Supreme Court No. 102864-4
Court of Appeals, Division III No. 38792-5-III
Spokane County Superior Court Case No. 17-2-021207

SUPREME COURT OF WASHINGTON STATE

CITY OF SPOKANE, a municipal corporation,
Petitioner,

v.

WEST TERRACE GOLF, LLC; et al.,
Respondents.

PETITION FOR REVIEW

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I. NAME & IDENTITY OF PETITIONER

The Petitioner in this matter is the City of Spokane ("City").

II. DECISION BELOW

On February 6, 2024, the Court of Appeals, Division III issued a published opinion finding – for the first time, and in the face of contrary law – that municipal water rates, such as those set by the City, must comply with the provisions of RCW 80.28.010, .090, and .100 in addition to compliance with RCW 35.92.010 and the Washington State Constitution, specifically:

> Under RCW 35.92.010, a municipal water supplier must charge a uniform rate for a given, statutorily permissible classification of customers or service. And under RCW 80.28.010(1), the rate must be just, fair, reasonable, and sufficient.

Appendix ("Appx."), p. 27-28 (hereinafter the "Opinion").

III. ISSUE FOR REVIEW

The Opinion, which involves a significant issue of statutory interpretation, should be reviewed under RAP 13.4(b) because the Opinion is in conflict with decisions of this Court and the Court of Appeals, as well as legislative changes enacted in 1959,

and is of substantial public importance to municipal water providers throughout the State.

IV. STATEMENT OF THE CASE

Since approximately 1950, the City of Spokane ("City"), has had two[1] classifications of water customers – inside-City water customers and outside-City water customers. The City has classified these customers according to the factors set forth in RCW 35.92.010. In addition, the City has set water rates in accordance with these classifications and the restrictions of RCW 35.92.010 – specifically ensuring its rates, for the particular class of customers served, are (1) uniform and (2) are not less than the cost of the water service provided, and pursuant to constitutional authority. Under this framework, the City determined the outside-City water customers would be charged at a rate higher than that of the inside-City customers. Since 2010, the City has charged a rate differential of 1.5x to outside-City customers

[1] The City has other water user classifications, which are not at issue and therefore not discussed. However, the Opinion would ultimately affect the City's other municipal water classifications.

(meaning these customers generally pay 50% more on a given rate than inside-City customers). The City sets its water rates through ordinances, which are adopted by the City Council. Consistent with all municipal actions, the City's setting of municipal water rates is subject to the grants and restrictions of authority in the Washington State Constitution. Applicable provisions include Article I, section 3 (personal rights), Article I, section 12 (special privileges and immunities prohibited), Article XI, section 14 (private use of public funds prohibited), as well as the requirement that the City not act in an arbitrary or capricious manner.

A commercial outside-City water user, West Terrace Golf, LLC, filed an action against the City in June 2017. Clerk's Papers ("CP"), 1-21. Shortly thereafter, both residential and commercial outside-City water customers brought a class action lawsuit

against the City in July 2017. CP 1744-1782.[2] The Respondents specifically challenged the rate differential that is applied to outside-City customers, asserting the rate differential was "arbitrarily and capriciously imposed" and requested a declaratory judgment finding that the City violated RCW 80.28.080(2), RCW 80.28.090, and RCW 80.28.100. Respondents have not alleged an outright challenge to either the constitutionality of the City's ordinances or to the rate itself. *See* CP 147-172; CP 2160-2187.

The City asserts it is governed by Chapter 35.92 RCW and related constitutional provisions in setting its municipal rates and the rate differential, and that the asserted provisions of Title 80 RCW are inapplicable to municipal ratemaking. Since 2017, the parties have sought various dispositive rulings on this case, but the application of RCW 80.28.010, .080, .090, and/or .100 to

[2]The identical claims in these two actions have been consolidated for purposes of the issues presented to the Superior Court, Court of Appeals, and at issue in this Petition.

municipal water rates, though argued, was not decided by the Superior Court. To resolve this issue, prior to trial, the City filed a Motion for Declaratory Relief, requesting the Superior Court rule as a matter of law that RCW 35.92 *et seq*., within the confines of the Washington State Constitution, governed municipal water rates. Supplemental Clerk's Papers ("Supp. CP"), 1-2. The Respondents later filed a cross-Motion for Declaratory Relief, requesting the Superior Court rule that certain portions of Title 80 RCW applied in conjunction with RCW 35.92.010. CP 3287-88. The Superior Court entered an Order granting the City's Motion, and denying Respondents' cross-Motion. CP 3323-25.

The Respondents' initial attempt to appeal the Superior Court's Order directly to this Court was denied, with the Commissioner finding that the Superior Court's Order was consistent with existing case law. Appx., p. 62-65. The matter was referred to the Court of Appeals, Division III. *Id*. The Court of Appeals accepted review, and reversed the Superior Court's

Order, holding that certain provisions of Title 80, specifically RCW 80.28.010, .090, and .100 apply to municipalities and municipal water rate making. Appx., p. 1-10. The City timely seeks review.

V. ARGUMENT

A. Standard of Review.

RAP 13.4 permits review by this Court of a Court of Appeals decision terminating review, if:

> (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
> (2) the decision of the Court of Appeals is in conflict with a published decisions of the Court of Appeals; or ...
> (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Review is proper under any of these provisions.

B. Division III's Opinion Creates Inconsistency.

Division III's Opinion is in conflict with decisions of the Supreme Court and a published decision of the Court of Appeals. RAP 13.4(b)(1)-(2). Specifically, the Opinion is in conflict with the following Supreme Court decisions: *Phinney Bay Water Dist.*

v. City of Bremerton, 58 Wn.2d 298 (1961) (en banc); *Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861 (1983) (en banc); and *Teter v. Clark County*, 104 Wn.2d 227 (1985) (en banc). The Opinion is also in conflict with the following published Court of Appeals decision: *Geneva Water Corp. v. City of Bellingham*, 12 Wn. App. 856 (Div. I, 1975). In addition, the Opinion is in direct conflict with the intent of the Legislature, and a 1959 change to the precise statute at issue which removed the very language the Court of Appeals has reinserted into the statute, absent any grant of legislative authority to do so.

i. Division III's Opinion is Contrary to a 1959 Legislative Change.

By way of background, the predecessor statute to RCW 80.28.010 was first adopted in 1911. *See* 1911 Wash. Sess. Laws, ch. 117, §26 (p. 558). This statute created a "Public Service Commission[3]" which, like today, exempted cities from the

[3]Predecessor to today's Utilities and Transportation Commission. *See* RCW 80.01.010.

enforcement of any order related to rates. *See State ex rel. West Side Imp. Club v. Dep't of Pub. Service of Washington*, 186 Wn. 378, 380 (1936). In 1917, the Legislature first expressly permitted a city to extend water to individuals residing outside of its boundaries. *Id*. at 381; *see also* 1917 Wash. Sess. Laws, ch. 12 § 1. However, the Legislature at that time directed the Commission to establish rates for outside-City customers, while a city still controlled the rates of its inside- City customers. *See West Side*, 186 Wn. at 381. Then, in 1933, the Legislature adopted the predecessor to RCW 35.92.010 (then codified as RCW 80.40.010) and provided a city with authority to set all water rates for both inside and outside city customers – setting up a statutory conflict. *See id.* The Supreme Court reconciled this conflict, holding:

> We are clear that it was the intention of the Legislature … to give the city sole and exclusive jurisdiction over the rates at which it would furnish water to those outside of its corporate limits …

Id. at 383-84 (emphasis added). *Faxe v. City of Grandview*, 48 Wn.2d 342, 348-49 (1956) followed, and the Supreme Court again revisited municipal water rates. However, at the time *Faxe*

was decided, the municipal water rate statute still required rates be "just and reasonable," a holdover from the prior statutory scheme. *See id*. (upholding the municipal water rates), *see also* 1951 Wash. Sess. Laws, ch. 252 § 1.

Importantly – and minimized by the Opinion – in 1959, following *Faxe*, the Legislature removed the statutory "just and reasonable" requirement, replacing it with the requirement that "the rates charged must be uniform for the same class of customers or service." *Compare* 1957 Wash. Sess. Laws, ch. 209 § 2 *with* 1959 Wash. Sess. Laws, ch. 90 § 6. This is the statutory requirement and language that exists today.

A review of RCW 35.92.010 makes it clear RCW 35.92.010 not only governs a municipality's ability to classify its water customers based on a number of factors, but also sets specific requirements with respect to setting water rates: (1) "the rates charged must be uniform for the same class of customers or service", and (2) "no rate shall be charged that is less than the cost of the water and service to the class of customers served."

The Opinion holds that RCW 35.92.010 only governs water user classifications. Appx., p. 1-10. This holding is in error, conflicting not only with the statutory language, but case law that followed the 1959 legislative change. The Court in *Geneva Water Corp. v. City of Bellingham*, 12 Wn. App. 856, 868-70 (1975), as discussed more thoroughly herein, addressed the Legislature's removal of the "just and reasonable" requirement. The *Geneva* Court, ruling for Bellingham, held:

> ...[The] trial court's conclusion that the city 'has full authority to regulate the price of water sold provided that rates are uniform for the same class of customers or service,' merely reflects the controlling statutory language. As we have noted, RCW 35.92.010 clearly provides, in part: A city or town (has) full power to regulate and control the ... price (of water from a municipal waterworks): Provided, that the rates charged must be uniform for the same class of customers or service. Significantly, the proviso contained in a predecessor statute and construed in *Faxe v. Grandview*, supra, stated: Provided, however, that all water sold by a municipal corporation outside its corporate limits shall be sold at just and reasonable rates. RCW 80.40.010, Laws of 1951, ch. 252, s 1, p. 791. In 1959, after the decision in *Faxe*, the proviso was amended to read in its present language (RCW 80.40.010, Laws of 1959, ch. 90, s 6, p. 533) and, in 1965, the statute became part of Title 35 …

> In short, we conclude that not only did the trial court in the case at bar properly conclude that the water districts failed to carry their burden of proving that the water rates in question 'are not just and reasonable' … but also there is no longer any statutory requirement that such rates be just and reasonable. RCW 35.92.010.

Id. (emphasis added). This holding reflected the statutory change in 1959. The Court of Appeals, in this instance, while acknowledging the Legislature's removal of the "just and reasonable" requirement, instead, based its Opinion primarily on *Faxe*, 48 Wn.2d at 348-49 - a ruling that pre-dates the 1959 Legislative change. The Court of Appeals also apparently relied upon what it considered the "original intent" of the law in 1911 ("The foregoing history shows that the 1911 [Public Service Commission] law originally intended to subject municipal utilities to the requirement that rates be "*just, fair, reasonable and sufficient*." RCW 80.28.010(1)." (emphasis in original)). This reliance excludes consideration of the 1959 Legislative change expressly removing this language from RCW 35.92.010. Moreover, RCW 35.92.010 has never included a reference to "fair" or "sufficient" rates. The Legislature's intent in 1911 is not

dispositive when considering the later changes to the statutory scheme and, more specifically, to RCW 35.92.010 itself.

ii. The Decision is in Conflict with Supreme Court & Court of Appeals Precedent.

The Opinion further conflicts with several Supreme Court and Court of Appeals decisions following the 1959 Legislative change.

First, in *Phinney Bay Water Dist. v. City of Bremerton*, 58 Wn.2d 298, 301-302 (1961)[4], this Court, sitting *en banc*, reviewed a water district's ordinance that established different water rates for users "residing within and without the city limits." In that case, the users contended the rate differential was "in

[4] The decision in *Phinney Bay*, issued on June 1, 1961, references RCW 80.40.010, which was moved from Title 80 to Title 35 at some point in 1961. The Legislature's explanatory note states "These chapters [including Ch. 80.40 RCW] relating to municipal utilities more logically belong with cities and towns where they were codified prior to the adoption of RCW. They have accordingly been omitted from this reenactment and upon the enactment of this bill the subject matter contained in said chapters will be codified in the 1961 supplement to RCW as part of Title 35, Cities and Towns." Appx., p. 26-27.

contravention of" Art. 1, § 12 of the Washington Constitution. This Court disagreed. In its holding, this Court underscored *Faxe*, and that ruling's reliance on the same constitutional provision:

> The aim and purpose of [Art. 1, § 12] is to secure the equality of treatment to all persons without undue favor on the one hand or hostile discrimination on the other. Compliance with this aim and purpose requires that legislation under examination apply alike to all persons within a class, and a reasonable ground must exist for making a distinction between those within and those without a designated class.

Id. (citing *Faxe*, 48 Wn.2d at 348). The *Phinney Bay* Court noted it's decision in *Faxe* "held that the ordinance was not discriminatory, if the rates applicable to each class of users were uniform ..." and extended that same reasoning to its holding:

> Appellant's evidence failed to establish that the class of patrons residing outside the city boundaries could be served by the city as economically as those residing within its corporate limits. Applying the rule announced in the cited case to the facts of the instant case, the rates established by the ordinance were not violative of the aim and purpose of Art. I, § 12, state constitution.

Id. at 302 (emphasis added). The *Phinney Bay* decision, issued two years after the 1959 Legislative change, removing the "just and reasonable" language from RCW 35.92.010 recognizes the two-step process to implementing municipal water rates. First, the municipality must classify its water users, in accordance with the factors set forth in RCW 35.92.010. This is confirmed by *Faxe*, *Phinney Bay*, and subsequent case law. Second, the municipality sets the rate for that class of customer within specific parameters. The rate must be uniform under the explicit statutory language. *See* RCW 35.92.010. The rate cannot be less than the cost of service. *Id*. The rate must also be compliant with Art. 1, § 12 of the Washington State Constitution, in that it must "apply alike to all persons within a class" and "a reasonable ground must exist for making a distinction" between classes. *See Phinney Bay*, 58 Wn.2d at 301-302; *see also Faxe*, 48 Wn.2d at 348.

The Court of Appeals' Opinion added language to these requirements, wholly unnecessarily and without any grant of

authority, that municipal water rates must also be "just, fair, ... and sufficient." Appx., p. 1-10.

Similarly, the Opinion is in conflict with the analysis this Court had in an analogous case, *Teter v. Clark County*, 104 Wn.2d 227 (1985), which was decided in 1985. In *Teter* this Court considered storm water facility charges under RCW 35.67.010 and .020. *Teter*, 104 Wn.2d at 227. The statute bears a striking resemblance to RCW 35.92.010, in that it authorizes a municipality to form and operate a "system of sewage" and to "charge 'rates and charges' for the use of such systems. The rates and charges must be uniform for the same class of customers or service." *Id*. at 230. More critically, the statutes first allow a municipality to classify sewer customers for the purpose of setting rates. *See id*. at 237-238; *see also* RCW 35.67.010, .020.

Importantly in *Teter*, and to where this Court of Appeals' decision runs contrary, the Court reviewed the challenge to the municipalities rates under "the applicable standard of review [which] is the 'arbitrary and capricious' test." *Id*. at 234 (citing

Tarver v. City Comm'n of Bremerton, 72 Wn.2d 726, 731 (1967)). The Court continued, reviewing the classification "for purposes of computing the charges" and found:

> We find that the rate schedule bears a reasonable relation to the contribution of each lot to surface runoff. Respondents are not required to *measure each* residential lot to ascertain the *exact* amount of impervious surface on each one. Absolute uniformity in rates is not required. *See Morse v. Wise,* 37 Wash.2d 806, 226 P.2d 214 (1951). The rates for each class must be internally uniform, but different classes may be charged different rates. *Morse,* at 812, 226 P.2d 214. Further, only a *practical* basis for the rates is required, not mathematical precision.

Id. at 237–38 (emphasis in original). These same principles have been subsequently held to apply to municipal water rates. *See Smith v. Spokane County*, 89 Wn. App. 340, 357 (1997); *see also Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19 (1978).

It is important to note that the Court of Appeals appeared persuaded by Respondents' argument that cases interpreting electrical rates (under RCW 35.92.050) are analogous to water rates. Appx., p. 1-10. But the Court of Appeals failed to recognize the stark difference between the water rate statute

(RCW 35.92.010) versus the electrical rate statute (RCW 35.92.050). Unlike RCW 35.92.050, the specific language of RCW 35.92.010 clearly demonstrates that it is a self-contained statute which provides the City with parameters and a framework around first classifying customers in consideration of the above factors, and then setting rates in accordance with such classifications. No similar provisions exist in RCW 35.92.050. *Compare* RCW 35.92.010 with RCW 35.92.020. Because the statutes are incomparable, case law interpreting electrical rates are, by extension, incomparable. This Court's Commissioner recognized the cases interpreting electrical rates were "not in measurable tension" with *Geneva*, *supra*. *See* Appx., p. 64.

The difference between water rates and electrical rates has been recognized before by this Court. In *Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861 (1983) (en banc), this Court highlighted the difference between the two types of rates:

> Just as there must be uniformity of standards for water rates under RCW 35.92.010, so must electrical rates be

> just and reasonable and nondiscriminatory under RCW 80.28.090, .100.

Case law regarding municipal sewer rates (e.g. *Teter*) is comparable to, and consistent with, case law regarding municipal water rates (e.g. *Geneva*, *supra*), and the Opinion is in conflict with the same.

Rather than recognizing the clear process which currently governs the establishment of municipal rates, the Court of Appeals instead sought to "reconcile" RCW 35.92.010 with RCW 80.28.010 under *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210 (2005) and *Tunstall v. Bergeson*, 141 Wn.2d 201, 211 (2000). As the Court of Appeals recognized, this principle allows: "'apparently conflicting statutes' may be reconciled, the court will 'give effect to each of them.'" Appx., p. 1-10. (emphasis added). Problematically, the premise upon which the Court's Opinion rests is incorrect. RCW 80.28.010 and RCW 35.92.010 are not in conflict. No party has asserted those statutes were in conflict; Respondents simply requested, and the Court

erroneously agreed, to superimpose the requirements of RCW 80.28.010 onto RCW 35.92.010.

The two statutory schemes operate independently of one another, governing different types of utility suppliers. Title 35 is titled "Cities and Towns" and is applicable to first class cities, second class cities, towns, unclassified cities, and other similar municipal entities. *See e.g.* RCW 35.22 – RCW 35.30, RCW 35.58. Chapter 35.92 RCW is titled "Municipal Utilities". In addition to municipal water providers, Chapter 35.92 governs other utilities, such as sewerage and solid waste handling systems (.020), stone and asphalt plants (.030), electrical (.050), transportation facilities (.060), and green electrolytic hydrogen (.445).

Title 80 RCW is titled "Public Utilities" and is applicable to those utilities governed by the jurisdiction of the Utilities and Transportation Commission (UTC), which expressly excludes municipalities. RCW 80.04.500; WAC 480-110-255. Title 80 RCW governs utilities such as private gas, electrical, and water

(Ch. 80.28), telecommunications (Ch. 80.36), energy (Chs. 80.40, 80.50), radio communications (Ch. 80.66), and others.

The Court of Appeals relied upon *Gorman* and *Tunstall*, recognizing the principle of reconciling "apparently conflicting statutes". *See Gorman*, 155 Wn.2d at 210. But both *Gorman* and *Tunstall* dealt with statutes that were – on their faces – actually in conflict.

In *Gorman*, maritime employees brought actions against their employers after developing lung cancer from asbestos exposure at their workplace. *Gorman*, 155 Wn.2d at 202. This Court was required to interpret whether provisions of the Longshore and Harbor Workers' Compensation Act barred the suits, or whether the suits were covered under the Industrial Insurance Act. *Id*. The two statutes at issue, were "by their plain terms ... in conflict ...". *Id*. at 210. The Court ultimately found,

> The plain language of section 102 and its legislative history suggests to us that the legislature intended to create a mechanism to provide temporary, interim benefits to cover the needs of maritime workers who develop illness as a result of exposure to asbestos until it

> is conclusively determined whether the state or federal workers' compensation program is responsible for providing benefits to such a worker. The legislature did not, we believe, intend to extend the whole panoply of WIIA coverage to those workers eligible for benefits under the LHWCA.

Id. at 212-213.

In *Tunstall*, a class of inmates brought suit concerning their rights to education, suing the State's Superintendent of Public Instruction, the Department of Corrections, and various school districts, arguing that the State failed to provide them with education, violating various state statutes, including the Basic Education Act (Ch. 28A.150 RCW). *Tunstall*, 141 Wn.2d at 211-212. This Court held, under the rules of statutory construction,

> [C]hapters 28A.193 and 72.09 RCW, not the basic education act, apply to the inmate class. First, applying the basic education act to DOC inmates would render chapter 28A.193 RCW and portions of chapter 72.09 RCW superfluous. Second, chapters 28A.193 and 72.09 are the more recent and far more specific statutes regarding inmate education, and thus should be given preference.

Id. at 212. Also recognized in *Tunstall* is the principle that, "courts avoid construing statutes in a way that renders any statutory

language superfluous". *Id*. at 211 (citing *Fray v. Spokane County*, 134 Wn.2d 637, 348 (1998)). Here, the Opinion has created superfluous and inapplicable language without any grant of Legislative authority, and in fact in direct contradiction of Legislative changes made over 50 years ago. The statutes at issue here do not directly conflict.

This Opinion also conflicts with a Court of Appeals' published opinion, *Geneva Water Corp.*, 12 Wn. App. at 856. *Geneva* is a seminal case on the interpretation of water rates, and expressly provided the framework for review of such rates. The Court failed to recognize the importance of *Geneva*. Despite *Geneva*'s age, it is still applicable.

Geneva is strikingly similar to the instant matter. The City of Bellingham had a number of water districts located outside of its city, which bought water from the city, and all of which were served by a single connection to the municipal water system. *Id*. at 858. Each district billed its own customers. *Id*. "Each district [paid] a base rate on meter readings *which is 150 percent of the*

in-city commercial rate," in addition to a monthly $1.50 per household surcharge. *Id*. The outside-city water districts challenged the City's higher rates as "discriminatory, arbitrary, and unreasonable." *Id*. The *Geneva* Court, in ruling for the city, found that under RCW 35.92.010, "the city had reasonable grounds to classify" the customers differently. *Id*. at 866-67. *Geneva* then continued – directly addressing the city's higher rates – interpreting the 1959 statutory change. *Id* at 868-70.

The Court found (1) the city had a duty under Art. 1, § 12 of the Constitution to fix nondiscriminatory rates. *Id*. at 863. Next, the Court found that, because the city's rates were uniform (based on the statutory requirement), it's review was limited to determining whether the classification was "manifestly arbitrary or unreasonable," again under the Constitution. *Id*. at 864. The Court then found, in accordance with prior law, that "rates established ... are presumptively reasonable." *Id*. at 868-69. It confirmed (and corrected the trial court's ruling) that there was no longer any statutory requirement that the rates be "just and

reasonable" under the prior language which had imputed requirements of Title 80 RCW. *Id*. The Court then held, using an arbitrary and capricious standard under the Constitution: "It is apparent from the foregoing ...[the argument] that the City was arbitrary in determining the water rates to be charged nonresident bulk users is without merit. ... We hold that the water districts failed to meet their burden to prove that the water rates charged by the city are either unreasonable or arbitrary." *Id*. at 870-71 (emphasis added).

Geneva reviewed both (1) the city's classification, and (2) the city's rates. Footnote 8, which has been the subject of dispute, is not a holding of the case. Further, it reflects that the Court could have chosen to impute language from Title 80 RCW, and opted not to. This Opinion directly conflicts with the holdings and analysis of *Geneva*. Review is appropriate, and necessary.

C. The Matter Involves an Immediate Issue of Substantial Public Interest Which Will Affect Every Municipal Water System in the State.

Review is also appropriate under RAP 13.4(b)(4), which allows review for "an issue of substantial public interest." Cases that meet this standard are those that have wide effect, (*State v. Watson*, 155 Wn.2d 574 (2005) (case had 'the potential to affect every sentencing proceeding' in a county)), present significant constitutional questions (*In re Matter of Williams*, 197 Wn.2d 1001 (2021) (denial of personal restraint petition challenging confinement during Covid); *see also Aji P. v. State*, 198 Wn.2d 1025 (2021) (whether Washington's youth have a right to a stable climate system)); where a split in two Court of Appeals' decisions create a clear need for statutory interpretation (*State v. Bergstrom*, 199 Wn.2d 23 (2022) (Court of Appeals – Division III decision conflicted with decision of Division II).

Here, as argued by the Washington State Association of Municipal Attorneys (WSAMA) in an amicus brief filed with the Court of Appeals, every city in the State of Washington relies

upon RCW 35.92.010 to set its municipal water rates for all types of customers, not only inside and outside-city customers. Appx., p. 66-83. WSAMA, urging the Court to affirm the Superior Court's Order stated: "WSAMA members have an interest in this appeal because the issues presented could negatively impact cities and towns throughout the state, by upending a state-wide system of local legislative autonomy for municipal water rate-setting with appropriate sideboards dictated by the Legislature and Constitution." *Id*. The Opinion now threatens to upend this system as feared. Moreover, this is a published Opinion that now applies immediately (and potentially, retroactively) to all municipalities.

The requirements of RCW 80.28, *et seq*. are not considered in municipal ratemaking decisions or criteria. *See id*. The wide effect of this Opinion cannot be understated; it will affect every municipality in the state that operates a water system. Further, the conflict between this Opinion and the decisions outlined above, is clear. The Court of Appeals impermissibly

superimposed language into a statutory scheme without a grant of authority – and in direct conflict with a legislative change. If it stands, this Opinion upends over 50 years of precedent.

The significant questions in this matter – of both statutory interpretation, imputation of new language onto a statutory scheme, and the constitutional implications of this Opinion – will be felt throughout the State. Review is appropriate in order to provide clarity on the framework by which a municipality may set its water rates. The Opinion interferes with the longstanding framework set by RCW 35.92.010 and the Constitution, which recognizes the legislative autonomy of cities and towns for municipal water rate-setting, creating statutory conflict where none previously existed. Immediate review is necessary.

VI. CONCLUSION

Review of the Opinion is appropriate under RAP 13.4, and the City respectfully requests this Court grant review.

VII. CERTIFICATE OF COMPLIANCE

This document contains 4,740 words, excluding the parts exempted from the word count, and complies with RAP 18.17.

RESPECTFULLY SUBMITTED this 7th day of March 2024.

ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.

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DECLARATION OF SERVICE

I, Bonita Felgenhauer, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address is 618 W. Riverside Ave., Ste. 210, Spokane, Washington 99201-5048, and telephone number is 509-747-9100.

2. On March 7, 2024, I caused to be served the foregoing on the individuals named below in the manner indicated.

Robert A. Dunn
Alexandria Drake
Dunn & Black, P.S.
111 N. Post, Ste. 300
Spokane, WA 99201

- ☐ U.S. Mail, postage prepaid
- ☐ Facsimile
- ☒ E-Mail - via WA Courts
- ☐ Via Hand Delivery

Michael Piccolo
Elizabeth L. Schoedel
City Attorney's Office
808 W. Spokane Falls Blvd.,
5th Floor
Spokane, WA 99201-3326

- ☐ U.S. Mail, postage prepaid
- ☐ Facsimile
- ☒ E-Mail - via WA Courts
- ☐ Via Hand Delivery

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

Dated this 7th day of March 2024, at Spokane, Washington.

_____
Bonita Felgenhauer

APPENDIX

542 P.3d 1029
Court of Appeals of Washington, Division 3.

WEST TERRACE GOLF LLC, a Washington limited liability company, Petitioner,

v.

CITY OF SPOKANE, a municipal corporation in and for the State of Washington, Respondent.

John E. Durgan, individually and as class representative for all others similarly situated; Ta Wndi L. Sargent, individually and as class representative for all others similarly situated; and Kristopher J. Kallem, individually and as class representative for all other similarly situated, Petitioners,

v.

City of Spokane, a municipal corporation in and for the State of Washington, Respondent.

No. 38792-5-III
|
Filed February 6, 2024

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Synopsis

Background: Water users, who resided outside city and purchased water from city, brought action against city for, among other things, declaratory ruling that city's higher water rates for nonresident users violated statutes in title governing water companies. City brought separate action for declaratory ruling that statute governing municipal utilities applied to a municipality's setting of its water rates. The Superior Court, Spokane County, Charnelle M. Bjelkengren, J., entered order in city's favor, holding that statute governing municipal utilities and city's municipal code, not title governing water companies, governed city's authority to establish water rates at issue, and certified its order for interlocutory review. Water users sought direct review in Supreme Court, which denied direct review and transferred consolidated action to Court of Appeals, which accepted discretionary review.

Holdings: The Court of Appeals, Birk, J., held that:

[1] as a matter of apparent first impression, when classifying customers and service for rate-setting purposes, a municipal water supplier may only consider reasonable grounds for distinction;

[2] statute requiring water rates to be "just, fair, reasonable and sufficient" was not repealed by implication as applied to municipal water suppliers; and

[3] as a matter of apparent first impression, a municipal water supplier must charge a uniform, just, fair, reasonable, and sufficient rate for a given class of customers or service.

Reversed and remanded.

Fearing, C.J., filed concurring opinion.

West Headnotes (13)

[1] Statutes Conflict

When apparently conflicting statutes may be reconciled, the court will give effect to each of them.

[2] Declaratory Judgment Scope and extent of review in general

On review of a declaratory ruling, the Court of Appeals reviews conclusions of law involving the interpretation of statutes and municipal ordinances de novo.

[3] Electricity Reasonableness of charges

The statute giving cities and towns "full authority to regulate and control the use, distribution, and price" of electricity is subject to the statute requiring that electric rates be "just, fair, reasonable and sufficient." Wash. Rev. Code Ann. §§ 35.92.050, 80.28.010.

[4] **Water Law** Similar situations, classifications, or categories

The statutory requirement that the rates charged by a municipal water utility be uniform for the same class of customers or service is consistent with the statute requiring the uniform rate for utilities in general to be "just, fair, reasonable and sufficient." Wash. Rev. Code Ann. §§ 35.92.010, 80.28.010(1).

[5] **Electricity** Reasonableness of charges

Gas Reasonableness of Charges

Water Law Reasonableness in general

The statute requiring gas, electrical, and water rates to be "just, fair, reasonable and sufficient" forbids rates from either being so high as to unduly burden the public or so low as to deprive the utility company of means to render adequate service.

[6] **Water Law** Uniformity of Charges

The statute listing factors that a municipal water "may in its discretion consider" in "classifying customers served or service furnished" for rate-setting purposes, in which the last enumerated factor is "any other matters which present a reasonable difference as a ground for distinction," only allows cities and towns to base a rate classification on a factor, including the enumerated factor of the "location of the various customers within and without the city or town," if the factor is in fact a reasonable ground for distinction; the last factor, an omnibus clause, marks the common attribute that connects the specific items listed, and this interpretation is consistent with other statutes prohibiting unreasonable rate preferences and rate discrimination. Wash. Rev. Code Ann. §§ 35.92.010, 80.28.090, 80.28.100.

[7] **Water Law** Reasonableness in general

Because the statute authorizing cities and towns to construct water works and classify services and water users for rate-setting purposes concerns only rate classifications, it does not preclude the statute requiring gas, electricity, and water rates in general to be "just, fair, reasonable and sufficient" from applying to particular rates set by municipal water suppliers. Wash. Rev. Code Ann. §§ 35.92.010, 80.28.010(1).

[8] **Statutes** Implied Repeal

Repeal of statutes by implication is strongly disfavored; this disfavor is the result of a presumption that the legislature acts with a knowledge of former related statutes and would have expressed its intention to repeal them.

[9] **Statutes** By inconsistent or repugnant statute

Statutes By Statute Relating to Same Subject

A repeal of a statute by implication will be found only where (1) a later act covers the entire field of the earlier one, is complete in itself, and is intended to supersede prior legislation, or (2) the two acts cannot be reconciled and both given effect by a fair and reasonable construction.

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[11] **Water Law** Uniformity of Charges

Water Law Reasonableness in general

Under the statute authorizing municipal water works, a municipal water supplier must charge a uniform rate for a given, statutorily permissible classification of customers or service, and under the statute governing water rates set by utilities in general, the rate must be just, fair, reasonable, and sufficient. Wash. Rev. Code Ann. §§ 35.92.010, 80.28.010(1).

[12] **Water Law** Rate and Amount in General

Water Law Evidence

A municipal water supplier has reasonable discretion to fix rates, its rates are presumptively reasonable, and those challenging the rates bear the burden of proof to show the rates are excessive and disproportionate to the service rendered. Wash. Rev. Code Ann. §§ 35.92.010, 80.28.010(1), 80.28.090, 80.28.100.

[13] **Water Law** Reasonableness in general

The inquiry into whether the rates charged by a municipal water supplier are excessive and disproportionate to the service rendered is governed by two controlling considerations: the value of the services to the public and fair compensation for the supplier. Wash. Rev. Code Ann. §§ 35.92.010, 80.28.010(1), 80.28.090, 80.28.100.

West **Codenotes**

Limitation Recognized
Wash. Rev. Code Ann. § 35.92.170

***1031** Appeal from Spokane Superior Court, Docket No: 17-2-02120-7, Honorable Charnelle M. Bjelkengren, Judge.

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PUBLISHED OPINION

Birk, J.[*]

***1032** ¶1 This case presents the question whether the rates established by a municipal water supplier are subject to RCW 80.28.010, .090, and .100, which among other things require that utility rates be "*just, fair, reasonable and sufficient*." RCW 80.28.010(1) (emphasis added). The petitioners, customers of the City of Spokane's (City) municipal water system residing outside the city and bringing claims based on these provisions, point to a statutory definition specifying the utilities subject to RCW 80.28.010, .090, and .100 that expressly includes municipal water suppliers. RCW 80.04.010(30)(a).

¶2 The City says another statute, RCW 35.92.010, regulates municipal water rates to the exclusion of RCW 80.28.010, .090, and .100. RCW 35.92.010 once included a requirement that municipal water rates be "*just and reasonable*," but the legislature eliminated that requirement by amendment in 1959. Compare Laws of 1951, ch. 252, § 1 (emphasis added), with Laws of 1959, ch. 90, § 6. The City says this shows the legislature's intent not to impose a statutory reasonableness requirement on municipal water suppliers. The City points to Geneva Water Corp. v. City of Bellingham, which, noting the 1959 amendment, said of municipal water rates "there is no longer any statutory requirement that such rates be *just and reasonable*." 12 Wash. App. 856, 869-70, 532 P.2d 1156 (1975) (emphasis added). With *that* standard removed from the code in 1959, that much plainly was true. But Geneva expressly declined to decide whether the rule of RCW 80.28.010 that rates be " '*just, fair, reasonable and sufficient*' " applied to municipal water suppliers. Id. at 870 n.8, 532 P.2d 1156 (emphasis added).

[1] ¶3 Presented with this precise question for the first time, we conclude that RCW 80.28.010, .090, and .100 apply to municipal water suppliers. We reach this conclusion for two reasons. First, when the entire history of the two sets of...

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... the legislature first enacted what are now RCW 80.28.010, .090, and .100, it intended that they apply to municipal water suppliers. Second—although for a brief eight year period in the 1950s, RCW 35.92.010 included a requirement that municipal water rates be "just and reasonable"—both then and as it has stood since 1959, the statute does not irreconcilably conflict with the requirements of RCW 80.28.010, .090, and .100. This case is therefore controlled by the principle that when " 'apparently conflicting

statutes' " may be reconciled, the court will " 'give effect to each of them.' " Gorman v. Garlock, Inc., 155 Wash.2d 198, 210, 118 P.3d 311 (2005) (quoting Tunstall v. Bergeson, 141 Wash.2d 201, 211, 5 P.3d 691 (2000)).

FACTS

¶4 Petitioners reside outside the City and use water purchased from the City. The water users sued the City, requesting in part a declaratory ruling that the City's higher water rates for nonresident users were unlawful under various provisions of chapter 80.28 RCW.

¶5 The City sought a declaratory ruling that RCW 35.92.010, not Title 80 RCW, governs a municipality's setting of its water rates. The water users sought their own declaratory ruling that RCW 80.28.010, .090, and .100 also govern a municipality's setting of its water rates. Agreeing with the City, the trial court ruled, "Title 80 is not controlling or applicable to water rates." The trial court entered a written order providing,

> RCW 35.92.010 and the Spokane Municipal Code, within the confines of the Washington State Constitution, are controlling and govern the City's authority to establish the municipal water rates at issue in these proceedings. Title 80 RCW, including but ***1033** not limited to RCW 80.28.010, .090, and .100, do not apply.

It certified its order for interlocutory review.

¶6 The water users sought direct review in the Supreme Court, which denied direct review and transferred the consolidated case to this court. We accepted discretionary review under RAP 2.3(b)(4).

ANALYSIS

¶7 The petitioners contend the trial court erred in declaring that RCW 80.28.010, .090, and .100 do not apply to a municipality's setting of its water rates. We agree.

Standard of Review

[2] ¶8 Under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, courts have the power to "declare rights, status and other legal relations whether or not... claimed." RCW 7.24.010. On review of a declaratory ruling, we review conclusions of law involving the interpretation of statutes and municipal ordinances de novo. Nollette v. Christianson, 115 Wash.2d 594, 600, 800 P.2d 359 (1990). "In cases where the question is whether one statute has been impliedly repealed or overruled by another related statute," the Supreme Court "has explained the legislative history of the statutory scheme and applied the relevant rules of construction without first engaging in a plain language analysis." Anderson v. Dep't of Corr., 159 Wash.2d 849, 859 n.6, 154 P.3d 220 (2007) (citing Hallauer v. Spectrum Props., Inc., 143 Wash.2d 126, 146-47, 18 P.3d 540 (2001)). We proceed in like fashion.

Statutory Background

¶9 The statute on which the City relies, RCW 35.92.010, was enacted in 1890 in Washington's first legislative session, four months after statehood. In Laws of 1889-90, § 1, at 520, the legislature authorized cities and towns to construct water works, providing that

> any incorporated city or town within the state be and is hereby authorized to construct, or condemn and purchase, or purchase or add to and maintain, water works within or without the city limits for the purpose of furnishing the city and the inhabitants thereof with an ample supply of water for all purposes.

This statute is the "general grant of authority to cities and towns to acquire, operate and maintain municipal waterworks." Scott Paper Co. v. City of Anacortes, 90 Wash.2d 19, 28, 578 P.2d 1292 (1978). In addition to other amendments over time, in 1897 the legislature added that the authorization to construct water works came "with full power to regulate and control the use, distribution and price thereof." Laws of 1897, ch. 112, § 1, at 326. In 1899, the legislature added that a city or town might construct water works not only for the "inhabitants thereof" but also "any other persons." Laws of 1899, ch. 128, § 1, at 250-51.

¶10 In Twitchell v. City of Spokane, 55 Wash. 86, 88, 104 P. 150 (1909), the court held that a municipality's "full power" under the statute to set rates was nevertheless not without constraint. The court explained, as a matter of common law, " 'although the municipality has a right to fix the terms by which the water will be supplied, and to establish the rates that shall be paid for it, the right must be exercised in a reasonable manner, so that the rates shall be reasonably proportionate to the service rendered.' " Id. (quoting 1 Henry Philip

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Farnham, The Law of Waters and Water Rights, § 162, at 855 (1904)). The court rejected the ratepayers' argument that the municipality could not charge a rate above cost, resulting in "some profit." Id. The court limited the requirement of reasonable...

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... any undue or unreasonable prejudice or disadvantage." And, under RCW 80.28.100, no water company may "directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive" from any person "a greater or less compensation" than it charges, demands, collects or receives from any other person "for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions." The PSC law created a statutory damages claim on which petitioners rely. RCW 80.04.440.

¶12 The PSC law expressly applied to municipal water suppliers. In a definition materially unchanged from the 1911 enactment, for purposes of Title 80 RCW today, a " '[w]ater company' " includes "every city or town owning, controlling, operating, or managing any water system for hire within this state." RCW 80.04.010(30)(a). At the same time, the PSC law exempted municipal water suppliers from some its regulatory scope. The PSC law generally regulated " 'public service compan[ies],' " defined as "every common carrier, gas company, electrical company, water company, telephone company, telegraph company, wharfinger and warehouseman" as individually defined in the law. Laws of 1911, ch. 117, § 8, at 545. The law created the Washington Public Service Commission, and gave it regulatory powers to adopt rules and regulations, subpoena witnesses and records, require reports, conduct hearings on complaints, and review proposed rate increases, among other powers.[1] Laws of 1911, ch. 117, §§ 2, 75, 78, 82, 85. However, the law provided, in language that is in force today, that, as to municipal utilities, the commission would not have authority to "make or enforce any order," but "all other provisions enumerated herein" would apply. RCW 80.04.500.

¶13 In 1917, the legislature passed a law, now codified as RCW 35.92.170, different from the statutory authorization for cities and towns to construct water works. The 1917 law expressly allowed cities and towns to extend utilities beyond their corporate limits, but it subjected service outside corporate limits to the regulation of the Public Service Commission. Laws of 1917, ch. 12, § 1. In 1933, the legislature passed a new law, now codified as RCW 35.92.200, again different from the statutory authorization for water works, empowering cities and towns to contract with others for furnishing water and fixing rates. Laws of 1933, 1st Ex. Sess., ch. 17, § 3. In State ex rel. West Side Improvement Club v. Department of Public Service, 186 Wash. 378, 382-83, 58 P.2d 350 (1936), the court concluded these two enactments conflicted. Because the 1917 law gave the commission "the power to fix the prices of the service outside the city," but the 1933 law gave municipalities the right to do so by contract, the court said there was an "irreconcilable conflict" between the two acts and held the later 1933 law controlled. Id.; Laws of 1933, 1st Ex. Sess., ch. 17, § 3. Thus, from 1917 until 1933, municipal water suppliers were subject to regulation by the commission for service provided outside their corporate limits. But neither the 1917 enactment nor the 1933 enactment discussed in West Side Improvement Club amended the 1890 law that is now RCW 35.92.010.[2]

¶14 In 1951, the legislature for the first time added a substantive requirement for ***1035** rates to the 1890 authorization to construct water works. Laws of 1951, ch. 252, § 1. By then, the 1890 law was codified at former RCW 80.40.010. See id. The 1951 amendment added a proviso requiring that "all water sold by a municipal corporation outside its corporate limits shall be sold at *just and reasonable* rates." Id. (emphasis added).

¶15 The Supreme Court interpreted the "just and reasonable" standard in the 1951 amendment in Faxe v. City of Grandview, 48 Wash.2d 342, 347, 294 P.2d 402 (1956). Two customers challenged a Grandview city ordinance increasing rates outside city limits. Id. at 344, 294 P.2d 402. The court first addressed whether the city had violated the duty to set nondiscriminatory rates. Id. at 347, 294 P.2d 402. The court assumed without deciding that the privileges and immunities clause of the Washington constitution, article I, section 12 required nondiscriminatory rates, because the test was "substantially the same" under "common-law principles." Id. at 347-48, 294 P.2d 402. The court said the rule required that legislation apply "alike to all persons within a class," and required a "reasonable ground" for distinguishing those within and those without a class. Id. at 348, 294 P.2d 402. The court listed several distinctions between those residing inside and outside Grandview's city limits in regard to financial contribution to the water system, and construction and operation of the system. Id. at 348-49, 294 P.2d 402. These and other factors afforded "reasonable ground for establishing, for rate-making purposes, a separate

class consisting of nonresident water users." Id. at 350, 294 P.2d 402.

¶16 But the court drew a distinction between whether justification existed for making a legislative classification, and whether the price charged a given class was reasonable. The court explained, "The amount of rate differential between two classifications of customers has no bearing on the question of discrimination." Id. The court then turned to whether the ordinance violated the statutory standard of the 1951 amendment. The court said it had not had occasion to construe the " 'just and reasonable' " standard, but said it had construed "a somewhat similar" term, namely the standard of the PSC law that rates be " 'just, fair, reasonable, and sufficient.' " Id. (quoting RCW 80.28.010). This standard requires that rates "shall not be so low as, among other things, to deprive the company of means to render adequate service, nor so high as to unduly burden the public." Id. at 350-51, 294 P.2d 402 (citing N. Coast Power Co. v. Pub. Serv. Comm'n, 114 Wash. 102, 105, 194 P. 587 (1921)). The court held the standard of " 'just and reasonable' " required the city to meet the same duty to *nonresident* customers that it owed as a matter of common law to its *resident* customers "irrespective of statute." Id. at 351, 294 P.2d 402. Like the standard of the PSC law, this required that " '[f]rom the standpoint of the public,' " the value of the services was not to be exceeded, and " '[a]s to the corporation rendering the services,' " the rate must give " 'a fair compensation for the service rendered.' " Id. (quoting 3 John F. Dillon, Commentaries on the Law of Municipal Corporations, 2265, § 1330 (5th ed. 1911)).

¶17 The court qualified this by explaining that "some reasonable discretion must abide in the officers whose duty it is to fix rates," and therefore rates are "presumptively reasonable" unless the challenger can show a rate "is an excessive one and disproportionate to the service rendered." Id. at 352, 294 P.2d 402. The court then discussed several factors bearing on the reasons Grandview charged higher rates to nonresident customers. Id. at 352-53, 294 P.2d 402. Ultimately, however, the court held the challengers failed to meet their burden of proof because they produced "no evidence" of "the value of the service to themselves" or "the return being received by the city on the investment devoted to nonresident service." Id. at 353, 294 P.2d 402.

¶18 The "just and reasonable" standard discussed in Faxe was short lived. Following its original enactment in 1951 and interpretation in Faxe in 1956, in 1959 the legislature amended former RCW 80.40.010, eliminating the "just and reasonable" standard. Laws of 1959, ch. 90, § 6. Besides eliminating that language, the 1959 amendment added to the 1890 authorization a new, extensive proviso. Id. It required uniform rates for the same class of customers or service, and listed factors ***1036** a municipality "may in its discretion consider" in classifying customers or service, one of which is the location of customers inside or outside the municipality's corporate limits. Id. Since the addition of the 1959 proviso, RCW 35.92.010 has set forth a list of factors bearing on rate classifications, and today states in relevant part,

> PROVIDED, That the rates charged must be uniform for the same class of customers or service. ...
>
> In classifying customers served or service furnished, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the water furnished; the time of its use; the achievement of water conservation goals and the discouragement of wasteful water use practices[3]; capital contributions made to the system including, but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction. No rate shall be charged that is less than the cost of the water and service to the class of customers served.

The City says the 1959 amendment is inconsistent with the provisions of the 1911 PSC law and exempts city water rates from the application of RCW 80.28.010, .090, and .100. The City does not directly dispute its falling within the PSC law's statutory definition of a " '[w]ater company' " in RCW 80.04.010(30)(a), but argues it does not therefore become subject to "any and all provisions of Title 80 RCW."

¶19 No relevant changes have occurred in the statutory provisions at issue since the 1959 amendment. We note, however, that in the 1960s, all the provisions were recodified. By 1961, efforts by the code reviser's office to restore session law language to the code had revealed that "because of the complicated statutory problems and history" relating to public utilities regulated in Title 80 RCW and transportation regulated in Title 81 RCW, "the titles in question are nonrestorable." Laws of 1961, ch. 14, general explanatory note, at 889....

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..., but provided the recodified provisions were to be construed as "restatements and continuations, and not as new enactments." Laws of 1965, ch. 7, § 35.98.010. The 1960s recodifications of both the 1911 PSC law and the 1959 amendment to the 1890 law therefore have no impact on our analysis.

Legislative Intent that RCW 80.28.010, .090, and .100 Apply

¶21 The foregoing history shows that the 1911 PSC law originally intended to subject municipal utilities to the requirement that rates be "*just, fair, reasonable and sufficient*." RCW 80.28.010(1) (emphasis added). The definition of a water company for purposes of the PSC law still set forth in RCW 80.04.010(30)(a) plainly included a municipal supplier. The Supreme Court read the statute to plainly so provide in Fisk v. City of Kirkland, 164 Wash.2d 891, 894-95, 194 P.3d 984 (2008).[5] Moreover, the statutory exemption of municipal suppliers from, originally, the Public Service Commission and, now, the Washington Utilities and Transportation Commission, always has been a partial exemption, stating explicitly that except as exempted from commission orders, "all other provisions enumerated herein" apply. RCW 80.04.500. When the PSC law expressly included municipal utilities in its scope and granted them a partial exemption from the law specifying that "all other provisions" applied, the legislature could not have put it any more plainly that the law applied to municipal utilities. Any other interpretation of the PSC law would improperly render " 'meaningless' " and " 'superfluous' " the statutory definition expressly covering municipal water suppliers and the statement that, except as exempted, the provisions of the law apply. Gorman, 155 Wash.2d at 210, 118 P.3d 311 (internal quotation marks omitted) (quoting Davis v. Dep't of Licensing, 137 Wash.2d 957, 963, 977 P.2d 554 (1999)).

¶22 The fact RCW 35.92.010 grants cities and towns "full power to regulate and control the ... price" of water services does not overcome the legislature's subsequent enactment of the rule that rates be "just, fair, reasonable and sufficient." RCW 80.28.010(1). First, as explained above, the "full power" language was enacted in 1897, so the 1911 PSC law is the later, more specific enactment that would control in the event of conflict. Gorman, 155 Wash.2d at 210-11, 118 P.3d 311. Second, as explained in Twitchell, even before the 1911 PSC law, the "full power" language never gave cities and towns the authority to set rates unconstrained by the common law rule that they be reasonable. 55 Wash. at 88, 104 P. 150.

[3] ¶23 Another reason the "full power" language does not avoid application of the PSC law is found in the fact the 1911 PSC law governs the rates cities and towns may set for *electric* utilities. This touches a point of dispute, because the petitioners say that the same rules apply to water rates, whereas the City, pointing to RCW 35.92.010, argues that water rates are subject to statutory provisions different from those governing electric rates. The only difference, however, comes from the 1951 and 1959 amendments. The same 1897 law that gave cities and towns "full power" over water rates gave them "full authority" over electric rates. Laws of 1897, ch. 112, § 1. This remains the law today, RCW 35.92.050, but it is equally settled this authority is subject to the rule of the 1911 PSC law that electric rates be " 'just, fair, reasonable and sufficient.' " Okeson v. City of Seattle, 130 Wash. App. 814, 824, 125 P.3d 172 (2005) (quoting RCW 80.28.010); accord Hearde v. City of Seattle, 26 Wash. App. 219, 221, 611 P.2d 1375 (1980). There is a legitimate question about whether water rates are ***1038** subject to the requirements of the PSC law *following* the 1951 and 1959 amendments to RCW 35.92.010, but there cannot have been one before those amendments distinguished the law of municipal water rates from that of municipal electric rates. The 1911 PSC law, and therefore RCW 80.28.010, .090, and .100, were originally intended to, and did, apply to municipal water rates.

The Statutes May Be Reconciled

[4] **[5]** ¶24 Following the 1959 amendment, RCW 35.92.010 in its present form regulates rate classifications. It states in relevant part that "the rates charged must be uniform for the same class of customers or service." RCW 35.92.010. This is...

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... amendment to RCW 35.92.010 today lists nine factors that a municipal water supplier "may in its discretion consider" in "classifying customers served or service furnished." This does not require that municipal water suppliers adopt any classification, or consider any particular factor. The last factor is an omnibus clause: "any other matters which present *a reasonable difference as a ground for distinction*." RCW 35.92.010 (emphasis added). Such an omnibus clause is appropriately interpreted as marking the "common attribute" that "connects the specific items" listed. Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 225, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008). The 1959 amendment permits consideration

of the "location of the various customers within and without the city or town." This reflects a legislative determination that this *is* "a reasonable difference" that may be considered in making a "ground for distinction." RCW 35.92.010. But nothing suggests the 1959 amendment meant to permit cities or towns to base a rate classification on this or another factor in the *absence* of its being, in fact, a reasonable "ground for distinction."

¶26 The 1959 amendment is consistent with the PSC law's prohibitions on unreasonable preferences and rate discrimination RCW 80.28.090 and .100. The unreasonable preferences prohibition, RCW 80.28.090, prohibits only "*undue* or *unreasonable*" rate preferences. RCW 80.28.090 (emphasis added). Likewise, the prohibition on rate discrimination in RCW 80.28.100 bars a utility from collecting from one person "a greater or less compensation" than it receives "from any other person," but only "for doing a like or contemporaneous service ... under the same or substantially similar circumstances or conditions." If a municipal water supplier's rate classification is based on matters presenting "a reasonable difference as a ground for distinction" under RCW 35.92.010, it will not give any ratepayer an advantage that is "undue" or "unreasonable" under RCW 80.28.090, or lead to a greater or less compensation for service made under "similar" conditions under RCW 80.28.100.

¶27 Geneva further shows that RCW 35.92.010 in its current form regulates *classifications*, in contrast to RCW 80.28.010, .090, and .100, which regulate *rates*. In Geneva, three water districts outside the city limits of the City of Bellingham challenged the rates it charged them. Id. at 857. The trial court found the city had "reasonable grounds" for establishing a separate rate class for the nonresident bulk users, and "breached no duty to fix nondiscriminatory rates." Id. at 861. We looked to RCW 35.92.010 for authority supporting the city's rate classification. Id. at 862. Based on evidence showing "reasonable grounds" to classify the challengers differently from in-city users, we affirmed the trial court's conclusion the city had not created an unlawful discriminatory classification. Id. at 863. To this extent, we simply ***1039** applied RCW 35.92.010 to the classification as established in the trial evidence.

[7] ¶28 The trial court in Geneva also found the challengers did not show the city's rates were not "just and reasonable." Id. at 861. Following Faxe, we distinguished the imposition of a classification from a review of the reasonableness of the rates. Id. at 863. We said, "[T]he question of the reasonableness of a classification pursuant to RCW 35.92.010 relates to whether the classification is invalidly discriminatory *and has no relation to the reasonableness of the amount of the water rate charged to members of a particular class*." Id. (emphasis added). We held that the absence of a finding the rates were unreasonable amounted to a finding against the challengers' burden of proof, and was sufficient to support the trial court's conclusion the challengers had not shown the rates were not just and reasonable. Id. at 868. Because current RCW 35.92.010 concerns only rate *classifications*, it does not pose a bar to application of the RCW 80.28.010(1) standard for the *reasonableness* of particular rates.

¶29 The City's argument that the two statutory schemes conflict ultimately rests on the fact that in 1951, the legislature *added* a requirement to RCW 35.92.010 that rates be "just and reasonable," and in 1959 *removed* it. During those eight years, the statutes established two standards, which Faxe admittedly referred to as alternative ones. At the same time, Faxe did not construe them as conflicting. To the contrary, to construe the meaning of the 1951 "just and reasonable" standard, the court adopted its historical interpretation of the PSC law's requirement that rates be "just, fair, reasonable and sufficient." RCW 80.28.010(1).

¶30 From this brief period of overlapping standards, Washington decisions have occasionally referred to there being different statutory regimes...

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... other municipal utilities. In Geneva, we commented that RCW 80.28.010 "was not deemed controlling" by the Supreme Court in Faxe, and that RCW 80.04.500 "exempts municipally-owned water systems from the control of rates by the utilities and transportation commission." 12 Wash. App. at 870 n.8, 532 P.2d 1156. But no party in Faxe argued that RCW 80.28.010 applied, and the same statute that exempts municipalities from the control of the Utilities and Transportation Commission also says that the provisions of the PSC law nevertheless otherwise apply. Other cases referring to statutory standards governing water and electric rates do so to highlight that there are statutes governing rates, without defining the specific statutory requirements. Earle M. Jorgensen Co. v. City of Seattle, 99 Wash.2d 861, 870, 665 P.2d 1328 (1983); King County Water Dist. No. 54 v. King County Boundary Rev. Bd., 87 Wash.2d 536, 546, 554 P.2d 1060 (1976).

[8] **[9]** ¶31 Repeal by implication is strongly disfavored. State v. Peterson, 198 Wash.2d 643, 647, 498 P.3d 937 (2021). "This disfavor is the result of a presumption that the Legislature acts with a knowledge of former related statutes and would have expressed its intention to repeal them." Loc. No. 497, Affil. with Int'l Bhd. of Elec. Workers, AFL-CIO v. Pub. Util. Dist. No. 2 of Grant County, 103 Wash.2d 786, 790, 698 P.2d 1056 (1985). A repeal by implication will be found only where (1) a "later act covers the entire field of the earlier one, is complete in itself, and is intended to supersede prior legislation" or (2) "the two acts cannot be reconciled and both given effect by a fair and reasonable construction." State v. Conte, 159 Wash.2d 797, 815, 154 P.3d 194 (2007).

[10] ¶32 Neither test is met. Recognizing the weight of history over which there has been a legal reasonableness requirement, the City does not contend that RCW 35.92.010 by itself "covers the entire field" of municipal water rates. Rather, the City argues the regulation of its rates must come at least from both RCW 35.92.010 and the state constitution. Likewise, nothing signals intent by the legislature to recede from the PSC law for municipal water suppliers, but no other class of private or public utility. Starting with Twitchell in 1909 and the legislature's comprehensive and enduring legislation in the PSC law two years later, Washington has long mandated reasonableness in utility rates. It would be a dramatic break with history and with logic to say that the 1959 ***1040** amendment to RCW 35.92.010 concealed an unstated legislative intent to remove any statutory reasonableness requirement from municipal water utilities *alone* of the private and public utilities all otherwise covered by the PSC law.

CONCLUSION

[11] **[12]** **[13]** ¶33 Because the statutory requirements are reconcilable, we give effect to both. Under RCW 35.92.010, a municipal water supplier must charge a uniform rate for a given, statutorily permissible classification of customers or service. And under RCW 80.28.010(1), the rate must be just, fair, reasonable, and sufficient. Under this standard, the city has reasonable discretion to fix rates, its rates are presumptively reasonable, and those challenging the rates bear the burden of proof to show the rates are excessive and disproportionate to the service rendered. Faxe, 48 Wash.2d at 352, 294 P.2d 402. This inquiry is governed by " 'two controlling considerations,' " consisting of the " 'value of the services' " to the public and " 'fair compensation' " for the supplier. Id. at 351, 294 P.2d 402 (quoting 3 John F. Dillon, Commentaries on the Law of Municipal Corporations, § 1330, at 2265 (5th ed. 1911)). This requires that the rates "shall not be so low as, among other things, to deprive the company of means to render adequate service, nor so high as to unduly burden the public." Id. at 350-51, 294 P.2d 402.

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... so much adoe about nothing? John Whitgift, *The defense of the aunswere to the Admonition, against the replie of T.C* (1574) (spelling and punctuation in original).

¶35 We know the phrase "much ado about nothing" as the title to a Shakespeare play published in 1599. But unlike abundant expressions entering the English language through the pen of Bill Shakespeare, an earlier writer first scripted the saying. This idiom describes this appeal.

¶36 I concur in Judge Birk's excellent opinion and agree to reverse the superior court's ruling. I write separately to emphasize one point implied on pp. 20 to 27 of the lead opinion, wherein Judge Birk discusses the reconcilability of the two statutory schemes. This appeal is about nothing.

¶37 Bulky RCW 35.92.010 reads in part:

> A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate waterworks, including fire hydrants as an integral utility service incorporated within general rates, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: PROVIDED, *That the rates charged must be uniform for the same class of customers or service....*
> *In classifying customers served or service furnished, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the water furnished; the time of its use; the achievement of water conservation goals and the discouragement of wasteful water use practices; capital contributions made to the system including, but not limited*

to, assessments; and any other matters which present a reasonable difference as a ground for distinction. No rate shall be charged that is less than the cost of the water and service to the class of customers served.

***1041** (Emphasis added.) The first sentence of RCW 80.28.010(1) succinctly declares:

All charges made, demanded or received by any...

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... any scenario, under which the outcome of a dispute as to the lawfulness of municipal water rates would depend on which of the two statutes a court engages. Neither party has enlightened the court as to how a ruling might differ if the superior court applied both statutes as opposed to harnessing only one of the two statutes.

All Citations

542 P.3d 1029

Footnotes

* The Honorable Ian S. Birk is a Court of Appeals, Division One, judge sitting in Division Three pursuant to CAR 21(a).

1 The 1911 Public Service Commission assumed the authority of the "Railroad Commission." Laws of 1911, ch. 117, § 107. The Railroad Commission had been established in 1905. Laws of 1905, ch. 81, § 1.

2 These two laws remain codified as RCW 35.92.170 and RCW 35.92.200, and, as modified in West Side Imp. Club, remain in force today. Neither party cites current RCW 35.92.170 or RCW 35.92.200 or asserts either has any bearing on the court's analysis.

3 The reference to "the achievement of water conservation goals and the discouragement of wasteful water use practices" was added in 1991. Laws of 1991, ch. 347, § 18.

4 The commission is now known as the Washington Utilities and Transportation Commission. The commission's website states that it became known as such in 1961.

5 Although Fisk holds that municipal water suppliers fall within the definition of RCW 80.04.010(30)(a), it is otherwise not relevant. In Fisk, after concluding the City of Kirkland fell within the Title 80 RCW definition of a water company, the court held the city did not have a duty under RCW 80.28.010(2) to supply water pressure to a fire hydrant adequate to more quickly extinguish a fire consuming the Fisks' recreational vehicle. 164 Wash.2d at 895-96, 194 P.3d 984.

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CHAPTER 117.

[S. S. B. 102.]

PUBLIC SERVICE COMMISSION LAW.

[This act specifically repeals §§8627 to 8661, inclusive, and §§8691 to 8716, inc., Rem.-Bal. See §109 *infra* for repeal. By implication, §§8682, 8684, 8688, 8689, 8690, 9305, 9306, Rem.-Bal. are repealed.]

AN ACT relating to public service properties and utilities, providing for the regulation of the same, fixing penalties for the violation thereof, making an appropriation and repealing certain acts.

Be it enacted by the Legislature of the State of Washington:

ARTICLE I.

PUBLIC SERVICE COMMISSION—GENERAL PROVISIONS.

SECTION 1. *Short Title.*

Name.

This act shall be known as the "Public Service Commission law," and shall apply to the public services herein described and the commission hereby created.

SEC. 2. *Public Service Commission: Appointment; Term; Removal.*

Commission of three persons.

There shall be and there is hereby created, a public service commission consisting of three persons, one of whom shall be elected as chairman, to be appointed by the governor, by and with the advice and consent of the senate. The terms of the commissioners first appointed under the provisions of this act shall be, one for the term of six years, one for the term of four years, and one for the term of two years; and thereafter the term of each commissioner shall be six years from and after the expiration of the term of his predecessor. Each commissioner shall hold office until his successor shall have been appointed and qualified.

Removal.

The governor may remove any commissioner for inefficiency, neglect of duty or misconduct in office, giving to him a copy of the charges against him, and an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his

same to the next connecting carrier under such regulations as the commission may prescribe.

SEC. 25. *Fares and Transfers on Street Railroads.*

Fares and transfers.

No street railroad company shall charge, demand or collect more than five cents for one continuous ride within the corporate limits of any city or town. Every street railroad company shall upon such terms as shall be just and reasonable, furnish to its passengers transfers entitling such passengers to one continuous trip over and upon portions of its lines within the same city or town not reached by the originating car.

Transfers.

ARTICLE III.

PROVISIONS RELATING TO GAS COMPANIES, ELECTRICAL COMPANIES AND WATER COMPANIES.

SEC. 26. *Duties of Gas, Electrical and Water Companies.*

Reasonable charges.

All charges made, demanded or received by any gas company, electrical company or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.

Efficient service.

Every gas company, electrical company and water company shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.

All rules and regulations issued by any gas company, electrical company or water company, affecting or pertaining to the sale or distribution of its product, shall be just and reasonable.

Safety to employees.

Every gas company, electrical company and water company shall construct and maintain such facilities in connection with the manufacture and distribution of its product as will be efficient and safe to its employees and the public.

SEC. 27. *Gas, Electrical and Water Companies Shall File Schedules.*

Every gas company, electrical company and water company shall file with the commission and shall print and

keep open to public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed by such gas company, electrical company or water company. File schedule.

SEC. 28. *Change in Schedule; Notice Required.*

Unless the commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or in any rule or regulation relating to any rate, charge or service, or in any general privilege or facility which shall have been filed and published by a gas company, electrical company or water company in compliance with the requirements of the preceding section, except after thirty days' notice to the commission and publication for thirty days, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes without requiring the thirty days' notice by duly filing, in such manner as it may direct, an order specifying the changes so to be made and the time when it shall take effect. All such changes shall be immediately indicated upon its schedules by the company affected. When any change is made in any rate or charge, form of contract or agreement, or any rule or regulation relating to any rate or charge or service, or in any general privilege or facility, the effect of which is to increase any rate or charge, then in existence, attention shall be directed on the copy filed with the commission to such increase by some character immediately preceding or following the item in such schedule, such character to be in form as designated by the commission. Notice required. Publication of changes proposed.

CHAPTER 11.

[H. B. 143.]

ALLOTMENT OF LANDS AND FUNDS TO STATE COLLEGE.

AN ACT relating to the support of the State College of Washington, and allotting lands and funds thereto.

Be it enacted by the Legislature of the State of Washington:

Federal land grant.

SECTION 1. The one hundred thousand acres of land granted by the United States government to the State of Washington for a scientific school in the enabling act of the State of Washington, is hereby assigned to the support of the State College of Washington.

Funds under Morrill act.

SEC. 2. All funds granted by the United States government under the Morrill act, passed by congress and approved July 2, 1862, together with all acts amendatory thereof and supplementary thereto, for the support and in aid of colleges of agriculture and mechanic arts, as well as experiment stations and farms and extension work in agriculture and home economics in connection with colleges of agriculture and mechanic arts are hereby allotted to the State College of Washington.

Passed the House February 2, 1917.

Passed the Senate February 2, 1917.

Approved by the Governor February 10, 1917.

CHAPTER 12.

[S. B. 21.]

OPERATION OF WATER WORKS BEYOND CITY LIMITS.

AN ACT relating to the acquirement, operation and maintenance of certain public utilities by municipal corporations, validating utility bonds in certain cases, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Authorizing cities and towns to operate water systems beyond corporate limits.

SECTION 1. Whenever any city or town in the State of Washington owns or has acquired, or may hereafter become the owner of or acquire any water utility, and

shall desire to extend such utility beyond its corporate limits, it shall be lawful for such city or town to acquire, make, build, construct and maintain such extension, and to sell, dispose of and distribute its product or service to any other municipality, or to any person, firm or corporation, desiring to purchase the same. Such portion of such public utility that extends beyond the corporate limits of any city, shall be operated at such prices, and under such rules and regulations, as may be prescribed by the public service commission: *Provided, however,* The rights and obligations of existing franchises shall be maintained by the owner of such public utility: *Provided further,* That all cities and towns are hereby authorized to purchase, own and control franchises and distributing systems of water in other cities and towns.

Validation of bonds for public utilities.

SEC. 2. Whenever any city or town has heretofore issued or authorized to be issued by such vote of its electors as is required by law at any election duly and legally held to vote on such proposition, such utility bonds for the purpose of purchasing, paying for or acquiring any such utility as is described in this act, in every such case such utility bonds are hereby declared to be legal and valid, and such city or town is hereby authorized and empowered to proceed to issue and negotiate such bonds and to continue and conclude proceedings for the purchase or acquirement of such utility, and is hereby given full power to maintain and operate the same within all and every part of such contiguous territory whether incorporated or unincorporated.

Taxes due on purchased plant, how paid.

SEC. 3. Whenever bonds have been authorized for the purchase of such utility as set forth in paragraph one herein, and such purchase price fails to include taxes which may or shall become due on any such utility, subsequent to the date of the election at which such bonds were authorized, then such taxes or the amount thereof may be paid by the said purchasing municipality in addition to the maximum sum authorized in the ordinance or proposition theretofore submitted to the electors and ap-

proved by them, without re-submitting to said electors the said proposition to pay said taxes or to purchase said plant at such increased cost; such additional sum for taxes may be paid by such utility out of the revenue of such system by issuing and negotiating water fund warrants against the revenue of such system, or in such manner as is authorized by law.

Emergency.

SEC. 4. This act is necessary for the immediate preservation of the public health and safety and shall take effect immediately.

Passed the Senate January 29, 1917.

Passed the House February 7, 1917.

Approved by the Governor February 10, 1917.

CHAPTER 13.

[S. B. 35.]

PREVENTION OF SPREAD OF HYDROPHOBIA.

AN ACT relating to the control of rabies or hydrophobia in dogs and amending section 6, chapter 100, Laws of 1915 (section 3204 of Remington & Ballinger's Annotated Codes and Statutes of Washington) and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 3204 of Remington & Ballinger's Annotated Codes and Statutes of Washington be amended to read as follows:

Quarantine districts.

Section 3204. Quarantine shall mean the placing and restraining of any animal or animals by the owners or agents in charge of them within certain enclosures described or designated by the commissioner of agriculture, the assistant commissioner of agriculture assigned to the division of dairy and livestock or any inspector of the department of agriculture, in writing, and if the quarantine shall be for the purpose of preventing the spread of rabies or hydrophobia, the notice shall be published in the official newspaper of the county or counties included in

CHAPTER 252.

[S. B. 399.]

MUNICIPAL WATERWORKS.

AN ACT relating to water supply to inhabitants within municipal utility districts; and amending section 80.40.010, R. C. W.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 80.40.010, R.C.W., as derived from section 1, chapter 214, Laws of 1947, is amended to read as follows: Amendments.

A city or town may construct, condemn and purchase, purchase, acquire, add to, maintain, and operate water works, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: *Provided, however,* That all water sold by a municipal corporation outside its corporate limits shall be sold at just and reasonable rates. Acquisition and operation of waterworks by cities. Rates for water sold outside of corporate limits.

For such purposes any city or town may take, condemn and purchase, purchase, acquire, and retain water from any public or navigable lake or watercourse, surface or ground, and, by means of aqueducts or pipe lines, conduct it to the city or town; and it may erect and build dams or other works across or at the outlet of any lake or watercourse in this state for the purpose of storing and retaining water therein up to and above high water mark; and for all the purposes of erecting such aqueducts, pipe lines, dams, or water works or other necessary structures in storing and retaining water, or for any of the purposes provided for by this chapter, the city or town may occupy and use the beds and shores up to the high water mark of any such watercourse or lake, and acquire the right by pur- Acquisition and conveyance of water. Dams. Use of beds and shores.

Acquisition of water rights.

chase, or by condemnation and purchase, or otherwise, to any water, water rights, easements or privileges named in this chapter, or necessary for any of said purposes, and the city or town may acquire by purchase or condemnation and purchase any properties or privileges necessary to be had to protect its water supply from pollution. Should private property be necessary for any such purposes or for storing water above high water mark, the city or town may condemn and purchase, or purchase and acquire such private property. No such dam or other structure shall impede, obstruct, or in any way interfere with public navigation of the lake or watercourse.

Pollution protection.

Private property for storage above high water mark.

Interference with public navigation prohibited.

[R.C.W. 80.40.010 was derived from Rem. Supp. 1947, § 9488 (first nine and one-half lines and beginning at line 28, page 836 to the last proviso).]

Passed the Senate March 8, 1951.

Passed the House March 6, 1951.

Approved by the Governor March 19, 1951.

CHAPTER 253.

[S. B. 410.]

PROTECTION OF STATE BOUNDARIES—MILITIA.

AN ACT relating to the powers and duties of the governor in connection with the militia of the state; empowering him to enter into compacts and agreements with governors of bordering states for guarding and patrol of bridges crossing the common boundaries of said states, and the patrol of said boundaries; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Interstate agreements respecting patrol of state boundaries.

SECTION 1. The governor, with consent of congress, is authorized to enter into compacts and agreements with governors of bordering states concerning guarding and patrol of bridges crossing the common boundaries of said states, and for the patrol of said common boundaries. In any such compact

Disposition of proceeds.

SEC. 3. The proceeds from the sale of the properties described in section 1 of this act shall be applied to the State College of Washington building account in the general fund.

Passed the Senate February 19, 1959.

Passed the House March 4, 1959.

Approved by the Governor March 9, 1959.

CHAPTER 90.

[S. B. 202.]

MUNICIPAL UTILITIES.

AN ACT relating to municipal utilities; amending section 3, chapter 266, Laws of 1955 and RCW 35.67.020; amending section 5, chapter 193, Laws of 1941 and RCW 35.67.190; amending section 6, chapter 193, Laws of 1941 and RCW 35.67.200 and 35.67.210; amending section 2, chapter 209, Laws of 1957 and RCW 80.40.010; amending section 3, chapter 209, Laws of 1957, section 3, chapter 288, Laws of 1957 and RCW 80.40.020; and adding a new section to chapter 80.40 RCW.

Be it enacted by the Legislature of the State of Washington:

RCW 35.67.020 amended.

SECTION 1. Section 3, chapter 266, Laws of 1955 and RCW 35.67.020 are each amended to read as follows:

Authority to construct and regulate rates.

Every city and town may construct, condemn and purchase, acquire, add to, maintain, conduct, and operate systems of sewerage and systems and plants for refuse collection and disposal together with additions, extensions, and betterments thereto, within and without its limits, with full jurisdiction and authority to manage, regulate, and control them and to fix, alter, regulate, and control the rates and charges for the use thereof: *Provided,* That the rates charged must be uniform for the same class of customers or service. In classifying customers served or service furnished by such system of sewer-

age, the city or town legislative body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; the location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the sewage delivered and the time of its delivery; capital contributions made to the system, including but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction.

Classification of service—Factors in.

SEC. 2. Section 5, chapter 193, Laws of 1941, and RCW 35.67.190 are each amended to read as follows:

RCW 35.67.190 amended.

The legislative body of such city or town may provide by ordinance for revenues by fixing rates and charges for the furnishing of service to those served by its system of sewerage or system for refuse collection and disposal, which rates and charges shall be uniform for the same class of customer or service. In classifying customers served or service furnished by such system of sewerage, the city or town legislative body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; the location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the sewage delivered and the time of its delivery; capital contributions made to the system, including but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction.

Revenues for service.

Classification of services.

If special indebtedness bonds or warrants are

Minimum rates.

issued against the revenues, the legislative body shall by ordinance fix charges at rates which will be sufficient to take care of the costs of maintenance and operation, bond and warrant principal and interest, sinking fund requirements, and all other expenses necessary for efficient and proper operation of the system.

Compulsory use.

All property owners within the area served by such sewerage system shall be compelled to connect their private drains and sewers with such city or town system, under such penalty as the legislative body of such city or town may by ordinance direct. Such penalty may in the discretion of such legislative body be an amount equal to the charge that would be made for sewer service if the property was connected to such system. All penalties collected shall be considered revenue of the system.

RCW 35.67.200 and 35.67.210 amended.

SEC. 3. Section 6, chapter 193, Laws of 1941 (heretofore divided and codified as RCW 35.67.200 and 35.67.210) is divided and amended as set forth in sections 4 and 5 of this act.

RCW 35.67.200. Sewerage lien—Authority.

SEC. 4. (RCW 35.67.200) Cities and towns owning their own sewer systems shall have a lien for delinquent and unpaid rates and charges for sewer service, penalties levied pursuant to RCW 35.67.190, and connection charges, including interest thereon, against the premises to which such service has been furnished or is available, which lien shall be superior to all other liens and encumbrances except general taxes and local and special assessments. The city or town by ordinance may provide that delinquent charges shall bear interest at not exceeding eight percent per annum.

RCW 35.67.210. Sewerage lien—Extent—Notice.

SEC. 5. (RCW 35.67.210) The sewerage lien shall be effective for a total of not to exceed six months' delinquent charges without the necessity of any writing or recording. In order to make such

lien effective for more than six months' charges the city or town treasurer, clerk, or official charged with the administration of the affairs of the utility shall cause to be filed for record in the office of the county auditor of the county in which such city or town is located, a notice in substantially the following form:

"Sewerage lien notice

City (or town) of .....

vs.

..... reputed owner.

Notice is hereby given that the city (or town) of ..... has and claims a lien for sewer charges against the following described premises situated in ..... county, Washington, to wit:

(here insert legal description of premises)

Said lien is claimed for not exceeding six months such charges and interest now delinquent, amount to $....., and is also claimed for future sewerage charges against said premises.

Dated .....

City (or town) of .....

By ....."

The lien notice may be signed by the city or town treasurer or clerk or other official in charge of the administration of the utility. The lien notice shall be recorded as prescribed by law for the recording of mechanics' liens.

SEC. 6. Section 2, chapter 209, Laws of 1957 and RCW 80.40.010 are each amended to read as follows:

RCW 80.40.010 amended.

A city or town may construct, condemn and purchase, purchase, acquire, add to, maintain, and operate waterworks, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom,

Authority to acquire and operate waterworks.

with full power to regulate and control the use, distribution, and price thereof: *Provided,* That the rates charged must be uniform for the same class of customers or service. In classifying customers served or service furnished, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the water furnished; the time of its use; capital contributions made to the system including, but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction. No rate shall be charged that is less than the cost of the water and service to the class of customers served.

Classification of services—Factors in.

For such purposes any city or town may take, condemn and purchase, purchase, acquire, and retain water from any public or navigable lake or watercourse, surface or ground, and, by means of aqueducts or pipe lines, conduct it to the city or town; and it may erect and build dams or other works across or at the outlet of any lake or watercourse in this state for the purpose of storing and retaining water therein up to and above high water mark; and for all the purposes of erecting such aqueducts, pipe lines, dams, or water works or other necessary structures in storing and retaining water, or for any of the purposes provided for by this chapter, the city or town may occupy and use the beds and shores up to the high water mark of any such watercourse or lake, and acquire the right by purchase, or by condemnation and purchase, or otherwise, to any water, water rights, easements or privileges named in this

chapter, or necessary for any of said purposes, and the city or town may acquire by purchase or condemnation and purchase any properties or privileges necessary to be had to protect its water supply from pollution. Should private property be necessary for any such purposes or for storing water above high water mark, the city or town may condemn and purchase, or purchase and acquire such private property.

RCW 80.40.020 amended.

SEC. 7. Section 3, chapter 209, Laws of 1957, section 3, chapter 288, Laws of 1957, and RCW 80-.40.020 are each amended to read as follows:

Authority to acquire and operate sewerage and garbage systems.

A city or town may also construct, condemn and purchase, purchase, acquire, add to, maintain, and operate systems of sewerage, and systems and plants for garbage and refuse collection and disposal, with full authority to manage, regulate, operate, and control them, and to fix the price of service thereof, within and without the limits of the city or town: *Provided,* That the rates charged must be uniform for the same class of customers or service. In classifying customers served or service furnished by such system of sewerage, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; the location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the sewage delivered and the time of its delivery; capital contributions made to the system, including but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction.

Classification of services—Factors in.

New section.

SEC. 8. There is added to chapter 80.40 RCW a new section to read as follows:

Connection charges authorized.

Cities and towns are authorized to charge property owners seeking to connect to the water or sewerage system of the city or town as a condition to granting the right to so connect, in addition to the cost of such connection, such reasonable connection charge as the legislative body of the city or town shall determine proper in order that such property owners shall bear their equitable share of the cost of such system. Connection charges collected shall be considered revenue of such system.

Severability.

SEC. 9. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Passed the Senate February 13, 1959.

Passed the House March 4, 1959.

Approved by the Governor March 9, 1959.

CHAPTER 91.

[S. B. 345.]

STATE FUNDS—INVESTMENTS.

AN ACT relating to the investment of state funds, and adding new sections each to chapter 41.32, 41.44 and 43.33 RCW.

Be it enacted by the Legislature of the State of Washington:

New section.

SECTION 1. There is added to chapter 41.32 RCW a new section to read as follows:

Investment, state teachers' retirement funds, authorized.

The state teachers' retirement board may authorize the state finance committee to invest those funds which are not under constitutional prohibition in farm ownership and soil and water conservation loans fully guaranteed as to principal and interest under the Bankhead-Jones Farm Tenant Act administered by the United States department of agriculture.

CHAPTER 14.
[H. B. 5.]

PUBLIC UTILITIES—TRANSPORTATION—TITLES 80 AND 81 RCW REENACTMENTS.

AN ACT Relating to public service properties and utilities, providing for the regulation thereof, enacting a public utilities and transportation code to be known as Titles 80 and 81 of the Revised Code of Washington; providing penalties; repealing certain acts and parts of acts; and declaring an emergency.

Be it enacted by the Legislature of the state of Washington:

TITLE 80

PUBLIC UTILITIES

Chapter 80.01

PUBLIC SERVICE COMMISSION

80.01.010 Commission created — Appointment of members— Terms—Removal. There is hereby created and established a state commission to be known and designated as the Washington public service commission, and in this chapter referred to as the commission.

The commission shall be composed of three members appointed by the governor, with the consent of the senate. Not more than two members of said commission shall belong to the same political party.

The members of the first commission to be appointed after taking effect of this section shall be appointed for terms beginning April 1, 1951, and expiring as follows: One commissioner for the term expiring January 1, 1953; one commissioner for the term expiring January 1, 1955; one commissioner for the term expiring January 1, 1957. Each of the commissioners shall hold office until his successor is appointed and qualified. Upon the expiration of the terms of the three commissioners first to be appointed as herein provided, each succeeding commissioner shall be appointed and hold office for the term of six years. One of such commissioners to be designated by the governor, shall, during the term of the appointing governor, be the chairman of the commission.

Each commissioner shall receive a salary of not less than ten thousand dollars nor more than twelve thousand dollars per annum, payable monthly, as may be fixed by the governor.

Any member of the commission may be removed for inefficiency, malfeasance or misfeasance in office, upon specific written charges

Explanatory note.

Code Committee's treatment of 1911 c 117 § 8 as amended, being the the definitions section of the public service commission act, wherein the definitions relating to public utilities were codified as RCW 80.04.010; those relating to transportation were codified as RCW 81.04.010; and those relating to wharfingers were codified as RCW 22.24.010. Several other independent acts were likewise doubly codified. As for Title 81, the legislative committee of the Washington Railroad Association has reviewed the sections of that title pertaining to railroads for the purpose of establishing what changes had been made from the session laws by the 1941 Code Committee. In a letter of January 2, 1953, addressed to the Statute Law Committee, Attorney Dean H. Eastman, chairman of the Washington Railroad Association, stated:

> "In view of what we have found thus far, we strongly urge that chapters 81.04 through 81.60 of Title 81, RCW, not be proposed for adoption in their present form, but that these chapters be given further study with a view of either restoring the wording of the Session Laws or making such corrections as may be necessary to retain the meaning of the Session Laws."

One basic difficulty in bar of the restoration of these titles is the fact that some of the sections codified in both of the titles have been subsequently amended by reference to only one of the titles, or, they have been amended in both titles for different substantive reasons so that they no longer read the same in each title. The net result is that any attempt to restore the session law language without at the same time proposing legislation to preserve these substantive differences, would be fruitless.

Pursuant to its finding of nonrestorability, the codifications subcommittee directed the reviser to prepare a draft of a bill for the repeal and reenactment of these titles, for the purpose of resolving as many of the aforesaid problems as may be ascertained and remedied without affecting the substance of the law. Copies of this draft were circulated extensively among the experts in the fields of public utilities and transportation, including representatives of the public service commission, and a series of conferences was held by the subcommittee (Oct. 23, Nov. 23, Dec. 4 and 18, 1959; Jan. 15 and 22, 1960) at which such industry representatives appeared and were heard concerning the proposed draft, each section thereof being minutely considered. The instant bill is the result.

In preparing the reenactment of these titles, the placement, division, and double codification of sections by the 1941 Code Committee have been accepted for the most part, but within such framework the session law language has been restored. Where the scope of the original session law language would encompass more than one title, it has been edited much in the same manner as the 1941 Code Committee tailored these session laws to fit the particular title, although for the most part such sections, in substance, were codified in full in each title. For example, 1911 c 117 § 75 was codified in both RCW 80.04.020 and 81.04.020, but the word "waybill" was deleted from the version in RCW 80.04.020 which applies only to public utilities: In this proposed reenactment the session law language has been restored to these sections, but the deletion of the word "waybill" from RCW 80.04.020 has been accepted.

Chapters 80.40, 80.44, and 80.48 RCW deal with municipal utilities and are not administered by the public service commission. They are not included in this bill, but will be recodified in Title 35—Cities and Towns, upon the enactment hereof. This is in accordance with the placement of these sections in codifications prior to RCW. In like manner, chapter 81.72 RCW relating to passenger transportation for hire, which is administered by the department of licenses, is included in another statute law committee bill which proposes the reenactment of Title 46—Motor Vehicles. Conversely, chapters 22.20—Storage Warehousemen and 22.24—Wharfingers and Warehousemen, both of which

58 Wash.2d 298
Supreme Court of Washington, En Banc.

PHINNEY BAY WATER DISTRICT, a municipal corporation, and T. F. Drake, Appellants,
v.
CITY OF BREMERTON, a municipal corporation, Respondent.
MARINE DRIVE WATER DISTRICT, a municipal corporation, and Howard B. Hostetler, Plaintiffs.
v.
CITY OF BREMERTON, a municipal corporation, Defendant.

No. 35734.
|
June 1, 1961.

Synopsis

Actions by a water district and a user therein for injunctive relief against increases in water rates and service charges as established by ordinance. The cases were consolidated for trial to the court. From judgments of dismissal in Superior Court, Kitsap County, J. Guthrie Langsdorf, J., the district and the user appealed. The Supreme Court, Ott, J., held that where rates established by the ordinance were identical for all users within each class though higher for those users outside the city boundaries, the rates were not violative of the constitution and that the city did not breach its contractual duty with the district when it established an increase in rates without approval or consent of the district.

Judgment affirmed.

West Headnotes (6)

[1] **Constitutional Law** Class Legislation; Discrimination and Classification in General

The aim of the constitutional provision is to secure equality of treatment to all persons without discrimination and compliance therewith requires that legislation apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within and those without a designated class. Const. art. 1, § 12.

1 Case that cites this headnote

[2] **Water Law** Judicial Intervention or Review of Administrative Determinations

Water user claiming that rates charged for water were unreasonable and constituted an illegal discrimination had burden of proof. RCW 80.40.010; Const. art. 1, § 12.

[3] **Water Law** Determination and disposition

In action by water user charging that rates charged users outside city were unreasonable and constituted an illegal discrimination because they were higher than those applicable to patrons residing in the city, where plaintiff's evidence failed to establish that patrons residing outside boundaries could be served by city as economically as those residing within its corporate limits, plaintiffs failed to establish that rates established by ordinance were discriminatory. RCW 80.40.010; Const. art. 1, § 12.

1 Case that cites this headnote

[4] **Water Law** Contract depriving municipality of right to establish rates

Where contract between city and consumers of water in district which conveyed its system to city required only that for three years after contract, rates established would remain constant and that users residing in district would not be charged more for water than other users residing outside city limits, city did not breach contract when it established an increase in rates without approval of district.

[5] **Water Law** Contract depriving municipality of right to establish rates

Terms of a contract between a water district and city whereby district conveyed its water system to the city did not require negotiations between district and city at any time a rate increase was proposed subsequent to initial three-year period referred to in contract.

[6] Appeal and Error Grouping assignments; multifariousness

Appellant's six assignments of error which were consolidated on its brief under two contentions were not separately determined.

Attorneys and Law Firms

***299** ****359** Garland & Bishop, Bremerton, for appellants.

Roy A. Holland, Bremerton, for respondent.

Opinion

OTT, Judge.

The Phinney Bay Water District is situated outside the corporate limits of the city of Bremerton. It formerly owned its water system and supplied water to residents of the district. The electors residing within the district voted to convey its water distributing system to the city of Bremerton. The city by ordinance, accepted the conveyance and agreed to furnish water to residents of the district. A contract for service was entered into March 19, 1952, which provided, *inter alia*:
'That the City hereby agrees to furnish to the consumers of water in the District, water service as long as the City shall maintain a public water supply and distribution system, or as long as the District shall continue as a duly organized water district under the laws of the State of Washington. Said water service shall be furnished to the consumers through individual meters, which shall be read by employees of the City and bills sent by the City and collections made by the City for and on account of the use of the water as measured through the individual meters. * * *

'*For a period of three years after the effective date of this contract*, rates for individual water consumers through a five-eighths inch by three-quarter inch meter for eight hundred cubic feet of water or less shall be $2.50 per month, per user. *At the expiration of three years new rates may be negotiated between the parties hereto for individual users*, but in no event shall rates charged to individual users through meter service be greater than that provided ***300** for domestic meter rates outside the City Limits as established by ordinance and collected from other individual users residing outside the limits of said City.

'Except as herein modified or changed, the service of water to the District, the installation of meters and the rates to be charged for service, and all other work or services to be furnished or performed by the City for the District, *shall be subject to the rules and regulations and/or ordinances now in effect or as the same may, from time to time, be amended or enacted*, and where in this agreement no specific mention is made of any particular service or charge, such shall likewise be governed by such rules and regulations and/or ordinances existing or later enacted during the term of this agreement: *Provided, that there shall not be any increase in basic minimum rate for a period of three years from the date of this agreement*.

'Disputes or questions between the parties to this agreement shall be settled by the Commissioners of the District and by the proper elected or appointed officials of the City.' (Italics ours.)

****360** The city maintained the same water rate to the users of the water district from 1952 to 1958.

May 29, 1958, the attorney for the water district, having been apprised of a contemplated rate increase to water users residing within and without the corporate limits of Bremerton, wrote to the city commissioners requesting that negotiations be opened between representatives of the water district and the city, in order that rates agreeable to the water district users might be established. The request to establish rates more favorable to the water district users than to other users residing outside the corporate limits of the city was denied.

Thereafter, the city adopted ordinance No. 2288 which established a new schedule of rates for all water users, and provided for other service charge increases. Section 8 of the ordinance provided in part:

"(a) Meter rates withing the City Limits:

	300 cubic feet or less	$1.50
	The next 9,700 cubic feet at	.30
	The next 10,000 cubic feet at	.25
	In excess of 20,000 cubic feet at	.20
"(b)	Meter rates outside the City Limits:	
	300 cubic feet or less	$2.00
	The next 9,700 cubic feet at	.40
	The next 10,000 cubic feet at	.33
	In excess of 20,000 cubic feet at	.25 "

***301** The ordinance rate schedule for other services established a differential between users residing within and without the city limits in approximately the same proportion.

The water district and T. F. Drake, a user within the district, commenced this action against the city, contending (1) that the city refused to negotiate and enter into a contract for water rates satisfactory to consumers within the district, (2) that the rates charged are unreasonable and constitute an illegal discrimination, and (3) that the rates are unjustified and confiscatory. The plaintiffs sought injunctive relief against the increases in rates and service charges as established by the ordinance.

The Marine Drive Water District and Howard B. Hostetler, a user within that district, instituted an action against the city of Bremerton involving identical facts. The causes were consolidated for trial to the court. At the close of the plaintiffs' evidence, the court sustained the city's challenge to its sufficiency, and entered identical judgments of dismissal. The Phinney Bay Water District (hereinafter referred to as though it were the sole appellant) and T. F. Drake have appealed.

Appellant's first contention is that political boundaries alone do not justify a differential in the rates between customers who reside within and those beyond the fixed boundary, and that, therefore, Laws of 1959, chapter 90, § 6, p. 533 (RCW 80.40.010), is in contravention of Art. I, § 12, of the state constitution.

[1] In Faxe v. City of Grandview, 1956, 48 Wash.2d 342, at page 348, 294 P.2d 402, at page 406, a case involving similar facts, we held that the ordinance was not discriminatory, if the rates applicable to each class of users were uniform, and defined the aim and purpose of Art. I, § 12, state constitution, as follows:

'The aim and purpose of this constitutional provision is ***302** to secure equality of treatment to all persons without undue favor on the one hand or hostile discrimination on the other. Compliance with this aim and purpose requires that the legislation under examination apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within and those without a designated class. State ex rel. Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101.'

Laws of 1959, chapter 90, § 6, p. 533 (RCW 80.40.010), provides in part [p. 534]:

'* * * In classifying customers served or service furnished, the city or town governing body may in its discretion consider *any or all* of the following factors: * * * *location* of the various customers within and ****361** without the city or town; * * *' (Italics ours.)

The legislature, in enacting this law, recognized the two classes of patrons and authorized the city, in the exercise of its discretion, to consider the 'location of the various customers' in its determination of the rates applicable to each class.

[2] The rates established by the ordinance are identical for all of the users within each class. When discrimination in the rates charged a particular class is claimed, the burden of proof rests upon the one who asserts it. Faxe v. City of Grandview, supra.

[3] Appellant's evidence failed to establish that the class of patrons residing outside the city boundaries could be served by the city as economically as those residing within its corporate limits. Applying the rule announced in the cited case to the facts in the instant case, the rates established by the ordinance were not violative of the aim and purpose of Art. I, § 12, state constitution.

[4] Appellant's second contention is that the city breached its contractual duty with appellant when it established an increase in rates without the approval or consent of the district. We do not agree.

The pertinent parts of the contract, quoted above, imposed only two restrictions upon the city: (1) that for a period of three years after the inception of the contract the rates established therein would remain constant, and ***303** (2) that in no event would users residing within the district be charged more for water than other users residing outside the city limits. The city complied with both of these contractual obligations.

[5] Finally, appellant urges that the terms of the contract require negotiations between it and the city at any time a rate increase is proposed, subsequent to the initial three-year period. We do not so construe the contract. It provides that 'At the expiration of three years new rates *may* be negotiated between the parties.' (Italics ours.) The contract further provides that water or services subsequently furnished to the district by the city '*shall* be subject to * * * ordinances now in effect or as the same may, from time to time, be amended or enacted.' (Italics ours.) There was no mandatory contractual obligation to negotiate after three years.

The record supports the court's determination that appellant's evidence failed to establish that the rates charged under ordinance No. 2288 were unreasonable or discriminatory.

[6] Appellant's six assignments of error were consolidated in its brief under the two contentions discussed and decided above, and, for that reason, are not separately determined.

The judgment is affirmed.

FINLEY, C. J., and MALLERY, HILL, DONWORTH, WEAVER, ROSELLINI, FOSTER and HUNTER, JJ., concur.

All Citations

58 Wash.2d 298, 362 P.2d 358, 39 P.U.R.3d 410

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104 Wash.2d 227
Supreme Court of Washington,
En Banc.

Kenneth E. TETER, Elmer Kauppila, Frank L. Akerill, Ira Knapp, Pete Rogers, Dave Sarss, Irene Larson, Sally Ross, Garver Gray, Joe Gesler, W.R. Wilson, Pete Van Den Bosch, Waldo Olson (Evergreen Airport), Jack Johnson, Theron Farris, John Mroczek, Dorothy Douglas, Dennis Hall, Myrth Hover, Dave Albeidings, Byron Albeidings, Evergreen Memorial Gardens, Inc., James Cotey, Gene Sorenson, Paul Barbeau, Charles Foil, James J. Powers, Ornal N. Kelly, P.L. Johnigan, Marion Nugent, Lloyd B. Tucker, Joe Stanker and Elmer Anderson, Appellants,

v.

CLARK COUNTY, Washington, a municipal corporation, and the City of Vancouver, Washington, USA, a municipal corporation, Respondents.

No. 51173–0.
|
Aug. 8, 1985.

Synopsis
Property owners brought action for declaratory judgment, challenging under State and Federal Constitutions right of city and county to impose charges on them for maintaining and operating storm water control facilities. The Superior Court, Clark County, John M. Skimas, J., granted city and county's motion for summary judgment as to constitutionality of charges and validity of method used to compute them. Property owners appealed. The Supreme Court accepted appeal as administrative transfer from Division Two of the Court of Appeals, and Pearson, J., held that: (1) city had statutory authority under statute authorizing city to form and operate system of sewerage to impose charges under its police power, with "special benefit" requirement not applying; (2) county had authority to impose such charges under statute permitting it to fix rates and charges for those who contribute to increase of surface water runoff under its police power, with "special benefit" requirement not applying; (3) legislative determination of charges was not made in arbitrary or capricious manner; (4) rate schedule bore reasonable relation to contribution of each lot to surface runoff; and (5) even if charges were actually taxes, they were both statutorily authorized and uniform, and were valid.

Affirmed.

West Headnotes (28)

[1] **Municipal Corporations** Necessity

Special assessment may only be charged against property which is specially benefited by project. West's RCWA Const. Art. 7, § 9.

2 Cases that cite this headnote

[2] **Municipal Corporations** Nature of assessment or tax

Charges imposed under West's RCWA 35.67.010(3), which includes storm or water surface sewers in sewerage systems cities are authorized to form and operate, and West's RCWA 35.67.020, which provides that rates and charges must be uniform for same class of customers or service, were not "special assessments," within West's RCWA Const. Art. 7, § 9, permitting special assessments to be made only against property benefited.

3 Cases that cite this headnote

[3] **Municipal Corporations** Connections with Sewers or Drains

City had statutory authority under West's RCWA 35.67.010 et seq., authorizing city to form and operate system of sewerage, to impose charges on property owners for such systems under its police power.

1 Case that cites this headnote

[4] **Counties** Control and regulation of public property, buildings, and places

West's RCWA 36.89.010 et seq., authorizing counties to establish, acquire, develop, and construct storm water control facilities, grants counties police power to operate management systems for storm sewers.

[5] **Counties** Governmental powers in general

"Police power" is broad enough to encompass all laws tending to promote health, peace, morals, education, good order, and welfare of people, with only limitation being that laws must reasonably tend to correct some evil or promote some interest of state.

1 Case that cites this headnote

[6] **Water Law** Power to establish and maintain in general

Cleanup by city and county of creek and lake, along with measures to prevent flooding in entire drainage basin, are within definition of "police power" as health, safety, or welfare measures.

1 Case that cites this headnote

[7] **Municipal Corporations** Connections with Sewers or Drains

Charges imposed on property owners whose property lies within drainage basin to maintain and operate storm water control facilities were properly characterized as charges imposed to implement health or safety law, and were valid under the police power, even though property owners did not receive any specific service, where charges were imposed pursuant to West's RCWA 36.89.080, requiring that all charges collected be deposited in special fund to be used only to pay costs of maintaining and operating storm water control facilities. West's RCWA 36.89.010 et seq.

4 Cases that cite this headnote

[8] **Statutes** Validity

Where court is asked to review legislative decision, applicable standard of review is "arbitrary and capricious" test.

1 Case that cites this headnote

[9] **Statutes** Presumptions and Construction as to Validity

Legislative determination will be sustained if court can reasonably conceive of any state of facts to justify that determination.

1 Case that cites this headnote

[10] **Municipal Corporations** Reasonableness of regulations

To be void for unreasonableness, ordinance or resolution must be "clearly and plainly" unreasonable.

1 Case that cites this headnote

[11] **Counties** Control and regulation of public property, buildings, and places

Municipal Corporations Judicial proceedings

Property owners, who were objecting to imposition of charges by city and county for maintaining and operating storm water control facilities, had heavy burden of proof that city and county's actions were willful and unreasoning, without regard for facts and circumstances, to void charges on grounds legislative determinations were not made in reasonable manner. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

2 Cases that cite this headnote

[12] **Counties** Control and regulation of public property, buildings, and places

Municipal Corporations Sewer rates

Legislative determination of charges to be imposed on property owners for costs of maintaining and operating storm water control facilities were not made in arbitrary or capricious manner, without regard to facts

and circumstances, where city and county considered specific contours of properties involved, utilized both standard engineering knowledge and engineering studies of specific area, performed in-field verification of drainage basin boundaries and water flow in arriving at determination that property owners' properties contributed to increased surface water runoff, and passed resolutions involving charges at open meetings of county commissioners. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

6 Cases that cite this headnote

[13] **Counties** Control and regulation of public property, buildings, and places

Municipal Corporations Judicial proceedings

Affidavits of property owners as to whether their properties actually contributed to increased surface water runoff had no bearing on reasonableness of city and county's decision-making process in determining upon which properties charges for costs of maintaining and operating storm water control facilities should be imposed, where affidavits were made several years after decision-making process and did not form part of data considered by city and county in making their decision; thus, property owners' affidavits were not relevant to Supreme Court review of determination. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

4 Cases that cite this headnote

[14] **Municipal Corporations** Sewer rates

Property owners bear burden of proof that rates imposed by city and county upon them for costs of maintaining and operating storm water control facilities were unreasonable. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

3 Cases that cite this headnote

[15] **Counties** Control and regulation of public property, buildings, and places

Municipal Corporations Sewer rates

Rates imposed on property owners by county and city for costs of maintaining and operating storm water control facilities are presumptively reasonable, and rates will be sustained unless it appears, from all circumstances, that they are excessive and disproportionate to services rendered. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

1 Case that cites this headnote

[16] **Statutes** Validity

"Arbitrary," for purposes of determining whether legislative determination was "arbitrary and capricious" on review by court, is willful and unreasoning action, without consideration and regard for facts or circumstances.

11 Cases that cite this headnote

[17] **Counties** Control and regulation of public property, buildings, and places

Municipal Corporations Sewer rates

Rate schedule of charges imposed on property owners by city and county for costs of maintaining and operating storm water control facilities bore reasonable relation to contribution of each lot to surface runoff, where charges were based on varying intensities of use of properties and relationship of that use to surface and subsurface water collection, with owners of single-family residence lots paying same rate, and owners of lots with more impervious surface, e.g., industrial, commercial, being charged more, depending on size of lot. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

8 Cases that cite this headnote

[18] **Counties** Control and regulation of public property, buildings, and places

Municipal Corporations Sewer rates

City and county were not required to measure each residential lot to ascertain exact amount of impervious surface on each one to impose charges on property owners for costs of maintaining and operating storm water control

facilities. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

2 Cases that cite this headnote

[19] **Municipal Corporations** Sewer rates

Absolute uniformity in rates charged property owners for costs of operating and maintaining storm water control facilities is not required. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

[20] **Municipal Corporations** Judicial proceedings

Rates charged each class of property owners for costs of maintaining and operating storm water control facilities must be internally uniform, but different classes may be charged different rates. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

2 Cases that cite this headnote

[21] **Municipal Corporations** Sewer rates

Only practical basis for rates charged property owners for costs of operating and maintaining storm water control facilities, based on surface runoff, is required, not mathematical precision. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

6 Cases that cite this headnote

[22] **Municipal Corporations** Sewer rates

County did not act arbitrarily in determining rate schedule of charges to property owners for costs of maintaining and operating storm water control facilities, where county submitted numerous documents which showed how and why rate schedule was devised, and rate of $15 per year for each single-family residence was not excessive nor disproportionate to services rendered. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

4 Cases that cite this headnote

[23] **Municipal Corporations** Sewer rates

If charges for maintaining and operating storm water control facility are intended to raise money, they are actually taxes. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

[24] **Municipal Corporations** Connections with Sewers or Drains

Municipal Corporations Power and Duty to Tax in General

Charges imposed on property owners for costs of maintaining and operating storm water facilities were properly characterized as "tools of regulation," rather than "taxes," where primary purpose of county resolution and city ordinance were regulatory in that both referred to regulation and control of storm and surface waters, management board report indicated purpose of ordinances was regulatory, and report stated county would adopt single plan for drainage area that would govern public and private actions in basin. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

11 Cases that cite this headnote

[25] **Municipal Corporations** Public improvements

Even if charges imposed on property owners for costs of operating and maintaining storm water control facilities were actually "taxes," charges would not be automatically invalid. West's RCWA 35.67.010 et seq., 36.89.010 et seq.

[26] **Taxation** Local taxes, and uniformity as to same locality

If charges imposed upon property owners for costs of maintaining and operating storm water control facilities were characterized as authorized taxes, charges had to be uniform. West's RCWA Const. Art. 7, § 1 as amended by Amend. 14.

[27] **Taxation** Constitutional requirements and operation thereof

If system of charges is administered in systematic, nondiscriminatory manner, it meets requirement of West's RCWA Const. Art. 7, § 1 as amended by Amend. 14, that taxes be uniform.

1 Case that cites this headnote

[28] **Municipal Corporations** Public improvements

Taxation Local taxes, and uniformity as to same locality

Charges imposed on property owners for costs of maintaining and operating storm water control facilities were both statutorily authorized and uniform, for purposes of upholding their validity if they were characterized as "taxes," where charges imposed were uniform as to each member of each category (industrial, commercial, single-family residential) and were based on engineering studies and averages relating to water runoff from various types of property. West's RCWA 35.67.010 et seq., 36.89.010 et seq.; West's RCWA Const. Art. 7, § 1 as amended by Amend. 14.

3 Cases that cite this headnote

Attorneys and Law Firms

**1174 *227 R. DeWitt Jones, Vancouver, for appellants.

Arthur Curtis, Clark County Prosecutor, Richard S. Lowry, Deputy County Prosecutor, Jerry King, City Atty., Vancouver, for respondents.

Opinion

PEARSON, Justice.

The primary issue in this case is whether *228 the charges imposed upon appellants by respondents to finance respondents' water management department are unconstitutional where appellants' properties do not receive any "special benefit" from the water management activities. A related issue is whether respondents' legislative determination that appellants' properties are located within the Burnt Bridge Creek drainage basin and contribute to an increase in surface water runoff is arbitrary and capricious. The final issue is whether respondents acted arbitrarily or capriciously in computing the rates and charges to be assessed against appellants' properties.

We hold that the "special benefit" requirement of article 7, section 9 of the Washington Constitution does not apply to rates or charges established pursuant to RCW 36.89.080 or RCW 35.67. We further hold that respondents did not act arbitrarily or capriciously in determining which properties should be charged for the water management program nor in computing the charges. We therefore affirm the trial court in every respect.

The Burnt Bridge Creek drainage basin is an approximately 27-square-mile area, partly in Clark County and partly in the city of Vancouver. In the past 30 years, much residential and light industrial-commercial development has occurred in this area. As the area developed, several storm sewer and sanitary sewer projects were completed; however, a large number of septic tanks were also permitted by the City and County.

As early as 1966, engineering studies showed that the danger of flooding and pollution in Burnt Bridge Creek, which flows into Lake Vancouver, was increasing as the development in the area progressed. Later engineering studies showed that the flooding and pollution problems throughout the entire drainage basin were worsening.

The County and City responded to these problems. In 1978, Clark County adopted two resolutions, pursuant to RCW 36.89, which formed a storm and surface water **1175 department for management of the entire Burnt Bridge Creek drainage basin. The County's preexisting water control *229 facilities were made a part of the new water department by the resolutions. Similarly, the City of Vancouver passed an ordinance, pursuant to RCW 35.67, which created a storm and surface water utility and transferred all preexisting water control facilities to that new utility.

The County and City then entered into an interlocal agreement, pursuant to RCW 39.34, authorizing joint operation, management, and financing of the newly formed water department or utility. The County was designated to be the principal operator of the joint water utility.

The County subsequently adopted another ordinance, pursuant to RCW 36.89.080, which set the charges to be paid by property owners whose property lies within the drainage basin. Appellants' property is so situated. However, because appellants refused to pay the charges, respondents placed liens upon their properties, pursuant to RCW 36.89.090. Appellants brought an action for declaratory judgment, challenging, under the state and federal constitutions, the right of the respondents to impose the charges. Appellants also challenged the method used by respondents to compute the charges.

Both parties moved for summary judgment. The trial court granted respondents' motion as to the constitutionality of the charges and as to the validity of the method used to compute the charges. Appellants appealed; this court accepted the appeal as an administrative transfer from Division Two of the Court of Appeals.

I

Appellants do not challenge that the City and County had statutory authority to form the water department. Rather, appellants challenge the inclusion of their properties among those which are to be charged for the operation of the department. Because their properties do not border on Burnt Bridge Creek, appellants argue that they do not specially benefit from the flood control services of the new water department. Furthermore, because their properties are served by sanitary sewers, appellants argue that their ***230** properties do not contribute to the pollution of the creek. Appellants finally argue that their properties do not contribute to an increase in surface water runoff.

Therefore, appellants contend that the charges imposed by respondents violate Const. art. 7, § 9, which states:

> SPECIAL ASSESSMENTS OR TAXATION FOR LOCAL IMPROVEMENTS. 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.

[1] **[2]** Appellants are correct that a *special assessment* may only be charged against property which is specially benefited by the project. In *Heavens v. King Cy. Rural Library Dist.,* 66 Wash.2d 558, 563, 404 P.2d 453 (1965), this court stated that special assessments

> are for the construction of local improvements ... appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the [city]. The benefit to the land must be actual, physical and material and not merely speculative or conjectural.

However, an examination of the statutes under which Clark County and the City of Vancouver acted shows that the charges imposed here are not special assessments.

The City of Vancouver acted pursuant to RCW 35.67. That statute authorizes a city to form and operate a "system of sewerage" (which includes storm or surface water sewers, RCW 35.67.010(3)) and to charge "rates and charges" for the use of such systems. The rates and charges must ****1176** be uniform for the same class of customers or service. RCW 35.67.020.

That statute's predecessor, which was worded identically to the current law, was construed by this court in *Morse v. Wise,* 37 Wash.2d 806, 226 P.2d 214 (1951). In that case, the city built new additions to an old sewer system. The property owners who had already paid for the *original* sewers ***231** objected to paying for the additions, *which would only serve new users and would be of no benefit to them.* This court held that the statute authorizes the city to act under its *police power* and that the concept of special benefits was not relevant in that case.

> The whole concept underlying [RCW 35.67] *et seq.,* is different from that of the local improvement district plan. Under these statutes, the city acts pursuant to the police power granted to it to provide sewer service to protect the health of its inhabitants and to defray the expense by making service charges. The special benefit idea does not enter into the picture at all. We have examined the cases cited by appellants ... They are of no aid in the solution of the problem now before us, as they involve assessments according to special benefits where improvements were being made pursuant to statutes providing therefor.

(Citations omitted.) *Morse,* at 810–11, 226 P.2d 214.

This court also stated in *Morse* that special assessments are not the exclusive means of financing local improvements; improvements necessary to health and safety may be

authorized under the police power and paid for "other than by local assessments". *Morse,* at 813, 226 P.2d 214. In such cases, Const. art. 7, § 9 is not implicated.

[3] Clearly, in the present case the *City* had statutory authority under RCW 35.67 to impose the charges. Further, in *Morse,* we upheld the constitutionality of such charges even where no special benefit is created for the property owners. Thus, the next question is whether the *County* also had statutory authority to impose the charges and whether those charges are constitutionally valid where no special benefit is created for appellants.

II

RCW 36.89.030 authorizes counties to "establish, acquire, develop, construct ... storm water control facilities". The statute authorizes several methods of funding: (1) issuance of general obligation bonds (RCW 36.89.040), (2) creation of utility local improvement districts and charging of special assessments (RCW 36.89.110), (3) issuance of revenue ***232** bonds (RCW 36.89.100), and (4) adoption of a resolution "fixing rates and charges for the furnishing of service to those served or receiving benefits ... or *contributing to an increase of surface water runoff*" (RCW 36.89.080). (Italics ours.)

Clearly, the County did not proceed under the special assessment section, RCW 36.89.110. No utility local improvement district was formed. Neither did the County proceed under methods 1 or 3 above, issuance of bonds.

[4] Rather, the County chose to proceed under the rates and charges method specified in RCW 36.89.080. That section of the statute authorizes the county to charge not only for services supplied to property owners, but also based upon contribution to increase of surface water runoff by the properties. We hold that just as RCW 35.67 grants cities the police power to operate management systems for storm sewers, RCW 36.89 similarly gives the counties such police power.

Legislative intent to give the counties such police power is found in the statute. Significantly, RCW 36.89 states as among its purposes:

> The storm water control facilities within such county provide protection from storm water damage for life and property throughout the county, generally require planning and development over the entire drainage basins, and affect the ****1177** prosperity, interests and welfare of all the residents of such county.

RCW 36.89.020.

Furthermore, the resolutions passed by the County pursuant to RCW 36.89 evidence an intended exercise of the police power. Clark County Resolution 1978–09–41 states:

> Clark County and ... Vancouver have ... cooperated in a joint program to implement a clean water program ... toward the control of the runoff from ... new development within the ... basin, the storage of excess runoff ... the provision of stream bank stabilization ... the creation of vegetative buffers for temperature control and habitat enhancement ... the treatment of first flush discharge from major storm drain systems ...

***233** That resolution further states that the basin

> constitutes a potential hazard to lives and property of County inhabitants, but that Burnt Bridge Creek itself and functionally related natural and man-made storm water control facilities constitute a storm water control facility ... that effective regulation and control of storm and surface water ... requires the establishment ... of a storm and surface water department ...

[5] **[6]** The police power is broad enough to encompass all laws tending to promote the

> health, peace, morals, education, good order and welfare of the people.... [T]he only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state ...

Markham Advertising Co., Inc. v. State, 73 Wash.2d 405, 421–22, 439 P.2d 248 (1968) (quoting *Shea v. Olson,* 185 Wash. 143, 53 P.2d 615 (1936)). The clean up by respondents of Burnt Bridge Creek and Vancouver Lake, along with measures to prevent flooding in the entire drainage basin, are well within the definition of police power as health, safety or welfare measures.

Notably, courts in other states have also held such charges to be valid when imposed as part of a general police power measure. In *Craig v. Macon,* 543 S.W.2d 772 (Mo.1976), the court held valid the charges imposed by the city for solid waste disposal, even though *appellants did not have their garbage removed by the city* and thus obtained no "service". The Missouri Supreme Court held that the statute under which the city acted was a public health regulation, intended to

protect the entire population. As a police power measure, the statute enabled the city to take whatever measures were reasonably required to meet the public health needs. The charges were only incidental to the regulatory scheme: the payments went only toward the costs of that program; none of the money went into general revenue. Thus, because the money was collected for a specific ***234** purpose (to pay the cost of a public health program) the charge was deemed valid.

[7] The rationale of the *Craig* case applies to the instant case. RCW 36.89.080 requires that all charges collected be deposited in a special fund to be used only to pay the costs of maintaining and operating storm water control facilities. Therefore, as in *Craig,* the charge is properly characterized as a charge imposed to implement a health or safety law and is valid, even though appellants do not receive any *specific* "service". *See also Hobbs v. Chesport, Ltd.,* 76 N.M. 609, 417 P.2d 210 (1966). In *Hobbs,* the city enacted a garbage collection ordinance and charged property owners for collection; appellant property owners did not use the city's service. There the court held that a due process violation did not exist because the ordinance is a health measure and the charges are not merely for the specific act of garbage removal, but to defray the expenses of the entire program. Further, appellants received a *general* benefit from the removal of others' garbage—the control of insects, etc. *Accord, Cassidy v. Bowling Green,* 368 S.W.2d 318 (Ky.1963); ****1178** *Lake Charles v. Wallace,* 247 La. 285, 170 So.2d 654 (1965); *Glendale v. Trondsen,* 48 Cal.2d 93, 308 P.2d 1 (1957).

Accordingly, we hold that the County had statutory authority to impose the charges upon appellants and that those charges are constitutionally valid under the police power.

III

The County determined that appellants' properties contributed to an increase in surface water runoff. We turn now to a review of the reasonableness of that decision by the County.

[8] **[9]** **[10]** **[11]** Where a court is asked to review a legislative decision, the applicable standard of review is the "arbitrary and capricious" test. *See Tarver v. City Comm'n of Bremerton,* 72 Wash.2d 726, 731, 435 P.2d 531 (1967). A legislative determination will be sustained if the court can reasonably conceive of *any* state ***235** of facts to justify that determination. *Ace Fireworks Co. v. Tacoma,* 76 Wash.2d 207, 210, 455 P.2d 935 (1969). To be void for unreasonableness, an ordinance or resolution must be "clearly and plainly" unreasonable. *Ace Fireworks,* at 210, 455 P.2d 935. Thus, appellants have a heavy burden of proof that the respondents' actions were willful and unreasoning, without regard for facts and circumstances. *Miller v. Tacoma,* 61 Wash.2d 374, 390, 378 P.2d 464 (1963).

On the issue whether respondents' legislative determination was made in a reasonable manner, respondents submitted various documents related to their decision-making process. One such document was the deposition of John Ostrowski, Director of Public Works for the City of Vancouver and former Assistant Director of Public Works for Clark County.

[12] In his deposition, Mr. Ostrowski identified the methods used by the County to determine (1) the boundaries of the Burnt Bridge Creek Utility, and (2) whether the properties included within those boundaries contribute to increased surface water runoff. One method utilized by the County was examination of contour maps of the drainage basin to determine the direction of the flow of surface water in that basin. The County then made in-field inspections to verify that the maps correctly identified the boundary lines of the basin. The County also made on-site inspections of a number of specific properties within the basin to ensure that the water runoff actually flows toward the creek. Thus, based on the contour maps, survey and engineering reports done by consulting firms in prior years, and on the County's numerous on-site property inspections, the County determined that appellants' properties contribute to surface water runoff in Burnt Bridge Creek drainage basin.

Certainly, the record shows that the legislative decision was not made in an arbitrary or capricious manner, without regard to facts and circumstances. Respondents considered the specific contours of the properties involved, utilized both standard engineering knowledge and engineering studies of the specific area, and performed in-field verification ***236** of the drainage basin boundaries and water flow in arriving at the determination that appellants' properties contribute to increased surface water runoff. The resolutions involved here were passed at open meetings of the County commissioners. Accordingly, we find that the County acted upon a reasonable basis when it included appellants' properties among those which contribute to the increase in surface water runoff in the Burnt Bridge Creek drainage basin.

[13] In support of their motion for summary judgment, appellants submitted affidavits from several of the appellants

who live close to the creek. These affiants each indicated that no surface water flows from their properties into the creek and that all rain water percolates into the soil and the underlying gravel beds and is diffused by underground channels. Appellants now argue that these affidavits create a genuine issue of fact as to whether appellants' properties contribute to runoff in the basin.

Appellants' argument misconceives the nature of judicial review of a legislative decision. Because our review is limited to **1179 determining whether the ordinances and resolutions passed by respondents are arbitrary or capricious, we do not undertake to ascertain whether appellants' properties actually contribute to increased surface water runoff.

The affidavits of appellants have no bearing on the reasonableness of the respondents' decision-making process, which occurred several years prior to the swearing of those affidavits. The affidavits did not form a part of the data considered by respondents in making their decision and are thus not relevant to our review of that decision.

We have assured ourselves that respondents' decision to charge appellants for water management services was reasonable; our review ends at that point. Accordingly, because appellants have failed to meet their burden of proof that respondents acted in a willfully unreasonable manner when they included appellants' properties among those to be charged, we affirm the trial court's order of summary judgment on that issue.

*237 IV

We now turn to the question whether the method employed by the County to compute the charges was valid. Respondents based the charges on formulae devised after studies of engineering reference material, aerial photographs, contour maps, and on-site examinations of some of the properties within the drainage basin. Appellants argue that the rate scheme devised by respondents is arbitrary and capricious merely because no consideration was given to the individual characteristics of each of the properties charged.

[14] [15] [16] Appellants carry the burden of proof that the rates are unreasonable. *Faxe v. Grandview,* 48 Wash.2d 342, 352, 294 P.2d 402 (1956). The rates are presumptively reasonable; they will be sustained unless it appears, from all the circumstances, that they are excessive and disproportionate to the services rendered. *Faxe,* at 352, 294 P.2d 402. We again apply the definition of "arbitrary" set out in *Miller v. Tacoma, supra* 61 Wash.2d at 390, 378 P.2d 464: "wilful and unreasoning action, without consideration and regard for facts or circumstances."

[17] In the present case, the County classified the properties, for purposes of computing the charges, based upon (1) the hydrologic impact of the development and use of the properties upon the peak rates of runoff and total quantity of runoff, and (2) water quality impacts. The annual charges were determined according to standard engineering knowledge regarding the estimated ratio of pervious to impervious land in each of the following categories: (1) single family residences; (2) residential duplexes, multi-family apartments, private schools; (3) retail, commercial, offices, hospitals, airports, utility stations; (4) industrial, manufacturing, railroad right-of-way. Thus, the charges are based on varying intensities of use and the relationship of that use to surface and subsurface water collection. Owners of all single family residence lots pay the same rate; owners of lots with more impervious surface (industrial, commercial) are charged more, depending on the size of the lot.

[18] [19] [20] [21] We find that the rate schedule bears a reasonable relation *238 to the contribution of each lot to surface runoff. Respondents are not required to *measure each* residential lot to ascertain the *exact* amount of impervious surface on each one. Absolute uniformity in rates is not required. *See Morse v. Wise,* 37 Wash.2d 806, 226 P.2d 214 (1951). The rates for each class must be internally uniform, but different classes may be charged different rates. *Morse,* at 812, 226 P.2d 214. Further, only a *practical* basis for the rates is required, not mathematical precision. *See* Annot., *Validity and Construction of Regulation by Municipal Corporation Fixing Sewer-Use Rates,* 61 A.L.R.3d 1236, 1259 (1975); *Port Orchard v. Kitsap Cy.,* 19 Wash.2d 59, 141 P.2d 150 (1943).

[22] Appellants have failed to show that the County acted arbitrarily in determining its rate schedule. The County has **1180 submitted numerous documents which show how and why the rate schedule was devised. The rate of $15 per year for each single family residence is not so excessive nor so disproportionate to the services rendered (overall drainage basin management) as to be called arbitrary. Appellants have not been able to prove that respondents acted in a willfully unreasonable manner, without regard to facts and

circumstances, by merely asserting that the rates are arbitrary because respondents did not *individualize each rate.*

V

Lastly, we consider the question whether these charges are actually taxes and if so, whether they are valid. We undertake this discussion as a point of clarification, since neither party has argued the question.

This court distinguished a "fee" from a "tax" in *Hillis Homes, Inc. v. Snohomish Cy.,* 97 Wash.2d 804, 650 P.2d 193 (1982). In *Hillis,* the counties involved passed ordinances which imposed "fees" on new residential developments as a condition of plat approval. These fees were to be used to pay for the additional services necessitated by the new developments. Significantly, the counties acted pursuant only to the general grant of police power in ***239** Const. art. 11, § 11; the counties did *not* have any *express* statutory or constitutional authority to impose the fees.

[23] In distinguishing between a "fee" and a "tax", we stated that if charges are intended to raise money, they are actually taxes. Conversely, if the charges are primarily tools of regulation, they are not taxes. Finding that the ordinances in *Hillis* clearly provided that the fees be applied to offset costs of specific services, and that the ordinances *made no provision* for regulation, this court held that the fees were actually taxes. Because counties cannot impose taxes based only on a general constitutional grant of police power and no express authority existed to tax, we held the tax invalid.

[24] Conversely, both the County resolution and the City ordinance in the present case refer to regulation and control of storm and surface waters. Furthermore, the Burnt Bridge Creek Interim Management Board Report[1] indicates that the purpose of the ordinances is regulatory, with the charges only being collected to pay for the necessary regulatory actions (*e.g.,* runoff control ordinances, erosion control ordinances, and septic tank regulations). As further evidence of regulatory intent, this report states at page 3 that the County will "[a]dopt a single plan for the drainage area that will govern the public and private actions in the basin."

Accordingly, because the primary purpose of these ordinances is regulatory, the charges are properly characterized as "tools of regulation", rather than taxes.

[25] **[26]** Even if the charges in the present case were actually ***240** taxes, these charges would not be automatically invalid. Unlike the situation in *Hillis,* RCW 36.89 expressly authorizes the county to impose these charges. However, if these charges are characterized as authorized taxes, the charges must be *uniform* as required by amendment 14 of our state constitution. That amendment states in part:

> All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only.

Const. art. 7, § 1 (amend. 14).

[27] In interpreting that amendment, this court has stated that absolute uniformity in taxation is not required. If the system ****1181** is administered in a systematic, nondiscriminatory manner, it meets the requirement of amendment 14. *Sator v. Department of Rev.,* 89 Wash.2d 338, 344, 572 P.2d 1094 (1977). This court has also held that legislative bodies have broad power to classify for the purposes of taxation.

> While all taxes upon persons in the same class should be equal and uniform, the question of what persons shall constitute the class is one primarily for the legislature to determine ... unless clearly arbitrary and without any reasonable basis.

Pacific N.W. Annual Conference of the United Methodist Church v. Walla Walla Cy., 82 Wash.2d 138, 144, 508 P.2d 1361 (1973) (quoting *Bates v. McLeod,* 11 Wash.2d 648, 120 P.2d 472 (1941)).

[28] In the present case the rate classifications are based upon a determination that industrial, commercial, and other properties which are highly developed contribute more to water runoff, due to increased impervious surfaces, than do single family residential developments. All single family residential properties pay the same rate and the other properties pay according to a formula which applies equally to all properties in each category. The charge imposed is uniform as to each member of each category and is based on engineering studies and averages. Accordingly, even if the charges are characterized as taxes, they are both statutorily ***241** authorized and uniform, and are valid.

The order of the trial court is affirmed.

DOLLIVER, C.J., and UTTER, DORE, BRACHTENBACH, CALLOW, GOODLOE and DURHAM, JJ., concur.

ANDERSEN, J., concurs in the result.

All Citations

104 Wash.2d 227, 704 P.2d 1171

Footnotes

1 The Interim Management Board was created by the County and City in their interlocal agreement of September 1979. This Board was composed of five members, two appointed by the City, two by the County, and the final member was appointed jointly by the Mayor of the City and the Chairman of the Board of County Commissioners. The Board studied the various aspects of operating the utility and reported its findings and recommendations to the City and County. The Board devised overall goals, funding plans and organizational structure for the utility.

99 Wash.2d 861
Supreme Court of Washington,
En Banc.

EARLE M. JORGENSEN COMPANY; Bethlehem Steel Corporation; Northwestern Glass, a division of Indian Head, Inc.; Todd Pacific Shipyards Corporation; Isaacson Corporation; Ideal Basic Industries, Inc.; Northwest Steel Rolling Mills, Inc.; Harbor Island Machine Works, Inc.; Washington Iron Works, Inc.; Markey Machinery Co., Inc.; PSF Industries, Inc.; Stainless Piping Systems, Inc.; Alaskan Copper Companies, Inc. d/b/a Alaskan Copper & Brass Co. and Alaskan Copper Works; Rainier Brewing Company; Lockheed Shipbuilding & Construction Co.; Kaiser Cement Corporation; Olympic Foundry Company; Paccar, Inc.; Pioneer Enamel Manufacturing Co., Inc.; and John W. Chapman, Appellants,

v.

The CITY OF SEATTLE, a Washington municipal corporation, Respondent.

No. 47986–1.
|
June 23, 1983.

Synopsis
Purchasers of electricity from city sought to set aside electrical rates set by city. The Superior Court, King County, Lee Kraft, J., granted partial summary judgment for city, and after entry of judgment in favor of city on claims that were not resolved through order of partial summary judgment, purchasers appealed partial summary judgment. The Supreme Court, Utter, J., held that: (1) purchasers were not denied due process interest in meaningful participation in setting of electric rates; (2) statutory delegation to city of power to set electric rates was lawful; (3) purchasers were not denied right to "intervene and participate" pursuant to Public Utility Regulatory Policies Act; and (4) city's ratemaking was not rulemaking under city administrative code.

Affirmed.

Rosellini, J., dissented and filed opinion in which Williams, C.J., and Dore, J., joined.

West Headnotes (20)

[1] **Constitutional Law** Gas and electricity

Kind of process which makes participation in setting of electric rates meaningful depends on kind of decision being made; thus, due process claims in challenge to rates depended on whether decisionmaking process was characterized as legislative or administrative and, if administrative, whether decisionmaker's function was legislative or adjudicative. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[2] **Electricity** Judicial review and enforcement

In determining character of electric rate-setting decision, Supreme Court is not bound by whether body making decision is legislative or administrative or by form which decision takes.

[3] **Constitutional Law** Administrative Agencies and Proceedings in General

Constitutional Law Initiative, recall, and referendum

Analysis of legislative/administrative distinction with respect to powers of referenda is not same analysis relevant to procedural safeguards that must inhere in administrative as opposed to legislative action; when court determines that action is administrative and thus not subject to referendum, it does not hold that such administrative action is subject to greater procedural safeguards than acts subject to referendum.

1 Case that cites this headnote

[4] **Electricity** Regulation of Charges

Municipality's setting of electric rates is legislative act.

1 Case that cites this headnote

[5] **Administrative Law and Procedure** Policy statements; other informal pronouncements

While administrative adjudications require many procedural safeguards, the same is not true with respect to administrative policymaking functions.

[6] **Electricity** Regulation of Charges

Final decision setting electrical rates is not "for A and against B"; ultimate consideration is what balance of all ratepayers' interests best serves community.

[7] **Constitutional Law** Nature and scope in general

Fact that legislative acts may be subdivided into series of adversarial contests does not make such acts quasi-judicial.

[8] **Electricity** Regulation of Charges

Although electric ratemaking may have administrative aspect, even under functional analysis, such aspect is not quasi-judicial; rate setting is legislative act, even with respect to allocation and design.

2 Cases that cite this headnote

[9] **Constitutional Law** Impartiality

Constitutional Law Witnesses; confrontation and cross-examination

Appearance of fairness doctrine and right of cross-examination, component of such doctrine, apply only in quasi-judicial context. U.S.C.A. Const.Amend. 14.

[10] **Constitutional Law** Gas and electricity

Since ratemaking is legislative act, only due process right of electricity purchasers was in nonarbitrary rates. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[11] **Electricity** Regulation of Charges

Setting of electric rates is local concern.

[12] **Constitutional Law** Municipalities and municipal employees and officials

General doctrine prohibiting delegation of legislative authority does not preclude legislature from vesting municipal corporations with certain powers as to matters purely of local concern.

2 Cases that cite this headnote

[13] **Electricity** Regulation of Charges

Although city council was elected body, it served as agent of legislature in setting electrical rates. West's RCWA 35.92.050.

[14] **Constitutional Law** Public utilities

Fact that electric rate-setting body is elective as to most of those affected is merely one of factors to weigh in determining if adequate procedural safeguards exist for delegation of legislative power to set such rates. West's RCWA 35.92.050.

[15] **Constitutional Law** Public utilities

Procedural safeguards need not inhere in statute authorizing city to set electric rates; if statutory delegation provides inadequate guidelines, procedural safeguards may be provided by administrative body. West's RCWA 35.92.050; U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[16] **Constitutional Law** Public utilities

Electricity Regulation in general; statutes and ordinances

Since, looking at entire decisionmaking process, adequate procedural safeguards existed with respect to setting of electrical rates by city, statutory delegation of such legislative power to city was lawful. West's RCWA 35.92.050; U.S.C.A. Const.Amend. 14.

[17] **Electricity** Judicial review and enforcement

Courts may set aside arbitrary or discriminatory electrical rates.

[18] **Electricity** Proceedings before commissions

Where city, prior to setting electric rates, provided notice and public hearings and published its findings with respect to consideration and adoption of specific federal standards and held evidentiary hearings where required, purchasers of electricity from city were not denied right to "intervene and participate" pursuant to Public Utility Regulatory Policies Act. Public Utility Regulatory Policies Act of 1978, §§ 111, 113, 114, 121, 16 U.S.C.A. §§ 2621, 2623, 2624, 2631.

1 Case that cites this headnote

[19] **Electricity** Proceedings before commissions

Right of any electric consumer of affected electric utility to intervene in ratemaking proceeding conducted by nonregulated electric utility pursuant to Public Utility Regulatory Policies Act is not right that confers full panoply of adjudicative safeguards. Public Utility Regulatory Policies Act of 1978, § 121(a), 16 U.S.C.A. § 2631(a).

1 Case that cites this headnote

[20] **Electricity** Proceedings before commissions

City's electric ratemaking was not rulemaking under city administrative code.

Attorneys and Law Firms

***862** ****1329** Edmund J. Wood, Cartano, Botzer, Larson & Birkholz, J. Jeffrey Dudley, Bogle & Gates, Elaine Spencer, Seattle, for appellants.

Douglas N. Jewett, Seattle City Atty., William H. Patton, Ricardo Cruz, Asst. City Attys., Seattle, for respondent.

Opinion

***863** UTTER, Justice.

This is a challenge of Seattle's 1980 adoption of an electrical rate increase. We reject appellants' various constitutional and statutory claims and affirm the trial court's order of summary judgment.

****1330** Appellants sought to set aside the electrical rates set by respondent City of Seattle (City) on July 21, 1980. Appellants are 19 industrial companies and one individual who purchase electricity from the City, located both within and without the Seattle city limits. The new rates increased the cost of electricity to 15 of the appellants by an average 88 percent.

In May 1978, the City, responding to an increase in power costs, formed a Citizens' Rate Advisory Committee (CRAC), which included representatives of appellants, to prepare recommendations concerning rate setting. The CRAC had 60 full committee meetings between May 1978 and July 31, 1980 in furtherance of its role in advising the City on electrical rate structure.

On April 23, 1980, Mayor Charles Royer submitted to the City Council an allocation proposal calling for roughly equal rate increases for all consumer classes. The City Council energy committee scheduled a public hearing for May 14 to obtain comments on this proposal.

On April 29 and May 5, the energy committee held public hearings to discuss electric rate assistance policies, finance policies, and Seattle City Light's revenue requirements. For these as well as other public hearings held by the Council, notice was sent to 1,000 interested parties and was published in the local newspapers.

On May 13, the day before the rate allocation public hearing, Mayor Royer submitted a new allocation proposal calling for increases of 35 percent for residential users, 27 percent for commercial users, and 82 percent for industrial users. Although various people protested at the May 14 hearing that they had had insufficient time to comment intelligently on the new proposal, no further hearings on the allocation formula were held. Instead, members of the energy committee held private meetings and informal ***864** "working sessions" with various people, including representatives of appellants, to discuss the allocation model. On June 9, the City Council approved the allocation model.

Meanwhile, on May 27, 1980, Mayor Royer had submitted to the Council a rate design proposal. A public hearing on this proposal was held on June 10. On June 20, a new rate design proposal was submitted by Seattle City Light at the request of Council member Randy Revelle, chairman of the energy committee. A deadline for comments on this proposal was set for June 27. Again, some of the appellants protested the short time allowed for comments and requested the opportunity to call and to cross-examine witnesses. No such opportunity was provided. The rates were subsequently further revised up to the day of final passage. They were finally passed by the Council as ordinance 109218 on July 21, 1980.

Appellants brought suit to have the rates set aside and for a refund of payments. They alleged: (1) the rates were unfair, unjust, and unreasonable in violation of RCW 80.28.010; (2) appellants had been denied due process; (3) appellants had been denied the rights to intervene and participate in the rate proceedings provided by the Public Utility Regulatory Policies Act (PURPA); and (4) the rates were unlawfully made retroactively effective. The court granted partial summary judgment for the City on claims (2) and (3). It found no just reason for delay and ordered immediate entry of judgment on these claims. That is the judgment challenged in this appeal.

On December 16, 1981, the trial court entered judgment in favor of the City on the claims that were not resolved through the court's earlier order of partial summary judgment. The court held the City did not act arbitrarily or capriciously in enacting ordinance 109218, that the rates were not unfair, unjust or unreasonable, and that the methodology employed by the City in establishing the rate increase was not fundamentally erroneous. Apparently, neither party plans to appeal this judgment.

***865** I

[1] Appellants first raise a number of claims founded upon a due process interest in meaningful participation in the setting of electric rates. The kind of process which renders participation meaningful depends ****1331** on the kind of decision being made. Thus, appellants' due process claims ultimately depend on whether we characterize the Seattle City Council's decisionmaking process in setting electrical rates as legislative or administrative (and if administrative—whether its function is legislative or adjudicative).

[2] Appellants urge us to adopt a functional analysis of whether the Council's action is legislative or administrative. We have embraced this functional approach in the past, *Westside Hilltop Survival Comm. v. King Cy.,* 96 Wash.2d 171, 634 P.2d 862 (1981), and are not bound by who makes the decision (*e.g.,* a legislative body) or the form the decision takes (*e.g.,* ordinance) in determining the decision's character.

In arguing the setting of electrical rates is administrative, appellants rely on case law dealing with whether certain matters are subject to referendum. *See, e.g., Leonard v. Bothell,* 87 Wash.2d 847, 557 P.2d 1306 (1976). All these cases in turn rely on 5 E. McQuillin, *Municipal Corporations* § 16.55 (3d ed. 1969) which identifies the factors by which to distinguish legislative from administrative acts in this context:

> Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative....
>
> The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely

pursues a plan already adopted by the legislative body itself, or some power superior to it.

***866** (Footnote omitted.) Appellants also point to the apparent anomaly of *State ex rel. Haas v. Pomeroy,* 50 Wash.2d 23, 308 P.2d 684 (1957), a referendum case in which the City's bond council argued and the court found convincing (though it did not rely on) the position that the City's rate setting powers are administrative.

[3] There are two problems with appellants' reliance on the referenda case law. First, analysis of the legislative/administrative distinction with respect to powers of referenda is not the same analysis relevant to the procedural safeguards that must inhere in administrative as opposed to legislative action. When a court determines that an action is administrative and thus not subject to referendum, it does not hold such administrative action is subject to greater procedural safeguards than acts subject to referendum. Quite the contrary, courts deny referenda with respect to administrative acts because of the broad discretion attached to such acts.

[4] We rely on a more germane body of case law, which specifically holds a municipality's setting of rates is a legislative act. *Springfield Gas & Elec. Co. v. Springfield,* 257 U.S. 66, 70, 42 S.Ct. 24, 66 L.Ed. 131 (1921); *Connett v. Jerseyville,* 110 F.2d 1015 (7th Cir.1940); *Algoma v. Public Serv. Comm'n,* 91 Wis.2d 252, 283 N.W.2d 261 (1978); *Apartment & Office Bldg. Ass'n v. District of Columbia,* 415 A.2d 797 (D.C.App.1980); *Fort Collins Motor Homes, Inc. v. Fort Collins,* 30 Colo.App. 445, 496 P.2d 1074 (1972); C. Rhyne, *Local Government Operations* § 23.14 (1980); 12 E. McQuillin, *Municipal Corporations* § 35.37 (Supp.1981). Courts have found no contradiction in finding such acts legislative yet not subject to the referendum process. *In re Initiative Petitions,* 534 P.2d 3 (Okl.1975); *Aurora v. Zwerdlinger,* 194 Colo. 192, 571 P.2d 1074 (1977). We, too, have held the setting of rates is a legislative act. *Scott Paper Co. v. Anacortes,* 90 Wash.2d 19, 28, 578 P.2d 1292 (1978).

[5] **[6]** **[7]** Appellants' second problem is that they wrongly assimilate "administrative" with "quasi-judicial." While administrative adjudications require many procedural safeguards, ***867** the same is not true with respect to administrative policymaking functions. Appellants concede some aspects of rate setting involve policymaking, but they claim the revenue allocation among customer ****1332** classes and the design of the actual rates are adversarial processes, which, though stemming from legislative authority, should be characterized as quasi-judicial. While it is true the setting of electrical rates involves weighing individual factors, it can hardly be said, as it can be in the rezoning context, that the final decision is for A and against B. Both A's and B's interests must be considered in rendering the final balance, but the ultimate consideration of the Council is what balance of *all* the ratepayers' interests best serves the community. All legislative acts may be subdivided into a series of adversarial contests, but that does not make such acts quasi-judicial. *See Harris v. Hornbaker,* 98 Wash.2d 650, 658 P.2d 1219 (1983). If we were to characterize rate setting as quasi-judicial, it would be so not only for ratepayers with the highest costs, but for all ratepayers. Every ratepayer would be entitled to notice and the procedural safeguards that accompany quasi-judicial decisions.

[8] While ratemaking may have an administrative aspect, even under a functional analysis, that aspect is not quasi-judicial. We have consistently held rate setting is a legislative act, even with respect to rate allocation and design. *See Phinney Bay Water Dist. v. Bremerton,* 58 Wash.2d 298, 362 P.2d 358 (1961); *Faxe v. Grandview,* 48 Wash.2d 342, 294 P.2d 402 (1956).

[9] This conclusion dispenses with appellants' broadest due process claims. The appearance of fairness doctrine, under any interpretation we have given it, applies only in a quasi-judicial context. The right of cross examination, a component of that doctrine, is similarly applicable only in a quasi-judicial context.

Appellants' remaining due process claims relate to failure of notice and an opportunity to comment. Generally, we have not imposed procedural requirements upon legislative decisions. In reviewing ratemaking decisions of legislative ***868** bodies, we have looked only to whether the rates were fair (*i.e.,* reasonable, nondiscriminatory, not arbitrary or capricious). *See Faxe v. Grandview, supra; Phinney Bay Water Dist. v. Bremerton, supra.*

One of the reasons for such judicial deference is the public accountability of elected officials. *Snohomish Cy. PUD 1 v. Broadview Television Co.,* 91 Wash.2d 3, 9, 586 P.2d 851 (1978). Appellants argue such deference should be abandoned as to non-resident ratepayers who were denied a meaningful opportunity to participate in the ratemaking process. At least as to them, the City Council is not accountable through the electoral process. Nonetheless, we have held in a similar context that nonresidents' constitutional rights were not

violated by delegation of legislative authority to set water rates to a city council when such delegation occurred with sufficient procedural safeguards. *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd.,* 87 Wash.2d 536, 546, 554 P.2d 1060 (1976). Implicitly, the court's holding on unlawful delegation included a finding of procedural due process to nonresidents.

[10] Since ratemaking is a legislative act, appellants' only due process right is in nonarbitrary rates. The City has prevailed on that issue in a separate action. To the extent there is any merit to providing procedural safeguards to insure the City's rate setting is not arbitrary, the question is more appropriately discussed under appellants' next claim addressing unlawful delegation.

II

RCW 35.92.050 grants municipalities "full authority" to regulate the price of power sold by them. Municipal utilities are exempted from the control of the Utilities and Transportation Commission. RCW 80.04.500. Appellants assert that this delegation of rate-setting authority is improper insofar as it does not provide for sufficient procedural protections. This argument is based on *Barry & Barry, Inc. v. Department of Motor Vehicles,* 81 Wash.2d 155, 159, 500 P.2d 540 (1972) in which this court held that ***869** legislative power may be delegated to administrative agencies only where "*procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.*"

****1333** **[11]** **[12]** Respondent argues it is not subject to the *Barry* delegation standard since ratemaking is a legislative act and the delegation doctrine applies to administrative bodies. Respondent is correct in asserting that our unlawful delegation doctrine has usually been applied in the context of legislative delegation to nonelective administrative bodies. The City Council is an elected body and the setting of electric rates is a local concern. As a leading commentator has stated:

> The general doctrine prohibiting the delegation of legislative authority does not preclude the legislature from vesting municipal corporations with certain powers as to matters purely of local concern.
>
> The fixing of rates to be charged by a lighting plant owned and operated by the municipality has been held a "municipal function," within the meaning of such words as used in this constitutional provision.

2 E. McQuillin, *Municipal Corporations* § 4.13, at 33 (3d ed. 1979).

2 E. McQuillin, *supra* at § 4.11, p. 27.

[13] **[14]** Nonetheless, the unlawful delegation doctrine has been applied to legislative delegation of its powers to elected officials, *Yelle v. Bishop,* 55 Wash.2d 286, 347 P.2d 1081 (1959) (delegation to Governor), and to local legislative bodies. *See Miller v. Tacoma,* 61 Wash.2d 374, 378 P.2d 464 (1963) (city council authorized to determine existence of blighted areas under urban renewal laws); *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd., supra* (city council delegated power to set water rates). The Seattle City Council is an elected body but it still serves as the agent of the Legislature in setting electrical rates. In *King Cy. Water Dist.* we indicated the city council was agent of the Legislature in setting water rates and was subject to the delegation doctrine, at least insofar as its decisions ***870** affected nonresidents. Yet the character of the decision was the same as to residents and nonresidents. That the decisionmaking body is elective as to most of those its rate-setting decision affects is simply one of the factors to weigh in determining if adequate procedural safeguards exist for the delegation of legislative power.

In *King Cy. Water Dist.,* the court found adequate procedural safeguards for delegation. Those safeguards consisted of: (1) statutory standards for water rates; (2) comprehensive regulation of water system financing by RCW 35.92.070 *et seq.;* (3) judicial power to set aside discriminatory, arbitrary, and unreasonable rates; and (4) the right of nonresidents to "attend and participate in public meetings of the city council. RCW 35.24.180." 87 Wash.2d at 546, 554 P.2d 1060.

[15] Appellants argue that since RCW 35.92.050 (authorizing the City to set electric rates) provides no procedural safeguards, it is unconstitutional. Appellants' focus is too narrow. Procedural safeguards need not inhere in the statute itself. If the statutory delegation provides inadequate guidelines, the procedural safeguards may be provided by the administrative body. *See Yakima Cy. Clean Air Auth. v. Glascam Builders, Inc.,* 85 Wash.2d 255, 534 P.2d 33 (1975); *State ex rel. Standard Mining & Dev. Corp. v. Auburn,* 82 Wash.2d 321, 510 P.2d 647 (1973); *Barry & Barry, Inc. v. Department of Motor Vehicles, supra;* K. Davis, *Administrative Law* § 3:3 (Supp.1981).

[16] **[17]** Looking at the entire decisionmaking process, we must conclude adequate procedural safeguards exist. Just as there must be uniformity of standards for water rates under RCW 35.92.010, so must electrical rates be just and reasonable and nondiscriminatory under RCW 80.28.090, .100. The comprehensive regulation of financing under RCW 35.92.070 applies equally to water and electric utilities. As with water rates, courts may set aside arbitrary or discriminatory electrical rates. Furthermore, notice must be provided for public meetings of the City Council under Seattle City Charter, art. 4, § 6. The public's right to participate is ***871** no greater under RCW 35.24.180 (regarding water rates) than under the City's charter. In addition to these comparable procedural safeguards, the City created CRAC, which met 60 times in its advisory ****1334** capacity. Some of appellants were represented on CRAC. Finally, the Congress has imposed other procedural safeguards through PURPA, including evidentiary hearings, which the City must comply with in its own ratemaking process. Taken as a whole, considerable safeguards are provided. We conclude the delegation of RCW 35.92.050 is lawful.

III

[18] **[19]** Appellants next claim they were denied a right to "intervene and participate" pursuant to 16 U.S.C. § 2631(a) (Supp.1978). That section provides:

> In order to initiate and participate in the consideration of one or more of the standards established by subchapter II of this chapter or other concepts which contribute to the achievement of the purposes of this chapter ... any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by ... a nonregulated electric utility.

The City is a "nonregulated electric utility." Subchapter II specifies standards that utilities are required to consider in rate setting, although not necessarily to implement. Subchapter II also requires hearings on certain specific subjects which provide for notice, consent and findings. Such hearings were conducted by the City.

The City argues section 2631's right to intervene is limited to the hearings it was required to hold under subchapter II and in which appellants chose not to participate. However, the House Conference Report on this section indicates:

> [T]his section creates a Federal right of participation and intervention in rate-making proceedings or other appropriate regulatory proceedings conducted by ... a nonregulated electric utility....
>
> ... The conferees intend for the term intervention to ***872** be interpreted broadly to include intervention or participation at the beginning of a proceeding or otherwise but do not intend for such term to connote a right to initiate a proceeding.
>
> The conferees intend that the phrase "other concepts which contribute to the achievement of the purposes of this title" be construed broadly so that no one will have to prove his case in advance before being allowed to intervene. Any issue which may contribute to the purposes of the title should be given consideration if it may contribute to these purposes.

H.R.Rep. No. 1750, 95th Cong., 2d Sess. 81–82, *reprinted in* 1978 U.S.Code Cong. & Ad.News 7660, 7797, at 7815–16. The legislative history thus indicates the right of intervention and participation exists in *any* proceeding.

At the same time, the conferees noted, at page 7816, "The procedures for the type of intervention are left to State law", thus leaving the plenary right of intervention limited by the nature of participation afforded under the City's ratemaking procedures. We do not interpret PURPA's right of intervention as a right that confers a full panoply of adjudicative safeguards. Nor do we feel the United States Supreme Court's recent opinion upholding the statute against constitutional attack, *Federal Energy Regulatory Comm'n v. Mississippi,* 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), supports appellants' broad interpretation of its intervention and participation rights under section 2631. The Court upheld both PURPA's substantive requirement that utilities "consider" various ratemaking standards and "certain notice and comment procedures when acting on [those] federal standards." 456 U.S. at 770, 102 S.Ct. at 2143. While finding the notice and comment procedures more intrusive than the federal mandate to "consider" the proposed standards, the Court nevertheless held, at page 4573:

> If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional ***873** about Congress' requiring certain procedural minima as that body goes about undertaking its tasks.

**1335 The notice and comment procedures to which the Court referred are the specific procedures for notice, hearing and findings under sections 2621 and 2623 of the act, as well as the evidentiary hearings required by the act. See 16 U.S.C. § 2624(b) (Supp.1978). The City complied with these provisions. In accordance with section 2624, the City held an evidentiary hearing on life line rates on April 15, 1980. On April 29 and May 5, the City held public hearings in accordance with section 2621 to consider the section's proposed standards. And on September 22, 1980, the City held a public hearing pursuant to section 2623 with respect to adoption of certain other federal standards. Appellants did not participate in any of these procedures.

If section 2631 had been meant to confer adjudicatory safeguards in *any* proceeding of the ratemaking authority concerning *any* subject, the United States Supreme Court would have been obliged to address such usurpation of state law in that portion of its opinion. It did not, nor is there any indication the Court felt section 2631 transformed the nature of every ratemaking proceeding of a nonregulated utility. Such a disruptive right would not facilitate PURPA's purposes.[1] The City complied with the specific procedural requirements of sections 2621, 2623 and 2624. It provided notice and public hearings and published its findings with respect to consideration and adoption of specific federal standards, and it held evidentiary hearings where required. Appellants' right of intervention and participation in all other proceedings of the Council were limited by the mode of participation provided by the City.

*874 IV

[20] Finally, appellants argue the City's ratemaking is rulemaking under the Seattle Administrative Code, ch. 3.02. Seattle Municipal Code (SMC) 3.02.020(A) states:

> A. "Agency" means The City of Seattle or any of its subdivisions including but not limited to, any city board, commission, committee, officer or department, including the City Council and its committees, when acting in accordance with or pursuant to authorization by ordinance or Charter to make rules, hear appeals, or adjudicate contested cases.

The code defines "rule" as

> any agency order, directive, or regulation of future effect, including amendment or repeal of a prior rule, which applies generally and which, if violated, subjects a person to a penalty or administrative sanction, including, but not limited to, an order, directive, or regulation which affects:
>
> —
>
> 4. Any qualification or requirement relating to the enjoyment of benefits of privileges conferred by law.

SMC 3.02.020(E). The City Council is subject to the City's administrative code and the provision defining "rule" is both broad and nonexhaustive. We might easily include the setting of electrical rates within the Council's rulemaking capacity since those rates have "future effect." But then so does most everything the Council does in its legislative capacity. It is simply because the definition of "rule" is so sweeping that we must place commonsense limits on it. Setting rates in the form of an ordinance does not exempt it from the City's administrative code, but we do not feel the City intended such ordinance to be an "order, directive or regulation" constituting a rule under the code. Nor do we feel the determination of electric rates is a "penalty or administrative sanction." Finally, even if rate setting were a rule within the code, the City would have been empowered to limit public participation to written presentations. Appellants seek more. Neither the City's administrative code nor the other **1336 bases proffered by appellants affords *875 them what they seek.

The trial court's order of summary judgment is affirmed.

STAFFORD, BRACHTENBACH, DOLLIVER, DIMMICK and PEARSON, JJ., concur.

ROSELLINI, Justice (dissenting).

The majority holds that the procedures afforded the public in this case are adequate to protect their interests in electric rate setting. Although I agree with the constitutional and statutory analysis contained in parts I and II of its opinion, I cannot agree with the majority's conclusions concerning the application of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 2631 (Supp.1978) or the Seattle Administrative Code, ch. 3.02. I therefore dissent.

As recognized by the majority, PURPA grants any electric consumer the right to intervene and participate in ratemaking

proceedings. 16 U.S.C. § 2631(a). The majority asserts, however, that this right is limited to participation in the consideration of which standards utilities are required to consider in ratesetting rather than participation in the actual ratemaking proceeding. I disagree. Such a result is consistent with neither the clear language of PURPA nor the legislative purpose behind its enactment. A close examination of the section relied upon by the majority demonstrates this fact. Section 2631(a) states:

> In order to initiate and participate in the consideration of one or more of the standards established by subchapter II of this chapter *or other concepts which contribute to the achievement of the purposes of this chapter,* ... any electric consumer of an affected electric utility may intervene and participate as a matter of right in *any* ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by ... a nonregulated electric utility.

(Italics mine.)

The majority's interpretation of this section focuses on the first part of clause one, *i.e.,* "in the consideration of one or more of the standards established by subchapter II of this ***876** chapter." But in doing so it ignores language in the second half of that clause. That language grants the right to participate in the consideration of "other concepts which contribute to the achievement of the purposes of this chapter." This language sweeps more broadly than suggested by the majority. When that phrase is recognized and read in light of the section's later reference to a right to "intervene and participate as a matter of right in *any* ratemaking proceeding," the opposite conclusion must be reached. (Italics mine.) The majority also relies upon *Federal Energy Regulatory Comm'n v. Mississippi,* 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) as authority for the proposition that the phrase "any ratemaking proceeding" means selective ratemaking proceedings. The majority contends that the United States Supreme Court would have had to address the issue of usurpation of state law if the section were so read. The majority's reasoning assumes that the court would reach an issue that was not directly before the court. Such an assumption is unsound. In addition, the PURPA's grant of intervention would survive constitutional challenge because the extent of that intervention is defined by state law. Because the majority misinterprets this section, its reliance is misplaced. For instance, the majority quotes the House Conference Report's statement that " '[t]he procedures for the type of intervention are left to State law' ". Majority Opinion, at 1334, quoting H.R.Rep. No. 1750, 95th Cong., 2d Sess. 81–82, *reprinted in* 1978 U.S.Code Cong. & Ad.News 7797, at 7816. The majority takes this deference to state law and equates it with deference to the City's procedures. Consequently, the majority declares "the plenary right of intervention [is] limited by the nature of participation afforded under the City's ratemaking procedures," (Majority Opinion, at 1334) and "[a]ppellants' right of intervention and participation in all other proceedings of the Council were limited by the mode of participation provided by the City." Majority Opinion, at 1335. Such a result is an absurd leap in reasoning. ****1337** Deference ***877** to state law means just that, state law. Nothing in PURPA justifies the majority's substitution of City of Seattle law for state law. To vest the right to determine the degree of intervention and participation with the utility or its municipal owner is to let the wolf guard the sheep. Neither section 2631(a) or *Federal Energy Regulatory Comm'n v. Mississippi, supra* justifies the majority's analysis.

Lastly, the limited right of intervention and participation contemplated by the majority neglects legislative history that clearly establishes that this section should be interpreted broadly. The section quoted by the majority demonstrates this point. *See* Majority Opinion, at 1334.

Having established that the right of intervention is to be determined by state law, the next question is what state law? I suggest the best resolution lies in this court requiring that the City of Seattle follow its administrative code in these proceedings. Such a result is consistent both with present state law and the goals of PURPA. The majority admits the Seattle Administrative Code could easily be interpreted to apply to the case at hand but implicitly asserts that such an interpretation exceeds the commonsense limits. I disagree.

Setting of electrical rates is the precise type of "regulation of future effect" which lends itself to the protections of the Seattle Administrative Code. If we as a court were to find ratemaking is a rule under the administrative code, ratepayers would be entitled to notice and a hearing on the adoption of the rates, instead of the limited notice and opportunity to comment allowed by the City in this case. This result would insure ratepayers notice and an opportunity to comment on the City's *final* rate design. This opportunity was denied by the City's last minute substitution of a new rate scheme, proposed hours before the public meeting.

Finally, by making the City's decision subject to hearing and comment under the administrative code, the court ***878**

would have established a basis for participation which is more consistent with the procedural rights granted in PURPA. I would therefore reverse summary judgment and require the City of Seattle to conform to its own administrative code when engaging in the ratemaking process.

WILLIAM H. WILLIAMS, C.J., and DORE, J., concur.

All Citations

99 Wash.2d 861, 665 P.2d 1328

Footnotes

1 The entire Court (including Justice Powell in concurrence and Justice O'Connor in dissent) discussed section 2631's right of intervention as relating only to ratemaking proceedings in which the federal standards are considered. No members of the Court interpreted the right to participate in proceedings considering “other concepts” as synonymous with an in terrorem right to turn any ratemaking proceeding into an adjudication of any ratepayer's particular agenda.

12 Wash.App. 856
Court of Appeals of Washington, Division 1.

GENEVA WATER CORPORATION, a Washington Corporation, et al., Appellants,

v.

CITY OF BELLINGHAM, Respondent.

No. 2639—42797—I.
|
March 3, 1975.
|
Rehearing Denied July 17, 1975.

Synopsis

Water districts brought suit alleging that city's nonresident water rate ordinance was discriminatory, arbitrary, and unreasonable and seeking to recover claimed overcharges. The Superior Court, Whatcom County, Byron L. Swedberg, J., dismissed the lawsuit and plaintiffs appealed. The Court of Appeals, Swanson, J., held that the City's rate differential between resident and nonresident bulk water users did not constitute an unlawful discriminatory classification, that the classification was based upon differences reasonably related to the rates charged, and water districts failed to carry their burden to prove that water rates charged by city were either unreasonably or arbitrary.

Affirmed.

West Headnotes (7)

[1] **Water Law** Refund of overcharges in general

Evidence in suit by water districts alleging that city's nonresident water rate ordinance was discriminatory, arbitrary and unreasonable and seeking to recover overcharges supported findings with respect to benefits accruing to city by improvement of property within city by providing water service, and lack of corresponding benefit by improvement of property outside city, and as to cost of water system. RCWA 35.92.010.

4 Cases that cite this headnote

[2] **Constitutional Law** Public improvements

Question of reasonableness of a classification pursuant to statute authorizing city to regulate and control the use, distribution and price of water from municipal water works relates to whether the classification is invalidly discriminatory and is not related to the reasonableness of the amounts of the water rate charged to members of the particular class. RCWA 35.92.010; RCWA Const. art. 1, § 12.

1 Case that cites this headnote

[3] **Constitutional Law** Class Legislation; Discrimination and Classification in General

Where it has been shown that the legislation in question uniformly applies to the members of the class, a reviewing court is limited to a determination whether the classification was manifestly arbitrary or unreasonable. RCWA Const. art. 1, §§ 1, 3.

1 Case that cites this headnote

[4] **Trial** Effect of burden of proof, and presumption as to negative findings

The absence of a finding in favor of one who has the burden of proof amounts to a finding adverse to such party.

2 Cases that cite this headnote

[5] **Water Law** Different regions within service area

City ordinance which provided rate differential classifying water district differently than residential bulk water users did not create an unlawful discriminatory classification for water rate-making purposes. RCWA 35.92.010, 80.04.010, 80.04.500, 80.28.010.

1 Case that cites this headnote

[6] **Water Law** Reasonableness in general

There is no statutory requirement that rates of municipality for water furnished to water districts be just and reasonable. RCWA 35.92.010, 80.04.010, 80.04.500, 80.28.010.

1 Case that cites this headnote

[7] **Water Law** Different regions within service area

City which set water rates for water districts in accordance with advice of consulting engineers except for recommendation to delete surcharge charged to water district users does not act arbitrarily in applying its water rate ordinance to water districts. RCWA 35.92.010; RCWA Const. art. 1, §§ 1, 3; art. 7, § 9.

Attorneys and Law Firms

***857** ****1156** Rusing & Platte, Gary M. Rusing, Bellingham, for appellant.

Dennis M. Hindman, Bellingham, Daniel F. Sullivan, Seattle, for amicus curiae.

Richard A. Busse, City Atty., Bellinglingham, for appellants.

Opinion

SWANSON, Judge.

Geneva Water Corporation, Van Wyck Water District, and Water District No. 2, ****1157** three water districts located outside of the corporate boundaries of the City of Bellingham (hereinafter generally referred to as "water districts"), appeal from a judgment dismissing their lawsuit in which they alleged that the city's nonresident water rate ordinance is discriminatory, arbitrary, and unreasonable.[1] The water districts primarily sought recovery for claimed overcharges resulting from the allegedly excessive rate differential between resident and nonresident bulk water users, and for repayment of a monthly $1.50 per household surcharge imposed only upon nonresidents. In addition, the Van Wyck and Geneva districts claimed reimbursement for pumping charges imposed only upon nonresidents. All of the water districts asked for an injunction to prohibit the city from charging them more than what the court might determine to be a reasonable water rate. After a nonjury trial, the trial court entered its judgment of dismissal on April 9, 1973, supported by findings of fact and conclusions of law determining that the city's nonresident water rates are not discriminatory, arbitrary or unreasonable.

***858** The factual context of this appeal, as disclosed by the trial court's unchallenged findings, is as follows: The appellant water districts are nonprofit corporations, organized after 1945, which serve a total of 743 members, plus 60 to 67 nonmember retail water customers, all residing outside the city limits of Bellingham. Including the appellants, there are 11 water districts located outside of the city which buy water from the city, and each of the water districts is served by a single connection to the municipal water system.[2] The water distribution systems beyond the city meters are constructed, maintained and owned by the water districts. Each district reads the meters of its retail customers where required, and does its own billing. The water districts purchase water in bulk only, and no connection fee is paid to the city for new users which connect to the individual water district lines. None of the districts has any alternate source of water supply, independent of that of the city or other holders of existing water rights. The water districts provide their own fire protection in the sense that they provide equipment for fire fighting, but they are dependent upon the city's maintenance of adequate pressure witnin the lines for fire fighting purposes.

Each district pays a base rate on meter readings which is 150 percent of the in-city commercial rate, plus a flat rate surcharge in the monthly amount of $1.50 per household user; the Van Wyck and Geneva districts pay a pumping ***859** charge, but Water District No. 2, which is gravity fed, does not. In 1971, the Geneva District paid about $14,000 to the city for its water while the Van Wyck District and Water District No. 2 paid the city $3,908 and. $14,253, respectively, for the water each received. Within 5 or 6 years prior to the date of trial, Water District No. 2 experienced a lack of pressure in its line and installed a booster pump at its own cost. The city set its water rates in accordance ****1158** with the advice of consulting engineers, but has not followed every recommendation offered by such consultants.[3]

***860** In addition to the foregoing, which is undisputed, the trial court made the following findings of fact which, in substantial part, are assigned as error by the water districts:

The City provides the management of the municipal water system, without charge to the system for the time expended by salaried city officers such as those on the Water Board, or legal services by the City Attorney. Improvement of property within the City by water service has the effect of improving the City's tax base, while no such benefit accrues to the City by the improvement of property outside the City boundary.

Finding of fact No. 8.
The water system of the City of Bellingham is a complex unified overall system serving both the City and outside users. It is probably impossible to isolate costs and benefits with precision. Present priorities of the City in capital improvements are at the request of or will primarily benefit the water districts in general with particular emphasis on Water District No. 2. The City has, within the last 10 years, completed improvements, primarily in transmission lines and reservoirs, at a cost of $720,000. $450,000 of this amount is reasonably attributed to the benefit of water districts in general and Water District No. 2 in particular.

Finding of fact No. 14.
The proportionate share of the cost of the filtration plant, and the amount attributable in other capital improvements to the benefit of the water districts is in the magnitude of $500,000. Revenue received from the water ***861** district in the last ten years above a $ .13 per hundred cubic feet cost of supplying and distributing, is about $197,500.

****1159** Finding of fact No. 15.

[1] In considering the water districts' challenge to the quoted findings, we have concluded, based upon a careful review of the record, that such findings are supported by substantial evidence and therefore the claims that they are in error are without merit. See State v. Smith, 84 Wash.2d 498, 505, 527 P.2d 674 (1974). In this connection, it would unduly lengthen this opinion to present our analysis of the record; it is enough to say that we have determined that we must treat the trial court's findings of fact as verities.

The thrust of the water districts' remaining assignments of error is a challenge to all of the trial court's conclusions of law, which state: "The City of Bellingham had reasonable grounds for establishing, for rate making purposes, a separate class consisting of non-resident bulk water users, and breached no duty to fix nondiscriminatory rates for water service to plaintiffs." Conclusion of law No. 1. "The City of Bellingham has full authority to regulate the price of water sold provided that rates are uniform for the same class of customers or service." Conclusion of law No. 2. "Plaintiffs' evidence failed to establish that there was no additional cost to the City in supplying non-resident bulk consumers." Conclusions of law No. 4. "Plaintiffs did not maintain the burden of proving the rates established by the City of Bellingham are not just and reasonable as to non-resident bulk consumers." Conclusion of law No. 5. "The City of Bellingham utilized the expert advice of consulting engineers, and did not act arbitrarily or capriciously in establishing the rates, nor in rejecting the concept of pressure valves and retaining the $1.50 per month per retail customer charge to plaintiffs." Conclusion of law No. 6.

The water districts' primary argument on appeal in support of their claim that the trial court's conclusions of law are erroneous is presented in a two-stage analysis: (1) the city created an unlawful discriminatory classification when ***862** it distinguished, for rate-making purposes, between resident and nonresident bulk users of municipally-supplied water; and (2) assuming arguendo such classification is valid, the water rates imposed by the city are unreasonable and arbitrary.[4]

[2] In considering the first stage of the water districts' argument—that the rate classification distinguishing between residents and nonresidents constitutes unreasonable discrimination—we note that both the water districts and the city recognize that the basic authority for the city's imposition of such a classification must be found in RCW 35.92.010, which provides in part:

A city or town (has) full power to regulate and control the use, distribution, and price (of water from a municipal waterworks): Provided, That the rates charged must be uniform for the same class of customers or service. In classifying customers served or service furnished, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; location of the various customers ****1160** within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the water furnished; the time of its use; capital contributions made to the system including, but not limited to, assessments; and ***863** any other matters which present a reasonable difference as a ground for distinction. No rate shall be charged that is less than the cost of the water and service to the class of customers served.

It should be recognized that the question of the reasonableness of a classification pursuant to RCW 35.92.010 relates to whether the classification is invalidly discriminatory and has no relation to the reasonableness of the amount of the water rate charged to members of a particular class. As our state Supreme Court observed in Faxe v. Grandview, 48 Wash.2d 342, 350, 294 P.2d 402, 407 (1956): "The amount of rate differential between two classifications of customers has no bearing on the question of discrimination. It is relevant only on the question of reasonableness of rates, to be dealt with below."

[3] The question presented is whether the city's classification of resident and nonresident bulk water users violates the city's duty to fix nondiscriminatory rates. The water districts contend that such duty is required by Article 1, s 12 of our state constitution.[5] This duty was described as follows in Faxe v. Grandview, Supra at pages 347—48, 294 P.2d at page 405:

The tests to be applied in determining whether the duty to fix nondiscriminatory rates has been breached are substantially the same, whether such duty is based upon the constitutional provision or common-law principles. . . . We will therefore assume, without deciding, that such a duty exists by virtue of Art. I, s 12, of the state constitution.

The aim and purpose of this constitutional provision is to secure equality of treatment to all persons without undue favor on the one hand or hostile discrimination on the other. Compliance with this aim and purpose requires that the legislation under examination apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within and those without a disignated class.

***864** (Citations omitted.) Moreover, in evaluating the reasonableness of a legislative classification, where it has been shown that the legislation in question uniformly applies to the members of the class, a reviewing court is limited to a determination of whether the classification was manifestly arbitrary or unreasonable. Washington Kelpers v. State, 81 Wash.2d 410, 502 P.2d 1170 (1972); Kasper v. Edmonds, 69 Wash.2d 799, 420 P.2d 346 (1966); Lenci v. Seattle, 63 Wash.2d 664, 388 P.2d 926 (1964); Clark v. Dwyer, 56 Wash.2d 425, 353 P.2d 941 (1960); Faxe v. Grandview, Supra. As our state Supreme Court stated in Clark v. Dwyer, Supra, 56 Wash.2d at 435, 353 P.2d at 947:

Article I, s 12 of the state constitution and the fourteenth amendment to the Federal constitution, prohibiting special privileges and immunities and guaranteeing equal protection of the laws, require that class legislation must apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within, and those without, a designated class. Within the limits of these restrictive rules, the (legislative body) has a wide measure of discretion, and its determination, when expressed in statutory enactment (ordinance), cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, ****1161** inequitable, and unjust. . .. It is universally held that courts will not look too nicely into legislative acts to determine whether a reasonable distinction exists.

(Citations omitted.)

In applying the foregoing principles to the facts of the instant case as reflected in the trial court's findings of fact, it is apparent, as the trial court indicated in conclusion of law No. 1, that the city did not establish an unreasonable and discriminatory classification between residents and nonresidents within the meaning of RCW 35.92.010 and the state constitution. Here, there is no contention that the water rates charged to the water districts as members of the nonresident classification are not uniform as to customers and service within that classification. Moreover, as the court observed in Phinney Bay Water Dist. v. Bremerton, 58 Wash.2d 298, 302, 362 P.2d 358, 361 (1961): "When discrimination ***865** in the rates charged a particular class is claimed, the burden of proof rests upon the one who asserts it." (Citation omitted.) The trial court's findings of fact which, as we have held, are supported by substantial evidence, clearly demonstrate that the water districts have failed to sustain their burden to prove that the city breached its duty to establish a nondiscriminatory classification.

[4] Thus, it is apparent from the findings that the city considered a number of the factors set forth in RCW 35.92.010, including "(t)he difference in cost of service to the various customers"; "location of the various customers within and without the city or town"; "the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system"; "the quantity . . . of the water furnished"; and "capital contributions made to the system," before it made the determination to create the classification distinguishing, for rate-making purposes, between resident and nonresident bulk users of water. Moreover, the water districts failed to demonstrate that "there was no additional cost to the City in supplying non-resident bulk consumers" as

compared to resident bulk consumers. Conclusion of law No. 4, in part; See Faxe v. Grandview, Supra; Phinney Bay Water Dist. v. Bremerton, Supra. Indeed, the unchallenged portion of finding of fact No. 14 states: "The water system of the City of Bellingham is a complex unified overall system serving both the City and outside users. It is probably impossible to isolate cost and benefits with precision." Finding of fact No. 14, together with finding of fact No. 15, both of which we have quoted in full previously, offer some comparison of costs and benefits in the context of capital improvements, but do not do so with reference to resident and nonresident users. Finding of fact No. 8, also quoted previously, indicates that water service to residents tends to increase the city's tax base, whereas such service to nonresidents does not. The significant feature of the trial court's findings of fact taken as a whole, however, is that there is no finding that the city ***866** does Not incur a greater cost in serving the nonresident water districts than it does in the case of comparable resident users. In this connection, the absence of a finding in favor of one who has the burden of proof—in this case, the water districts—amounts to a finding adverse to such party. See Schmitt v. Matthews, 12 Wash.App. 654, 531 P.2d 309 (1975); Baillargeon v. Press, 11 Wash.App. 59, 521 P.2d 746 (1974).

The water districts place substantial reliance upon Kliks v. Dalles City, 216 Or. 160, 335 P.2d 366 (1959), in which the Oregon court held unreasonable and discriminatory a city water rate classification which imposed different rates for apartment houses and hotels; however, the case is factually dissimilar to the case at bar.[6] In Kliks, unlike the situation here, there was no showing of any difference to support ****1162** the classification, in terms of location, costs, service or other factors which properly could be related to the water rates charged. Significantly, the Kliks court recognized that a municipal classification for rate-making purposes is to be presumed nondiscriminatory, but correctly observed at page 178: "The differences upon which the classification is predicated must have a reasonable relationship to the purpose for which the classification is made." In the instant case, the trial court's findings of fact and conclusions of law reflect the trial court's recognition that the classification challenged by the water districts is based upon differences reasonably related to its purpose. Faxe v. Grandview, Supra; RCW 35.92.010.

[5] Notwithstanding certain factual distinctions between Faxe and this case, the basic differences between resident and nonresident users of a municipal water system substantially are equally as applicable here as they were in Faxe where the court stated at page 348, 294 P.2d at page 406:

After the city and its citizens had grandually developed ***867** the water system over a period of . . . years, (the) nonresidents sought and obtained permission to connect. They found the system a going concern. They were not required to assume any of the past burden or accept any future responsibility, save for providing a lateral connection and the payment of rates. While much of the system within the city is of no direct benefit to (nonresidents), they could not have obtained service had not a financially sound utility been developed.

The cost of rendering service to nonresident is greater than to residents. . . .

The city gains an indirect benefit from rendering water service to resident users in the form of higher property valuations. No such indirect benefit is realized from service to nonresidents.

Although the water districts presented evidence through their expert witness that it costs the city less to furnish bulk water to them than it does to serve comparable resident users, and otherwise argued that there were no additional reasons for the city to impose higher water rates upon them, the trial court properly believed substantial evidence to the contrary. We hold that the trial court correctly concluded that the city had reasonable grounds to classify the water districts differently than resident bulk water users and, consequently, the city did not create an unlawful discriminatory classification for water rate-making purposes.

[6] Directing our attention to the second stage of the water districts' argument—that the water rates charged them by the city are unreasonable and arbitrary—we note again that the trial court specifically concluded: "Plaintiffs (the water districts) did not maintain the burden of proving the rates established by the City of Bellingham are not just and reasonable as to non-resident bulk consumers." Conclusion of law No. 5. As the court stated in Faxe v. Grandview, Supra, at page 352, 294 P.2d at page 408:

Rates established by a municipality for utility service to inhabitants are presumptively reasonable. . . . It follows that one who challenges such rates as unreasonable has the burden of proof.. . . We see no reason ***868** why the same principle should not apply with regard to a challenge to the reasonableness of nonresident utility rates.

(Citations omitted.) Similarly, in Kliks v. Dalles City, Supra, the Oregon court stated, 216 Or. at page 173, 335 P.2d at page 372:

The defendant city has the power to fix the rates to be charged for water which it sells. . . . In doing so it acts in a legislative capacity. . . . There is a strong presumption that the city, in exercising this function, acts within the bounds of reasonableness, and in the absence of evidence clearly establishing that the rate fixed is unreasonable, we have no power to set it aside.

(Citations omitted.) The trial court made no finding that the city's water rates as ****1163** applied to the water districts are unreasonable and the absence of such a finding alone is sufficient to support the trial court's conclusion that the water districts failed to meet their burden of proof. Further, the trial court's conclusion that the city "has full authority to regulate the price of water sold provided that rates are uniform for the same class of customers or service," (Conclusion of law No. 2) merely reflects the controlling statutory language. As we have noted, RCW 35.92.010 clearly provides, in part:[7] "A city or town (has) full power ***869** to regulate and control the .. . price (of water from a municipal waterworks): Provided, That the rates charged must be uniform for the same class of customers or service." Significantly, the proviso contained in a predecessor statute and construed in Faxe v. Grandview, Supra, stated: "Provided, however, That all water sold by a municipal corporation outside its corporate limits shall be sold at Just and reasonable rates." (Italics ours.) RCW 80.40.010, Laws of 1951, ch. 252, s 1, p. 791. In 1959, subsequent to the decision in Faxe, the proviso was amended to read in its present language (RCW 80.40.010, Laws of 1959, ch. 90, s 6, p. 533) and, in 1965, the statute became part of Title 35 (RCW 35.92.010, Laws of 1965, ch. 7, p. 430). In short, we conclude that not only did the trial court in the case at bar properly conclude that the water districts failed to carry their burden of proving that the ***870** water rates in question "are not just and reasonable" (Conclusion of law No. 5), but also there is no longer any Statutory requirement that such rates be just and reasonable. RCW 35.92.010.[8]

****1164** **[7]** It is apparent from the foregoing that the water districts' claim that the city was arbitrary in determining the water rates to be charged nonresident bulk users is without merit. In Bishop v. Houghton, 69 Wash.2d 786, 794, 420 P.2d 368, 373 (1966), the court characterized "arbitrary and capricious administrative action" as "willful and unreasoning action, without consideration and in disregard of facts or circumstances, and . . . where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration, even though it may be otherwise felt that a different conclusion might be reached." See Helland v. King County Civ. Serv. Comm., 84 Wash.2d 858, 529 P.2d 1058 (1975); Buell v. Bremerton, 80 Wash.2d 518, 495 P.2d 1358 (1972); State ex rel. Corpenter v. Everett Bd. of Adjus., 7 Wash.App. 930, 503 P.2d 1141 (1972). The trial court's findings of fact disclose that the city set its water rates with the advice of consulting engineers in the context of the city's need for additional revenue for necessary expansion and operation of the water system. The fact that the city did not follow every recommendation of the consulting engineers is indicative of the absence of arbitrary action in that it suggests a considered ***871** weighing of alternatives where there was room for more than one opinion. Finding of fact No. 16.[9] Moreover, as we have held, the water districts have made no showing of any "unreasoning action," either in the city's classification of resident and nonresident water users for rate-making purposes or in the amount of the rates charged. Under such circumstances and in the absence of any finding by the trial judge of arbitrary action on the part of the city, we uphold the trial court's conclusion that the city did not act arbitrarily in applying its water rate ordinance to the water districts.

To recapitulate, we hold that the city has not established an unlawful discriminatory classification for water rate-making purposes, in distinguishing between resident and nonresident bulk users of city water, because the classification is based upon differences reasonably related to the rates charged and the water districts failed to carry their burden to prove otherwise. Similarly, we hold that the water districts failed to meet their burden to prove that the water rates charged by the city are either unreasonable or arbitrary.

The judgment is affirmed.

FARRIS and CALLOW, JJ., concur.

All Citations

12 Wash.App. 856, 532 P.2d 1156

Footnotes

1 The notice of appeal was directed to the Supreme Court but, by an order dated November 16, 1973, the cause was transferred to this court for determination. Prior to such transfer, authority was granted to Daniel F. Sullivan to file an amicus curiae brief on behalf of the Washington State Trial Lawyers Association.

2 Finding of fact No. 6 states in part: "The City of Bellingham operates a municipal water system governed by a Water Board consisting of the City Comptroller, the Mayor, the president of the City Council, the City Engineer, and a private citizen. It services approximately 12,000 users, including industrial, commercial, and residential users. The City, within its own limits, and with outside direct service customers, owns and maintains its transmission and service lines which it repairs and flushes as required. . . . Lateral water lines within the City are generally paid for by residents and developers, and become the property of the municipal water system. Major capital improvements are financed by revenue bonds and other funds of the water utility, including operating revenues. The system was valued in 1937 at $2,000,000 by consulting engineers for the city, and was in the magnitude of several millions by 1945. . . ."

3 The trial court also made the following specific findings relating to rates, costs and water use, which are not challenged by the water districts:

The Bellingham water utility services a variety of customers. Single family residences, not metered, pay a flat rate of $5.50 per month. Direct service non-resident single family residences, metered, pay $7.75 per month for the first 2,000 cubic feet, and a fee of $100.00 per connection to be used for mains and reservoirs. Bulk water consumers within the City, metered, pay as follows:

First	1,500	cubic feet	$5.50/month
Next	3,500	cubic feet	.24/hundred
Next	15,000	cubic feet	.22/hundred
Next	20,000	cubic feet	.18/hundred
Next	40,000	cubic feet	.14/hundred
Next	80,000	cubic feet	.12/hundred
Over	160,000	cubic feet	.11/hundred

Plus $1.00 per month for each retail customer. In addition, a $100 connection charge for each residential unit or equivalent above single family residential density to be used for mains and reservoirs.

Bulk water consumers outside the City, metered, pay as follows:

First	1,000	cubic feet	$7.75/month
Next	4,000	cubic feet	.36/hundred
Next	15,000	cubic feet	.33/hundred
Next	20,000	cubic feet	.27/hundred
Next	40,000	cubic feet	.21/hundred
Next	80,000	cubic feet	.18/hundred
Next	160,000	cubic feet	.16/hundred

Plus $1.50 per month for each retail customer. The City receives no connection charge from bulk consumers outside the City.

Finding of fact No. 9.

Outside users not gravity fed were charged $ .10 per hundred cubic feet for pumping until June 1969 when the charge was reduced to $ .04 per hundred cubic feet.

Finding of fact No. 10.

The average cost per retail customer from the total of charges billed by the City, from November 1970 until October 1971 was, in the Geneva Water Corporation $5.49 per month, in the Van Wyck Water District $5.16 per month, and in Water District No. 2 $4.41 per month.

Finding of fact No. 11.

The total use of water by all outside water districts is in the neighborhood of 2.5 per cent of total water produced and distributed by the City of Bellingham.

Finding of fact No. 12.

In November of 1968, a new filtration plant went into service, at a cost of $3,057,000, including $213,500 in projects referred to in Finding of Fact number XIV, and a federal grant of $1,291,000.

Finding of fact No. 13.

4 The water districts and the amicus curiae also argue that RCW 35.92.010, which is the basis of authority for the city's water rate ordinance, is unconstitutional because it permits a taking of property without due process of law in that nonresident water users have no opportunity to be heard on the question of the amount or kind of water rates to be established and, further, in that it places no burden upon the city to establish that its water rates are reasonable. See Const. art. 1, ss 1, 3. The water districts present the additional argument that the water rates charged nonresidents are an unconstitutional tax or assessment in that they are not uniform when compared to resident rates and are imposed outside of the city's jurisdiction. See Const. art. 7, s 9. To the extent these contentions have any merit, we do not reach them because the record indicates they were not properly presented to the trial court. Further, they are not supported by pertinent citations of authority and, in view of our disposition of this appeal, are otherwise unnecessary for us to resolve.

5 Const. art. 1, s 12 provides: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

6 The water districts also direct our attention to Montgomery v. Greene, 180 Ala. 322, 60 So. 900 (1913), which is equally distinguishable on its facts from this case as it was in Faxe v. Grandview, Supra 48 Wash.2d at page 354, 294 P.2d 402.

7 The water districts and amicus curiae recognize that RCW 35.92.010 contains no language requiring “reasonableness” in municipal water rates. The dilemma facing nonresident water users in such a situation is described as follows in 4 R. Clark Water & Water Rights, s 349 (1970) at pages 458—60:

In the absence of statutory regulation, outsiders have turned to the courts for some protection when the rate differential between resident and nonresidents is unreasonably great. Judicial protection was indeed slow to materialize. Most courts felt that since the municipality is under no legal obligation to supply nonresidents with water, it is free to deal with them at arm's length and to fix water charges in its discretion. This view is often termed the “no duty” rule.

In 1952, the Texas court in City of Texarkana v. Wiggins, (151 Tex. 100, 246 S.W.2d 622 (1952)) broke away from this approach and adopted what is usually called the “reasonableness” rule, viz., that nonresidents are entitled to demand reasonable rates for water and that it is unreasonable per se to make the charges depend solely upon the fact that some consumers are located outside the corporate limits of the municipality. The reasonableness rule has received general support in recent years and is now generally regarded as the preferable approach.

. . . The dilemma of the nonresident is that while he is entitled to reasonable rates, it is virtually impossible for him to produce the economic data necessary to attack effectively the particular rate structure.

(Footnotes omitted.)

In this connection, the amicus curiae contends that a burden must be placed upon the city to present cost data justifying the water rates it imposes upon nonresidents, but directs our attention to no judicial or legislative support for such a requirement. We note, however, that some support for the argument advanced is suggested in a "solution" offered by Professor Sax as quoted in 4 R. Clark, Water & Water Rights, Supra at page 460:

A workable solution may be found in maintaining the burden of proof of discrimination on the nonresident plaintiffs, but imposing upon the defendant cities a duty of compiling and producing the cost data for each item which is utilized in determining the rates. The suggestion here, of course, is not especially unconventional; it is merely that the defendants bear, as they do under modern discovery rules, a burden of production of the evidence in their possession. It goes beyond the bare discovery principle only in suggesting that defendants not be permitted merely to "open the files" at large, but that they be required to compile the relevant data indicating precisely how the rate differential was calculated.

8 The water districts and the amicus curiae strongly urge that the city is a "Water company" within the meaning of RCW 80.04.010 and therefore is subject to the requirement contained in RCW 80.28.010 that all charges made by a water company "shall be just, fair, reasonable and sufficient." In view of the trial court's conclusion, which we have sustained, that there has been no showing by the water districts that the rates here in question "are not just and reasonable" (Conclusion of law No. 5), we need not reach the merits of this contention; however, we note that RCW 80.28.010 was not deemed controlling by our state Supreme Court in Faxe, 48 Wash.2d at 350, 294 P.2d 402, and that RCW 80.04.500 excepts municipally-owned water systems from the control of rates by the utilities and transportation commission. See State ex rel. West Side Imp. Club v. Department of Public Service, 186 Wash. 378, 58 P.2d 350 (1936).

9 "The City set its rates in accordance with the advice of consulting engineers . . . except that it did not follow the recommendation to delete the surcharge charged to water district users. It operated under the rates then established for a period of time and found that revenues were not sufficient for the necessary expansion and operation of the system. It obtained an updated consulting engineer's report (which) suggested that the $1.50 per month per retail customer charge be deleted, and that pressure valves be installed in the system which would made the service irregular to water districts while maintaining pressure within the City. The city rejected the concept of pressure valves, retained the $1.50 per month charge, and proceeded with the capital improvements referred to (in other findings)." Finding of fact No. 16, in part.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WEST TERRACE GOLF, ET AL., Petitioners, v. CITY OF SPOKANE, Respondent.	No. 100521-1 RULING TRANSFERRING MOTION FOR DISCRETIONARY REVIEW

Petitioners West Terrace Golf, L.L.C., John Durgan, Tawndi Sargent, Kristopher Kallum, individually and as representatives of a class of plaintiffs challenging respondent City of Spokane's water rates for customers outside the city limits seek direct discretionary review of a Spokane County Superior Court declaratory judgment order favorable to the city on a statutory choice of law question. As explained below, the motion for discretionary review is transferred to the Court of Appeals for a decision in the first instance.

This dispute relates to the rates the city charges for water provided to customers located outside the city limits, such as petitioners in this case. The city generally charges such customers 150 to 200 percent the rates it charges for customers within city limits. In the summer of 2017, West Terrace Golf and the class action plaintiffs separately filed actions against the city, claiming that the water rates are unreasonable under Title 80 RCW (relating to utility rates). The city's position has been that the

action is barred by the Washington Constitution and chapter 35.92 RCW (concerning a municipality's authority to operate utilities). Extensive discovery followed. The parties filed cross-motions for summary judgment in both cases. The superior court denied the cross-motions in both cases, not elaborating on why it denied the motions.

Both sides in both cases sought discretionary review in the Court of Appeals, where the cases were consolidated. No. 37523-4-III. The Court of Appeals denied discretionary review, reasoning that denial of both motions for summary judgment reflected the superior court's determination that genuine issues of material fact existed and concluding that there was no showing of obvious or probable error under RAP 2.3(b). The city sought discretionary review in this court, but review was denied in 2020. No. 99085-9.

The matter proceeded in the superior court. The parties filed cross-motions for declaratory relief. Petitioners argued that the city, operating as a water company, must comply with utility rate standards set forth chapter 80.28 RCW. The city contended that its rates and rate-setting activities are controlled by RCW 35.92.010 and the Washington Constitution, not chapter 80.28 RCW.

In December 2021 the superior court denied petitioners' motion and granted the city's motion and entered the following order:

> RCW 35.92.010 and the Spokane Municipal Code, within the confines of the Washington State Constitution, are controlling and govern the City's authority to establish the municipal water rates at issue in these proceedings. Title 80 RCW, including but not limited to RCW 80.28.010, .090, and .100, do not apply.

Appendix to Statement of Grounds for Direct Review at 2. The superior court certified its order for immediate review under RAP 2.3(b)(4).

Petitioners now seek direct discretionary review in this court. RAP 2.3; RAP 4.2. The city opposes review and urges transfer of the case to the Court of

Appeals. Now before me for determination is whether to grant review, and if so, whether to retain the case in this court. Another option is to transfer the case now and let the Court of Appeals decide the motion for discretionary review and, if review is granted, the merits of the case. Such a transfer is appropriate in this instance.

Petitioners urge this court to retain the case to resolve a conflict among Court of Appeals decisions or an inconsistency in this court's decisions and/or because this case involves a "fundamental and urgent issue of broad public import" requiring a prompt and ultimate decision by this court. RAP 4.2(a)(3), (4). Neither of those criteria applies in this case.

With respect to RAP 4.2(a)(3), petitioners disagree with a Court of Appeals decision discussing the interplay between Title 80 RCW and RCW 35.92.010. *See Geneva Water Corp. v. City of Bellingham*, 12 Wn. App. 856, 868-70, 532 P.2d 1156 (1975). However, they fail to identify any Court of Appeals decisions conflicting with *Geneva Water Corporation*. Contrary to petitioners' suggestion of a conflict, the Court of Appeals analysis of a municipality's setting of electric rates in *Hearde v. City of Seattle*, 26 Wn. App. 219, 221-22, 611 P.2d 1375 (1980), and its discussion on the use of electric utility funds for advertising and public relations in *Okeson v. City of Seattle*, 130 Wn. App. 814, 824, 125 P.3d 172 (2005), are not in measurable tension with each other or with *Geneva Water Corporation*. As for any inconsistency in Supreme Court decisions, petitioners discuss *Fisk v. City of Kirkland*, 164 Wn.2d 891, 893-95, 194 P.3d 984 (2008), where this court held a municipality was a water company under Title 80 RCW for purposes of maintaining a fire suppression system, but they fail to identify any decision of this court that is inconsistent with *Fisk* on that narrow question, which is not dispositive in this case in any event.

Turning to RAP 4.2(a)(4), there is no compelling showing that this dispute implicates fundamental and urgent issues of broad public importance. This case has

been in litigation since the summer of 2017. Motions for discretionary review in the Court of Appeals and this court were denied and the case was remanded to the superior court in 2020. While this case presents debatable issues of statutory interpretation, there is nothing particularly urgent about it: if petitioners ultimately prevail they may be entitled to refunds. Also, there is nothing especially fundamental about this dispute over water rates. Furthermore, while the case involves a class of plaintiffs, it is centered on a single municipality. There is no showing that this is a controversy brewing in other cities and counties of Washington.

The Court of Appeals efficiently dealt with the earlier motion for discretionary review in No. 37523-4-III. There is no reason it cannot do so again in this instance. In sum, the better use of judicial resources is to transfer this motion for discretionary review to the Court of Appeals so it can decide it in the first instance. The court's analysis on discretionary review, and its decision on the merits if it grants review (which is possible but not certain), will be particularly useful if the aggrieved party seeks further review in this court.

The motion for discretionary review is transferred to Division Three of the Court of Appeals.

COMMISSIONER

February 2, 2022

No. 38792-5-III

THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WEST TERRACE GOLF L.L.C., and JOHN E. DURGAN, et al.,

Appellants,

v.

CITY OF SPOKANE,

Respondent.

BRIEF OF *AMICUS CURIAE* SUBMITTED ON BEHALF OF THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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I. INTRODUCTION AND IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (WSAMA) join Respondent City of Spokane in asking this Court to dismiss this appeal. WSAMA is a non-profit corporation comprised of attorneys who represent Washington's 281 cities and towns.[1] WSAMA's members frequently advise their clients on the legislature's statutory and constitutional framework that governs their legislative powers over rate-setting for municipal water utilities.

It is axiomatic that, in Washington, water rates for consumer-owned, municipal utilities are regulated by elected municipal officers. In contrast, investor-owned utilities are regulated by the Washington Utilities and Transportation Commission (WUTC), who approves rates and charges of these utilities. Appellants ask this court to invade legislative autonomy

[1] "About WSAMA", WSAMA, http://wsama.org/ (last accessed March 30, 2023).

by presenting a false dilemma: Appellants assert that this case requires the court either hold that Title 80 (and by extension, the UTC) controls municipal water rate-setting, or embrace unregulated, uncontrolled rate-setting without consequences. This court should reject this false dilemma, dismiss this meritless appeal, and can do so in reliance on the steps taken by the Washington State Legislature to preserve the legislative autonomy of Washington's cities and towns, balanced against "sufficient standards and safeguards to satisfy constitutional requirements" found in the RCW 35.92.010 and the Spokane Municipal Code. Indeed, this power is not exercised by Washington's cities and towns without recourse, as rate-setting must survive review to ensure the action was not arbitrary and capricious.

As a collective voice for Washington's cities and towns, WSAMA's members have an interest in this appeal because the issues presented could negatively impact cities and towns

throughout the state by upending a state-wide system of local legislative autonomy for municipal water rate-setting with appropriate sideboards dictated by the Legislature and Constitution. This court should reject Appellant's invitation to invade the Legislature's province to find Title 80 and the UTC supplant legislative autonomy and dismiss this appeal.

II. SPECIFIC ISSUES ADDRESSED

Importantly, this appeal is not an evaluation of the City's rate-setting and the City's legislative classifications, but instead a *de novo* review of which laws control the trial court's evaluation of the City's rate-setting and the City's legislative classifications.

With that in mind, WSAMA's brief focuses on the Appellants' request for this court to misapply UTC's jurisdiction over consumer-owned, municipal water utilities, the historical reluctance of courts to interfere with the management of these water-systems by elected local government officials, and the existing sideboards for evaluating rate-setting set out in RCW

35.92.010 and the Washington State Constitution.

III. STATEMENT OF THE CASE

WSAMA adopt the Statement of the Case in Respondent City of Spokane's Response to Appellants' Brief.

In addition, WSAMA joins Respondent in its bewilderment at the lengthy and argumentative recitation of (disputed) "facts" in this appeal of a pure legal question. Importantly, in affirming the trial court's Order on the City's Motion for Declaratory Judgment this Court need not reach the issue of whether the City's rate setting was arbitrary and capriciously done, but only the legal framework against which the rate-setting will be evaluated. The Court should not engage in Appellants' efforts to confuse the legal issue presented with one-sided, misleading and disputed facts that are not properly before the Court.

IV. ARGUMENT

A. The trial court correctly affirmed legislative autonomy and the adequacy of safeguards that exist

against discriminatory rate-setting under RCW 35.92.010 and the Washington Constitution.

WSAMA urges this Court to dismiss this appeal and affirm the trial court's reasoned decision that rate-setting by consumer-owned, municipal water systems is governed by RCW 35.92.010 and the Washington State Constitution. Appellants ask this Court to hold in contravention of the axiomatic framework guiding all consumer-owned, municipal water utilities: the power to control water rates is a legislative act, with adequate safeguards set out in RCW 35.92.010 and the Washington State Constitution. Indeed, "[t]he general grant of authority to cities and towns to acquire, operate and maintain municipal waterworks is found in RCW 35.92.010." *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 28, 578 P.2d 1292 (1978).

Longstanding jurisprudence cited by both Appellants and the City confirm that, through RCW 35.92.010, the Legislature preserved the general grant of authority over water rate-setting by municipalities while ensuring that legislative act was

nondiscriminatory through a requirement that there must be "uniformity of standards for water rates." *Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 870, 665 P.2d 1328 (1983); *see also Geneva Water Corp. v. City of Bellingham*, 12 Wn. App. 856, 864, 532 P.2d 1156 (1975). As the City notes, Appellants focus on cases pertaining to electrical utilities which are inapposite, but even then ignore the court's clear distinction between the statutes that apply to water rates (RCW 35.92.010) from those that apply to electrical rates (RCW 80.28.090). *See Jorgensen Co.*, 99 Wn.2d at 870 (1983) (holding "[j]ust as there must be uniformity of standards for water rates under RCW 35.92.010, so must electrical rates be just and reasonable and nondiscriminatory under RCW 80.28.090, .100.").

Geneva Water Corp. v. City of Bellingham, 12 Wn. App. 856, 532 P.2d 1156 (1975) is instructive and confirms that municipal water rate setting is evaluated against RCW 35.92.010 and the Washington Constitution. Washington's cities and towns

understand that water rate setting must be uniform within a legislative classification, consistent with RCW 35.92.010, and that the courts will evaluate the reasonableness of a legislative classification to ensure it is not arbitrary or capricious. In *Geneva*, the court holds (not in dicta) that the trial court did not error in rejecting a challenge to the legislative classifications where the trial court noted no evidence that the city acted *arbitrary and capriciously* in its rate-setting. 12 Wn. App. at 871. Holding that this is the test applicable to legislative classifications and is a key component of the court's decision; likewise, is its rejection of the alternative standard of "just and reasonable" from RCW 80.40.010.

As a legislative act, the arbitrary and capricious lens is the appropriate tool to evaluate water rate-setting by elected officials who are tasked by the Legislature to exercise judgment about how best to serve the public interest. This appeal asks the court to upend this by injecting requirements from Title 80 and UTC oversight

into this legislative act, and should therefore be rejected.

B. The requirements of Title 80 and UTC oversight are inexorably intertwined and do not apply to rate-setting for consumer-owned, municipal water systems.

Appellants posit that this Court may, on the one hand, hold that elements of Title 80 should be added to the statutory requirements for rate-setting for consumer-owned, municipal water systems, while simultaneously rejecting the portions of Title 80 that expressly delegate enforcement of Title 80 to the UTC. Because the UTC's authority is inexorably tied to the requirements of Title 80—as the mechanism by which those requirements are evaluated and enforced—the Court should reject Appellants' attempt to insert UTC jurisdiction in municipal water rate setting in contravention of the Legislature.

As an administrative agency, the UTC only has the authority and jurisdiction given to it by the Legislature. *US W. Commc'ns, Inc. v. Washington Utilities & Transp. Comm'n,* 134 Wn.2d 74, 90,

949 P.2d 1337 (1997), *as corrected* (Mar. 3, 1998). Based on the express delegation of authority to the UTC set out in Title 80, the UTC historically has not regulated nor asserted jurisdiction over and presently does not regulate nor assert jurisdiction over municipal water.[2] Instead it is Washington's investor-owned utility companies who must receive approval from the UTC to adjust the rates they charge for services. These requests are evaluated by the UTC against the requirements set out in Title 80, and the UTC approves rates that allow a utility to make a fair rate of return for the company's stockholders. *See People's Org. for Washington Energy Res. v. Washington Utilities & Transp. Comm'n*, 104 Wn.2d 798, 813, 711 P.2d 319 (1985). An appeal of rate setting by the UTC is subject to review under the Administrative Procedures Act, RCW Chapter 34.05.

The exemption of consumer-owned, municipal water

[2] Washington Utilities and Transportation Commission, "[t]he UTC regulates private water companies operating within Washington state…" https://www.utc.wa.gov/regulated-industries/utilities/water (last accessed March 30, 2023).

systems from UTC oversight is not without legal import, despite Appellants' urging to the contrary. The Legislature has delegated to Washington's cities and towns the "…full power to regulate and control the price (of water from a municipal waterworks): Provided, That the rates charged must be uniform for the same class of customers or service." RCW 35.92.010. Consistent with this express delegation, the Legislature provided Washington's cities and towns an exemption from UTC regulation. RCW 80.04.500. Challenges to the legislative task of rate-setting and the City's legislative classifications are submitted to Washington's courts (and not through the UTC).

Unlike the investor-owned utilities companies regulated by the UTC, the water utilities operated by cities and towns are owned by consumers. Cities and towns may not surplus water mains or well sites without a public hearing as infrastructure is owned not by the city but by the consumer. RCW 35.94.040. Cities and towns are expressly prohibited from profiting off the rates set, and the

rates must be reinvested in public infrastructure and for public purposes. Article 7, section 1 (Amendment 14) of the Washington State Constitution requires that taxes and other public funds be spent only for public purposes. Further, Article 11, section 15 provides:

> The making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.

The City aptly points out another of the myriad of regulations embedded in Title 80 that cannot abide if applied to consumer-owned, municipal water systems. Washington's voters would be quick to challenge (and a court would be quick to invalidate) any consumer-owned, municipal water system that set a discounted water rate for employees and elected officials, in contravention of the constitutional prohibition on the gifting of public funds found in the Washington Constitution at Article 8, section 7.

The UTC serves an important purpose to ensure investor-owned water systems charge a rate that balances gross revenues, operating expenses, and "the return to which investors are reasonably entitled." *People's Org. for Washington Energy Res. v. Washington Utilities & Transp. Comm'n*, 104 Wn.2d 798, 828, 711 P.2d 319, 336 (1985) (citing RCW 80.28.020). The application of any of the ratemaking provisions in Title 80 RCW are expressly inapposite and unenforceable against a municipal "water company," and for valid reasons since the underpinnings of these requirements designed to address concerns that arise through the profit-driven privatization of public water systems do not apply to consumer-owned, municipal water systems.

Injecting the UTC into the review of water rate-setting by Washington's cities and towns is in contravention to the Legislature's intentional delegation of certain authorities to municipalities and certain authorities to the UTC. Washington's cities and towns would face competing and inconsistent

instructions as to the methods and means by which rates may be set, and the procedures by which they may be challenged.

Appellants' piecemeal advocacy in favor of certain portions of Title 80 but selective rejection of the UTC's role in the application and enforcement of Title 80 ignores the exemption from UTC regulation afforded consumer-owned, municipal water systems. The Court need look no further than the dissimilarities between investor-owned, profit-driven utilities companies and consumer-owned, municipal water systems to see why application of Title 80 and UTC oversight are inappropriate and unwarranted.

V. CONCLUSION

The trial court's Order granting the City's Motion for Declaratory Judgment correctly found that consumer-owned, municipal water systems set rates in accordance with RCW 35.92.010 and the Washington State Constitution. Likewise, the trial court correctly rejected Appellants' attempt to link rate-setting with the regulations set out in Title 80 that are subject to UTC

oversight. WSAMA thus joins the City of Spokane in respectfully asking this Court to affirm.

I certify that this memorandum contains 2,359 words, in compliance with the Local Civil Rules.

RESPECTFULLY SUBMITTED this 31st day of March, 2023.

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I, Katia R. Perez, hereby declare under penalty of perjury under the laws of the State of Washington, that on March 31, 2023, I caused to be served true and correct copies of the *Brief Of Amicus Curiae Submitted On Behalf Of The Washington State Association Of Municipal Attorneys* on the parties and/or counsel of record via Mandatory E-Service:

DATED this 31st day of March 2023 at Bellevue, Washington.

s/ Katia R. Perez
Katia R. Perez
Legal Assistant

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