. 326, 325 P.3d 419 (2014) that was never the subject of a petition for review to this Court. Resp. Br. at 23. Ordinarily, the legislative acquiescence doctrine applies to decisions of this Court or AGOs. *Soprani v. Polygon Apt. Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999) (Supreme Court decisions); *Bowles v. Dep’t of Retirement Sys.*, 121 Wn.2d 52, 63-64, 847 P.2d 440 (1993) (AGO).

In sum, the Legislature never gave the City the authority it now claims to tax the Districts; RCW 35A.82.020's plain language does not grant the City any such authority to tax the Districts. The *Algona* court held that RCW 35A.82.020 did not constitute such necessary express authority. In effect, the City argues that this Court should overrule *Algona sub silentio*<sup>8</sup> and *vastly* expand city taxing power without any authorization from the Legislature, the branch of government our Constitution mandates must make such a decision, and in the face of the legislative history that the Legislature has expressly denied cities such taxing authority. The Court should reject the City's argument. The City's recourse is to go to Olympia and get a bill passed, not to have this Court expand its taxing authority in a way the Legislature expressly chose not to do. App. Br. at 20 n.26.

(2) The Districts' Services Are Governmental in Nature and Subject to the Governmental Immunity Doctrine

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

Recognizing the lack of any *express* legislative authorization to cities to levy utility taxes on other governments, the City is compelled to shift the analytical paradigm and claim that the doctrine is confined to

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<sup>8</sup> Again, there is considerable irony in the City's contention that the Districts seek to override *stare decisis* principles, resp. br. at 37-41, when the City so blatantly seeks to overrule *Algona* without compliance with this Court's *stare decisis* protocol.

“governmental” services only. Resp. Br. at 12-20. That position is unsupported by this Court’s key decision in *Algona*, the traditional conception of the doctrine, authority from around the nation, and common sense.

First, the City cherry picks certain language in *Algona* to attempt to bolster its contention that this Court confined the governmental immunity doctrine to “governmental services,”<sup>9</sup> rather than other governments, as such. Resp. Br. at 13. However, the *Algona* court made clear that doctrine applied to governments, not just their services. 101 Wn.2d at 793 (“The governmental immunity doctrine provides that one municipality may not impose a tax on another without express statutory authorization,” citing the Sands & Libonati treatise on *Local Government Law*).<sup>10</sup> The discussion to

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<sup>9</sup> The *Algona* court actually addressed “public or governmental” services. *Id.* at 794.

<sup>10</sup> That treatise confirms the general principle that governmental property is exempt from taxation by another governmental entity:

Questions as to whether one local government entity can enact a tax on property of another may arise either where two or more entities occupy some or all of the same territory or where an entity owns property situated outside its own territory. In such situations, the answers to such questions are generally against the tax liability under exemptions which accrue sometimes to property which is owned by a government entity or, more often, to that which is devoted to public use or held in governmental capacity. There can be said to be a presumption favoring the exemption of governmental property from taxation.

*Id.* at 65. That policy extends to the levying of taxes by one government upon the activities of another, according to the treatise. *Id.* at 67.

which the City alludes regarding solid waste disposal as a governmental service merely dispatches a narrowing argument that Algona made there, after stating the more general proposition that the governmental tax immunity doctrine nullified Algona's taxation of another government. 101 Wn.2d at 794 ("The City argues that governmental immunity should not apply because the County operation of a solid waste transfer station is proprietary."). The City deliberately neglected to note in its brief that this was a city contention in *Algona*<sup>11</sup> and its "Put another way," contention about what the *Algona* court determined, resp. br. at 13, is a fundamental distortion of this Court's holding. In fact, the *Algona* court *nowhere* limited the immunity doctrine to "governmental services," and it merely *rejected* the specific argument Algona offered that solid waste services were proprietary and therefore immune from the doctrine.<sup>12</sup>

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<sup>11</sup> The Supreme Court brief of the City of Algona specifically asserted at 5 that the city had the authority to levy its B&O tax "upon the proprietary function of a county within a city, or upon such an installation as the transfer station involved herein." In turn, King County argued in its reply brief at 5-6 that its solid waste transfer station was not like a "store" located within Algona but was a necessary element of an "overall system for collection and disposal of solid waste" that benefitted all county residents and was not merely for the County's "pecuniary advantage."

<sup>12</sup> The City's attempts to distinguish authorities cited in the *Algona* opinion are equally misleading. Resp. Br. at 18-20. For example, the Arizona decision in *Salt River Proj. Agricultural Impr. & Power Dist. v. City of Phoenix*, 631 P.2d 553 (Ariz. App. 1981) involved the question of whether a tax could be levied on the sale of electricity by the Salt River Project Agricultural Improvement and Power District. The court held that the sale of non-surplus electricity was not proprietary, but a core function of the district as a government, just as the provision of water/sewer services are core functions of the Districts

Similarly, the City's citation of *Burba v. City of Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989) and *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.2d 475 (2007) do nothing to advance its argument. *Burba* does not even cite *Algona*. The principal issue in *Burba* was whether a city could impose a gross receipts tax on water/sewer utility revenues it generated from City residents and non-residents. In permitting Vancouver to tax utility services extra-territorially, the Court expressly analogized the Vancouver tax to a B&O tax on a retailer selling products or services to residents inside or outside the City. 113 Wn.2d at 807. In this case, the Districts have never contended that the City lacked statutory authority to levy a B&O tax on its own utility revenues; they have argued, and do now contend, that the City lacked express statutory authority to levy such a tax *on other governments*. *Burba* does not address the issue of intergovernmental taxation and for the City to claim otherwise, albeit in a footnote, resp. br. at 14 n.9, is a reach.

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Similarly, the City's misguided attempt to distinguish *Village of Willoughby Hills v. Bd. of Park Commissioners of Cleveland Metro. Park Dist.*, 209 N.E.2d 162 (Ohio 1985) should be rejected. Again, the critical point there was that a park district, as such, provided governmental services. *Id.* at 163 (“...it becomes very clear that this court has found a park district to be a political subdivision of the state of Ohio which performs a function of the state that is governmental in character.”). The court rejected an excise tax on such a government “not authorized by statute.” *Id.* at 164. *Schenkolewski v. Cleveland Metroparks Sys.*, 67, Ohio St. 2d 31, 426 N.E.2d 784 (Ohio 1981), cited by the City is a tort immunity, not a tax, case in which the Ohio Supreme Court concluded that a park district was subject to suit for a plaintiff's personal injuries occasioned by the district's operation of a zoo, *after* the Legislature abolished sovereign immunity.

Much as it did with *Burba*, the City wants to isolate *Burns* from its factual and analytical underpinnings. *Burns*, like *Burba*, is not about inter-governmental tax immunity, and the Court was not called on to rule on the issue. The case evaluates only the legality of contractual payments made by Seattle to several suburban cities in light of a statutory prohibition preventing the imposition of franchise fees on an electric utility. Citing the more liberal contracting authority associated with a municipality acting in its propriety capacity, the Court found Seattle's payment of monies to the cities not to be franchise fees, but to be permissible consideration for the forbearance of the cities' right to form competing electric utilities. In *dicta*,<sup>13</sup> the Court referenced the issue of intergovernmental tax immunity under *Algona*, but went no further than to speculate that, in part because *Algona* presented different facts, the issue of intergovernmental taxation remains an unresolved legal question.<sup>14</sup>

Finally, Division III's opinion in *Wenatchee*, a decision that was not the subject of a petition for review to this Court, is the central basis for the City's argument that *Algona*'s expansive reading of the governmental

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<sup>13</sup> A three-justice dissent was highly critical of the majority's suggested "substantial limitations" for this Court's holding in *Algona*, an effort it described as "unnecessary" and beyond the limited scope of the Court's review. 161 Wn.2d at 167.

<sup>14</sup> While the Districts certainly do not agree that there is any uncertainty after *Algona*, the Court may take the opportunity in this case to reaffirm the fundamental notion that, under our system of government, the right of one municipality to tax the revenues of another must be delegated by the Legislature through an *express* statutory enactment.

immunity doctrine should be limited *sub silentio*. Resp. Br. at 15-16. Division III's decision there is bereft of much analysis as to why the courts should override the governmental immunity doctrine, a doctrine that honors the *Legislature's* central function under our Constitution of deciding expressly when a municipality has the power to tax, the scope of such a tax, any tax exemptions, and whether such a tax should apply to other political subdivisions of the State, in favor of impliedly permitting the courts to make tax policy. As noted in the Districts' opening brief at 24-25, that decision does not appropriately analyze this fundamental question.

It is also noteworthy that the City *nowhere* acknowledges the Fearing concurrence that cuts to the heart of the analytical flaws in adopting a governmental/proprietary limitation to governmental tax immunity. Where is an effective, workable definition of what is a governmental or proprietary service? The City seems to contend that if a service is billed to a customer, it is "proprietary." Resp. Br. at 7, 15. But that definition<sup>15</sup> is nonsensical. Even the City concedes that Washington law treats solid waste services as "governmental." Customers are generally billed for such services. Certainly the people dumping garbage at King County's Algonia

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<sup>15</sup> It is unclear under which of the six governmental/proprietary tests identified by Judge Fearing this analysis falls.

transfer station, discussed in *Algona*, did so.<sup>16</sup> Yet, those services were not proprietary.<sup>17</sup>

The governmental immunity doctrine, as traditionally understood in the United States, and as applied in *Algona* and AGO 1990 No. 3 means that one government cannot tax another government in Washington without *express*, not implied, legislative authorization. As the Districts are governments, as the City *concedes*, the immunity doctrine applies to the Districts, and the City's tax is unlawful.

(b) The Districts Provide Governmental Services

Lacking any definition of “governmental” or “proprietary” services *anywhere* in the FWMC,<sup>18</sup> and despite its notion that merely billing

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<sup>16</sup> King County's opening brief in *Algona* at 5-6 described how a transfer station related to the County's overall solid waste disposal and collection system. In the same brief at 7, the County noted how the transfer station fees covered transfer station operating expenses and a share of the expenses at the County's regional disposal site at Cedar Hills in Maple Valley.

<sup>17</sup> Lakehaven bills the City for hydrant services, and the City admits those are “governmental.” How are one-time connection charges, paid under authority of RCW 57.08.005(11), to be characterized using the “billed to customers” approach? While these are typically paid in full at the time of connection, the law allows that they may be paid in installments over a period not exceeding fifteen years. Does allowing installment payments paid by ratepayers change them from not “billed to customers,” and thus governmental, to “billed to customers,” and thus proprietary? This is a definitional morass the Court can, and should, avoid by staying the course on *Algona*'s articulation of the governmental immunity doctrine.

<sup>18</sup> *Nowhere* does the City's utility tax ordinance purport to exempt “governmental” services, however defined, from its reach. The ordinance purports to tax businesses, but begs the question of when a government's actions are taxable “business events.”

customers makes a service “proprietary,” the City falls back on a broad common law definition of “governmental” services that only *supports* the Districts’ argument that the water/sewer services they provide are governmental in nature. Resp. Br. at 26-41. Indeed, in making its argument, the City *ignores* the concurring opinion in *Wenatchee*, and asks this Court to ignore contrary precedent that indicates water/sewer services are governmental in nature.<sup>19</sup> Ultimately, the City asks this Court to disregard a variety of statutes that forcefully document that water/sewer services are vital to the public good of the people of our State. Simply put, in a modern society, potable water and sewage collection, treatment, and disposal are central to society’s existence. Those services benefit the public generally, not just those connected to water/sewer systems who are billed for services. Unlike cellular phones, for example, they are not discretionary services that “customers” can opt to forego, or buy from private concerns, thereby choosing not to be billed for them. Those services are crucial to public health and safety, and taxing them only increases public expense.

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<sup>19</sup> The City bemoans the Districts’ reliance on precedent that arose in the eminent domain context, resp. br. at 29-30, but the principal case on which it relies, *Wash. State Major League Baseball Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 202 P.3d 924 (2009), did not arise in the taxation setting either.

Initially, the City makes a vital concession. It acknowledges, as it must, the wealth of authority provided by the Districts documenting the fact that the Districts are *governments*, created for the specific public purpose of providing water/sewer services. Resp. Br. at 8. Such special purpose governments provide *governmental services* by definition.<sup>20</sup>

In the tax setting, this Court has been literal in its application of principles analogous to the governmental immunity doctrine confirmed in *Algona*. For example, article VII, § 1 of our Constitution bars the imposition of property taxes on other governments: “Property of the United States and the state, counties, school districts and other municipal corporations...shall be exempt from taxation.” This Court has never implied a limitation to that constitutional provision confining it to property those governments use for “governmental purposes.”<sup>21</sup> The governmental

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<sup>20</sup> The aphorism attributed to the late former Seahawks Coach Chuck Knox that “Football players make football plays” applies here. As governments, the Districts provide governmental services. Critically, the distinction between governmental and proprietary services often arises in the context of the State or general purpose local governments who have multiple functions. The central focus of special purpose districts like the Districts, the reason for their very existence as governments, is to deliver water/sewer services.

<sup>21</sup> By contrast, some jurisdictions do confine the scope of such an exemption. In New Jersey, for example, the immunity is statutory and is limited to property of the State and local governments “used for public purposes.” But New Jersey courts interpret that concept very broadly. *See, e.g., Gourmet Dining, LLC v. Union Township*, \_\_ A.3d \_\_, 2019 WL 2306701 (N.J. Tax Court 2019) (restaurant operated in building on university campus was used for public purpose and was tax-exempt).

immunity doctrine applies to the activities of governments, as such, without a qualification of the nature of the activities those governments perform.

Throughout its argument, the City chronically misrepresents the Districts' argument as seeking to "overturn" precedent on the governmental/proprietary distinction in a calculated attempt to shift this Court's focus from the fact that the Court has never defined, or needed to define, in the context of the governmental immunity doctrine, what services are "governmental" or "proprietary." In fact, contrary to the City's repeated assertion, the Districts do not ask this Court to overturn its precedents on the distinction between "governmental" and "proprietary" services generated in other areas. The Districts instead ask this Court to reinforce its broad conception of governmental *tax* immunity by not embarking on the extremely difficult task of reconciling multiple definitions of governmental/proprietary services in the taxation setting.

As noted in the Districts' opening brief at 24 n.32, this Court need not define governmental/proprietary services or reconcile case law on whether water/sewer services are "governmental" or "proprietary" at all.

If this Court, however, believes that the governmental/proprietary distinction carries significance in the governmental tax immunity setting (and it does not), this Court should reject the City's result-driven discussion of this distinction (which would require overruling *Algona* because the

transfer station in that case provided a billed utility service to customers) and the analytical mishmash the City has offered to justify it. Resp. Br. at 25-36.

Affirming its earlier articulation of a proprietary service as one involving billings to customers, resp. br. at 7, the City suggests that governmental functions are those for the benefit of all citizens, citing *Wash. State Major League Baseball Stadium Dist.* Resp. Br. at 26.<sup>22</sup> It then makes the broad assertion that the operation of a utility is *invariably* a proprietary function if customers are billed. Resp. Br. at 26-27. Ignoring contrary precedent, it further asserts that the provision of water and sewer services are proprietary. Resp. Br. at 27-32. It then asks this Court to turn a blind eye toward all of the actual ways water and sewer services serve the larger common interest in public health and safety by asserting, incorrectly, that it is the Districts that are attempting to change how the law, or reality and common sense treat water/sewer services. Resp. Br. at 32-36. This Court should reject the City's unprincipled arguments.

Moreover, the City's claim that "Washington courts have consistently held that the operation of a utility system serving billed customers is a proprietary function" is flatly *untrue*. See, e.g., *Carlson v.*

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<sup>22</sup> And seemingly ignoring the other five definitions of governmental/proprietary services noted in the Fearing concurrence.

*City of Spokane*, 73 Wn.2d 76, 81, 436 P.2d 454 (1968) (solid waste utility services); *Algona*, *supra*. Indeed, even where customers pay rates, this Court has been more nuanced in its treatment of whether services are ultimately “governmental” in nature. See *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008); *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012) (fire hydrants/fire flow as governmental services that could not be supported from utility rates). What is critical is the *purpose* for which a local government raises the revenue. *Okeson v. City of Seattle*, 150 Wn.2d 540, 552-53, 78 P.3d 1279 (2003).

Equally problematic in the real world is the City’s simplistic contention that its tax applies to any revenue the District’s generate, period. Resp. Br. at 35 (“... the fact that the Districts may spend a portion of their budgets on governmental activities is not relevant.”). Thus, while accepting that the hydrant rates it pays Lakehaven are for a governmental service, the City takes a completely contrary position by admitting that it will tax even *governmental* services the Districts provide merely because the revenue for such services comes from rates.<sup>23</sup>

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<sup>23</sup> And the City’s attempt in its brief at 36 n.24 to wiggle away from the fact that it is not barred from imposing a higher rate than the present 7.75% rate (and perhaps up to 36% as other cities have done – app. br. at 8 n.13, if not more) ought to concern this Court, reinforcing the point that this should be an *express* legislative decision.

As noted in the Districts' opening brief at 42, governments across the state could radically redesign their rate structures to associate a specific revenue source, for example, a specific portion of rates billed to customers, with a specific government service, such as water for fire suppression, as Seattle did after *Lane*, to avoid taxation. This will, of course, only breed further uncertainty, and litigation, as other cities copy the City's tax.

Moreover, in making this spurious argument, the City makes no effort to differentiate between the specific types of functions the Districts provide in delivering water/sewer services. For example, in the delivery of sewer services, arguably, the operation of sewage treatment facilities is of lesser interest to sewer ratepayers who merely want to see sewage removed from their homes and businesses than the public which has an interest in fact that proper sewage treatment and disposal advances public health by avoiding diseases associated with untreated sewerage and protects the environment by keeping our waters pristine. The same can be said for water fluoridation. Customers merely want water, but the general public has an interest in the health effects of water fluoridation. *See generally, Parkland Light & Water Co. v. Tacoma Pierce Cty. Bd. of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004).

Further, there is precedent, including decisions of this Court and a 1949-51 AGO, that treats sewer services as governmental. App. Br. at 35.

This Court need look no farther than Justice Hale’s description of sewer services in *Town of Steilacoom v. Thompson*, 69 Wn.2d 705, 709, 419 P.2d 989 (1966): “Sanitary sewers and sewage treatment facilities are, by their very nature, both public necessities and conveniences.” That decision has been the law of Washington for 53 years.<sup>24</sup> It is the City, not the Districts, that seeks to abandon past precedent on this point, contrary to the City’s contention. Resp. Br. at 37-41. The City is compelled to argue that water/sewer services may be “governmental” or “proprietary,” depending upon whether the setting is taxation, tort liability, eminent domain, etc. *Id.* It can provide no principled rationale why, in the tax setting, these vital services should be proprietary, but, in another setting, governmental. The City’s argument makes virtually no sense and only creates added confusion regarding a distinction already rife with confusion, as the Fearing concurrence in *Wenatchee* observed.

Indeed, as the Districts have noted, app. br. at 34-35, there is no analytical distinction between the provision of garbage services (*Carlson*) or operation of a transfer station (*Algona*), which are “governmental,” and the types of water/sewer services the Districts provide. The City’s bald

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<sup>24</sup> It is completely consistent with other states’ assessment. *E.g.*, *City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 368 P.2d 637, 640 (Ariz. 1962) (sewage treatment is a governmental function benefitting “the citizens of the state generally, all of whom have an interest in the prevention and spread of infectious or contagious diseases.”).

assertion to the contrary, resp. br. at 31 (“A municipality’s operation of a governmental solid waste facility is not comparable to furnishing sewer services to billed customers.”), bears no resemblance to reality. Indeed, King County disagreed in *Algona*.<sup>25</sup>

Finally, the City ignores the fact that water/sewer services are for the benefit of the public, far more so than the baseball stadium that was the subject of *Wash. State Major League Baseball Stadium Dist.* The Legislature acknowledged their critical public importance in the GMA. App. Br. at 35-37. The City is reduced to making the truly bizarre contention in its brief at 33 that the public health and safety benefits of water and sewer systems are merely “incidental” to billing customers. Again, the City seems oblivious to reality. The Districts have no entrepreneurial profit motive. Billing customers is not their “objective.” Rather, water/sewer districts exist precisely to carry out the critical function of delivering water/sewer services to benefit the public health. As noted in the Districts’ opening brief at 5-6, 30, water/sewer districts are created *only* if the public health and welfare are benefitted. That such districts have met those legislatively-stated purposes is documented by the list of diseases no longer

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<sup>25</sup> In its brief at 30, King County stated: “Except for the fact that the garbage is in solid form, and thus transportable in vehicles rather than through pipes, the function of the solid waste system is essentially identical to that of a sewer system.” The Districts’ sewer systems deal with sewage sludge, a solid waste.

rampant in modern society that were the result of tainted water or untreated sewage.<sup>26</sup> Similarly, the public safety benefit of a water system to suppress fires or to provide potable water is manifest.<sup>27</sup>

In sum, the City's effort to claim that all utility services billed to customers are proprietary is flatly wrong. Its effort to obscure case law treating sewage services as governmental is disingenuous. Its effort to claim water/sewer services offer no public benefit defies reality in the public health and safety context and is belied by the reality of modern life. This Court should not take up the governmental/proprietary distinction for purposes of the Districts' tax immunity, but, if it does, the services the Districts provide are plainly public or governmental in nature.

(3) The City's Tax Is Unconstitutional as Applied to the Districts

(a) The Districts Have Standing to Raise Their Constitutional Arguments

The trial court correctly determined the Districts had standing to raise their constitutional arguments. CP 1527-28. The City offers a short argument in its brief at 41-42 to the contrary that misses the mark.

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<sup>26</sup> That list includes such diseases as legionella (leading to Legionnaire's disease), cryptosporidium, giardia duodenalis, e coli, norovirus, or even cholera. [https://www.cdc.gov/healthwater/drinking/public/water\\_diseases.html](https://www.cdc.gov/healthwater/drinking/public/water_diseases.html).

<sup>27</sup> *E.g., Pinetops Lake Ass'n v. Ponderosa Domestic Water Impr. Dist.*, 2010 WL 2146415 (Ariz. App. 2010) (district could exercise eminent domain power to improve a domestic water system; water delivery was a governmental, not proprietary, function of a district whose legislatively-authorized purpose was water delivery).

First, there is no question that corporations generally possess rights under the United States and Washington Constitutions. “[A] corporation is a ‘person’ within the meaning of the equal protection and due process of law clauses.” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 80 L. Ed. 2d 660 (1936).<sup>28</sup> See also, *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 342-43, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (corporations have rights under the First Amendment). The Washington Constitution is no different. *American Legion Post #149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 594-95, 192 P.3d 306 (2008) (noting that corporations are persons for purposes of article I, § 7 and concluding that the plaintiff, a corporation, had standing to assert an article I, § 7 rights violation). Indeed, by the express language of article I, § 12, its protections apply to corporations.

Second, the federal authority cited by the City in support of its argument *predates* the United States Supreme Court authority set forth above. Moreover, that Court in *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933) merely held that a municipal corporation lacked standing under the federal constitution to raise a privileges and immunities challenge *against a state*. *Id.* at 40. It

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<sup>28</sup> This Court recognized this point in *Olympic Forest Products, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 424, 511 P.2d 1002 (1973), describing it as “well-settled.”

did not address due process. Of course, this case does not involve a constitutional challenge by the Districts against the State of Washington. Even that limited holding is of questionable status in light of more modern analysis. *See, e.g., Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 464 n.7, 487 n.31, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982) (school districts had standing to sue the state for a violation of 14th Amendment equal protection as to an initiative prohibiting bussing for racial desegregation and were entitled to fees under 42 U.S.C. § 1988).

With regard to the authority of municipal corporations to raise state constitutional issues, there is little question that they may do so. *See, e.g., Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 490-94, 585 P.2d 71 (1978). Indeed, even if this Court were to conclude the Districts lack standing themselves, the Districts would have standing to press equal protection issues associated with the integrity of the Districts' financial structure or in an associational capacity on their ratepayers' behalf. *City of Seattle v. State*, 103 Wn.2d 663, 668-69, 694 P.2d 641 (1985).

Specifically, the cases cited by the City in support of its due process argument, like *Samuel's Furniture, Inc. v. State*, 147 Wn.2d 440, 54 P.3d 1194 (2002), relate to municipal corporations' challenges *against the State*, not another municipality. *Id.* at 463.

Similarly, as to article I, § 12 challenges, although that provision appears to exempt municipal corporations from its protection, that exemption, too, applies to actions against the State itself. It was designed to preserve the Legislature's authority to confer such powers on subdivisions of the State, as the Legislature, in its discretion, may choose, as our Supreme Court noted in *City of Spokane v. Spokane County*, 179 Wash. 130, 136-37, 36 P.2d 311 (1934). There, the Court addressed a challenge to statutory provisions that conferred authority on most cities, but not fourth class cities. The Court observed that the inapplicability of article I, § 12 to municipal corporations was designed to address this type of situation. "The Legislature is authorized by the Constitution to classify cities and towns, and is not required to endow all classes with the same powers and functions or impose upon all equally the same limitations." *Id.*

If there is any question about standing, the City's central argument in this case undermines its standing argument. If the Districts are mere corporate *taxpayers* providing services like any other business subject to the City's tax, then, like those other businesses, 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).

The trial court did not err on standing.

(b) The City's Tax Is Vague

The City largely concedes the applicable standard for a vagueness challenge to an enactment as set forth in the Districts' opening brief at 44-45. Resp. Br. at 42-43. But it claims that its tax ordinance, lacking *any* definition of "governmental" or "proprietary" services, a distinction it has argued to this Court is vital to the tax's validity, is nevertheless clear to persons of common intelligence. *Id.* at 43-44, 45-47. It also contends that the ordinance is not susceptible to arbitrary enforcement even though a single City official – its Finance Director who is focused on revenue generation as her/his central goal – will decide which services are taxable and which are not without *any* guidance in the FWMC or regulations. *Id.* at 44-45. But the City's arguments are unsupported on this record.

With regard to the question of whether a taxpayer of common intelligence can understand if the tax applies to it, the City falls back on the definition of "gross income" in the FWMC, arguing in its brief at 43-44 that this definition "is a term of common usage in the context of excise taxes." Resp. Br. at 43. But the critical flaw in that assertion is that income derived from "governmental" or "proprietary" services, a question at the core of whether the City can apply its tax to other governments, is neither definitively defined in state law, nor *anywhere* in the FWMC or regulations.

The Districts' experienced financial personnel could not decipher what revenue the Districts generated was taxable under the City's ordinance. App. Br. at 47 n.36.<sup>29</sup> Indeed, as the Fearing concurrence in *Wenatchee* documented, *six* different definitions of governmental/proprietary services potentially apply in our law: Which one governs the City's tax? Only it knows for sure, and, as will be noted *infra*, it is loathe to tell anyone.<sup>30</sup>

The City essentially asks this Court to equate "business" under its taxing ordinance with proprietary activity of a governmental entity. Such a categorical determination, without more, offends due process. *Johnson v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (categorical approach to assessing whether conduct fit within residual clause of Armed Career Criminal Act offended due process as vague). The City's approach to the putative governmental/proprietary distinction for tax immunity is equally categorical and no less vague.

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<sup>29</sup> As indicated in n.2, *supra*, any *agreed* definition of income in the Lakewood City franchise agreement does not control, as the City itself argues.

<sup>30</sup> CP 688-93. Despite extensive discovery and repeated attempts to pin the City Finance Director down on what services are "governmental," he refused to answer. Lakehaven's Finance Director, Morgan Dennis, testified below to the complex array of rates and charges that Lakehaven imposed. CP 406-12. It was not until late into the discovery process that the City finally identified which revenue sources were "governmental" and therefore not taxable. App. Br. at 40 n.47. There was no rhyme nor reason to the City's determinations, given the absence of any statutory, ordinance, or regulatory direction.

The City asserts that there is a City process that “protects” taxpayers from arbitrary enforcement of its tax. Resp. Br. at 44. But that process is no protection at all and, in fact, results in greater harm to taxpayers challenging its Finance Director’s unilateral decision.

In the absence of any definition of governmental/proprietary services, taxpayers are left to guess what services are subject to taxation. The taxpayer must then endure the delay and expense of the City’s process, and face the risk of penalties and interest on any sums due if its guess is erroneous. FWMC § 3.10.190. *See* Appendix. If the City seriously believes that all revenue generated by the Districts is taxable, regardless of the purpose sustained by the revenue the Districts generate, then the City’s so-called process is nothing but a futile exercise.

The City’s tax is unconstitutionally vague.

(c) The City’s Tax Violates Washington’s Constitutional Anti-Favoritism Provision – Article I, § 12

The City dismisses the Districts’ article I, § 12 argument by claiming that its unwritten policy of allowing certain favored taxpayers to avoid collection of the utility tax does not offend constitutional anti-favoritism principles. Resp. Br. at 47-50. The City’s position is nothing more than sophistry and should be rejected by this Court.

The City does not dispute the anti-favoritism thrust of article I, § 12 set forth in the Districts' opening brief at 51. Nor does it dispute the fact that its tax ordinance and the FWMC *nowhere* provide a tax exemption for taxpayers that have a franchise agreement with the City. Thus, at issue here is an unwritten tax exemption offered at the present time *only* to the City of Tacoma. App. Br. at 50-51. There is no written policy setting out the procedures by which a taxpayer may seek a similar tax exemption or specifying the conditions for its grant.

To evade this Court's clear holding in *City of Spokane v. Horton*, 189 Wn.2d 696, 708, 406 P.3d 638 (2017) regarding express legislative authority for tax exemptions, the City offers the strange assertion that Tacoma does not enjoy a tax exemption, but rather "an agreement not to collect a future tax for a limited period of time in exchange for valuable consideration." Resp. Br. at 48. Simply put, that is nonsense. A tax exemption means that the taxing authority is not collecting an otherwise applicable tax. In effect, the City claims that it may, at its whim, carve out a deal with a taxpayer, subject to no written policy or guidelines, to immunize a taxpayer from an otherwise applicable tax. Such a notion, rife with opportunities for abuse, is supported *nowhere* in Washington law, and certainly not by this Court's *Burns* decision cited by the City as support for its highly unorthodox tax policy. Resp. Br at 49.

Finally, the City's argument that its utility tax might not be applicable to taxpayers who have "fairly negotiated franchise agreements with utilities at arm's length" is not a constitutional justification for its tax where there is no authority for such an exemption in RCW 35A.82.020 or anywhere else in state law. Nothing in writing in the City's ordinance or the FWMC justifies it.

The City's tax violates article I, § 12. The City's claim that its utility tax applies to "everyone" engaged in providing water or sewer services in Federal Way is flatly a *falsehood*.

#### D. CONCLUSION

Nothing offered in the City's brief should dissuade this Court from invalidating the City's illegal tax imposed on the Districts. Despite its false assertion to the contrary, the City lacks express statutory authority to levy its utility tax on the Districts; the Legislature denied cities such authority historically and *nothing* in the plain language of RCW 35A.82.020 gives the City authority to tax the Districts. The City distorts the governmental immunity doctrine by claiming it does not apply to "proprietary" services. In any event, water/sewer services the Districts provide are governmental in nature. The City offers no analysis of why that is not true.

Alternatively, the ordinance violates the Districts' rights under the Washington and United States Constitutions. In particular, the City's tax is

unconstitutionally vague, given its lack of any definition of when a service is a “governmental” or “proprietary.” It also unconstitutionally favors Tacoma.

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 21st day of June, 2019.

Respectfully submitted,



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# APPENDIX

RCW 35A.82.020:

A code city may exercise the authority authorized by general law for any class of city 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: PROVIDED, That no license or permit to engage in any such activity or place shall be granted to any who shall not first comply with the general laws of the state.

No such license shall be granted to continue for longer than a period of one year from the date thereof and no license or excise shall be required where the same shall have been preempted by the state, nor where exempted by the state, including, but not limited to, the provisions of RCW 36.71.090 and chapter 73.04 RCW relating to veterans

FWMC § 3.10.190:

Any taxpayer aggrieved by a determination of the designated official under the provisions of this chapter may appeal such determination pursuant to the following procedures. If the determination being appealed is the amount of the tax or fee due, the amount determined by the designated official must be paid to the city under protest prior to filing an appeal.

(1) *Form of appeal.* Any appeal must be in writing and must contain the following:

- (a) Name, address and UBI/tax registration number of taxpayer;
- (b) A statement identifying the determination of the designated official from which the appeal is taken;
- (c) A statement setting forth the grounds upon which the appeal is taken and identifying specific errors the designated official is alleged to have made in making the determination;
- (d) A statement identifying the requested relief from the determination being appealed; and

(e) An appeal fee of \$500.00, which is refundable in the event the appellant prevails on the appeal.

(2) *Time and place to appeal.* An appeal shall be filed with the city clerk no later than 30 days following the date on which the determination of the designated official was mailed to the taxpayer. Failure to follow the appeal procedures in this section shall preclude the taxpayer's right to appeal.

(3) *Appeal hearing.* The hearing examiner shall schedule a hearing date, notify the taxpayer and the designated official and shall then conduct an appeal hearing in accordance with this chapter and procedures developed by the hearing examiner, at which time the appellant taxpayer and the designated official shall have the opportunity to be heard and to introduce evidence relevant to the subject of the appeal.

(4) *Burden of proof.* The appellant taxpayer shall have the burden of proving by a preponderance of the evidence that the determination of the designated official is erroneous.

(5) *Hearing record.* The hearing examiner shall make an electronic sound recording of each appeal unless the hearing is conducted solely in writing.

(6) *Decision of the hearing examiner.* Following the hearing, the hearing examiner shall enter a decision on the appeal, supported by written findings and conclusion in support thereof. A copy of the findings, conclusions and decision shall be mailed to the appellant taxpayer and the designated official.

(7) *Judicial review.* The decision of the hearing examiner may be appealed to the superior court of King County by the appellant taxpayer or by the designated official, which must be filed within 30 days of mailing of the hearing examiner's decision.

DECLARATION OF SERVICE

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

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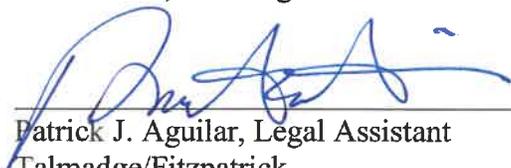
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Original e-filed with:  
Washington Supreme Court  
Clerk's Office

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: June 21, 2019 at Seattle, Washington.

  
\_\_\_\_\_  
Patrick J. Aguilar, Legal Assistant  
Talmadge/Fitzpatrick

**TALMADGE/FITZPATRICK/TRIBE**

**June 21, 2019 - 12:20 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

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**Comments:**

Motion for Leave to File Over-Length Reply Brief of Appellants Reply Brief of Appellants

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