

FILED

NOV 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 311953

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

CITY OF WENATCHEE, a
municipal corporation,

Appellant,

vs.

CHELAN COUNTY PUBLIC
UTILITY District NO. 1, a municipal
corporation,

Respondent.

APPELLANT'S BRIEF

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Counsel for Appellant

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I. INTRODUCTION

This is an appeal of a declaratory action. The Chelan County Public Utility District No. 1 (“District”) challenged a business and occupation tax levied by the City of Wenatchee (“City”) on the sale of domestic water the District provides to paying customers within the corporate limits of the City. The District claimed that the City did not have express statutory authority to levy the tax on the District’s water revenues and that the governmental immunity doctrine is irrelevant to the determination of whether a municipality must have express legislative authority to tax another municipality. The City argued that by virtue of selling domestic water to residents of the City the District is acting in a proprietary capacity and is therefore subject to the business and occupation tax as is any other private business. The trial court ruled in favor of the District and ordered the City to cease charging the District taxes on the District’s water system.

II. ASSIGNMENTS OF ERROR

The City assigns the following errors made by the trial court:

1. That the right to charge and the obligation to pay taxes should not be dependent on the distinction between proprietary and governmental functions;

2. That the distinction between proprietary and governmental activity, and whether the District's water system is one or the other or both, is not determinative of whether the City has proper authority to levy taxes against the District on revenue from the sale of water within the City's corporate city limits;
3. That the business and occupation tax imposed by the City on the revenues from the District's water system and its customers is unlawful; and
4. That the City shall cease charging the District taxes on the District's water system.

The City presents the following issues pertaining to the assignments of error:

1. Whether the governmental immunity doctrine is applicable to the determination as to whether the City may levy taxes against the District's water revenues the District receives from the sale of domestic water within the corporate limits of the City;
2. Whether the District is acting in a proprietary capacity when providing domestic water to paying customers; and
3. Whether the City has constitutional, legislative or other legal authority to levy taxes on revenues the District receives from

supplying water to customers in the corporate limits of the City.

III. STATEMENT OF THE CASE

The District generates revenue from the sale of electric power and domestic water to citizens and businesses located within the corporate limits of the City. CP 4. The City levies taxes on these revenues. CP 4. The tax levied by the City is six percent (6%) for electric power and sixteen percent (16%) for the provision of water. CP 4.

The City establishes a tax on the District's water revenue by City ordinance, specifically Wenatchee City Code Chapter 5.84 et. seq. CP 4, 20-27. The City's utility tax on domestic water sales has been in place since the passage of Ordinance no. 1814 on April 20, 1964. CP 18-19, 28-37. The District has historically met its obligation to pay the City utility tax on domestic water service. CP 4.

The District challenged the City's tax on the District's water revenues, claiming the City does not have express legislative authority under Chapter 35A.82 RCW or any other statute to levy a tax on revenues the District receives from providing water to customers within the corporate limits of the City. CP 3-7. The District also claimed that the governmental immunity doctrine does not apply under the attendant circumstances, and therefore, the District is immune from being taxed by the City on water

revenues unless there is legislation that expressly authorizes the City to levy taxes on the sale of water. CP 3-7.

The City asserts that the District operates in its proprietary capacity when supplying domestic water to paying customers, and therefore, the governmental immunity doctrine does not apply to prevent the City from levying taxes against revenue from the sale of water. CP 3-7. The City further contends that RCW 35A.82.020 grants the City the authority to impose a tax on revenue in regard to business, production, commerce, entertainment, exhibition, and upon all occupations, trades, and professions and any other lawful activity occurring within the City limits, and that by virtue of selling domestic water within the corporate limits of the City, the District is subject to the business and occupation tax. CP 3-7.

The trial court concluded that the City does not have express statutory authority to levy taxes against the District for the sale of domestic water within the corporate limits of the City. CP 77. Additionally, the trial court concluded that the right to charge and the obligation to pay taxes should not be dependent on the distinction between proprietary and governmental functions, and thus, the distinction between whether the District's sale of water is one or the other is not determinative as to the legitimacy of the City's authority to levy and collect taxes on the revenue generated from the sale of water. CP 65. The trial court ordered the City

to cease from charging the District taxes on the District's water system revenues. CP 67.

IV. ARGUMENT

A. Standard of Review

Declaratory judgments are subject to appellate review, and no special procedures or standards of review apply. *City of Spokane v. Spokane Civil Serv. Comm'n*, 98 Wn. App. 574, 578, 989 P.2d 1245 (1999). If the trial court based its decisions solely on affidavits or declarations appellate review is de novo. *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). Further, the proper interpretation of a statute or rule of court is reviewed de novo. *State v. Greenwood*, 120 Wn.2d 585, 845 P.2d 971 (1993). This action is a review of a trial court's order relative to a petition for a declaratory judgment wherein the trial court based its order on the interpretation of various statutes. The facts are uncontested. As a result, the proper standard of review is de novo.

B. The City Has Proper Legal Authority to Levy and Collect Taxes on the District's Water Revenue.

The Washington State Constitution allows the state Legislature to enact laws that give municipalities the power to levy and collect taxes. Washington State Constitution, Article VII, Section 9 provides:

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.

In addition to Article VII, Section 9, Article XI, Section 12 provides:

The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.

Pursuant to these provisions, the legislature has given municipalities “all powers of taxation for local purposes except those which are expressly preempted by the state”. RCW 35A.11.020.¹ The state legislature has also vested the City with authority to levy business and occupation taxes,

¹ RCW 35A.11.020 provides in part: [T]he legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state before or after the enactment of this title, such authority to be exercised in the manner provided, if any, by the granting statute, when not in conflict with this title. Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits all powers of taxation for local purposes except those which are expressly preempted by the state as provided in RCW 66.08.120, 82.36.440, 48.14.020, and 48.14.080.

including the power to tax “all occupations, trades and professions and any other lawful activity”. RCW 35A.82.020.²

Despite the authority granted to the City under the state Constitution and through the legislature’s enactment of RCW 35A.11.020 and RCW 35A.82.020, the trial court determined that the City does not have the necessary authority to levy taxes against the water revenues of the District. CP 61-67. Buttressing its argument on the premise that a corporate municipality must have express legislative authority to tax another municipality, the District relied in part on Article VII, Section 5 of the Washington State Constitution which provides:

No tax shall be levied except in the pursuance of law;
and every law imposing a tax shall state distinctly the
object of the same to which only it shall be applied.

In connection with Article VII, Section 5 of the Washington State Constitution, the governmental immunity doctrine provides that a corporate municipality may not impose a tax on another corporate municipality without express statutory authorization. *King County v. City of Algona*, 101 Wn.2d 789, 793, 681 P.2d 1281 (1984).

² RCW 35A.82.020 provides in part: A code city may exercise the authority authorized by general law for any class of city to license and revoke the same for cause, to regulate, make inspections and to impose excises for regulation or revenue in regard to all places and kinds of business, production, commerce, entertainment, exhibition, and upon all occupations, trades and professions and any other lawful activity: PROVIDED, That no license or permit to engage in any such activity or place shall be granted to any who shall not first comply with the general laws of the state.

The Washington State Supreme Court addressed the necessary legal requirements for a municipality to tax another municipality in *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984). In *City of Algona* the Court considered a business and occupation tax imposed on King County by the City of Algona for King County's involvement in the operation of a solid waste transfer station. *Id.* Relying on the same statutes as the City relies on in this case, namely RCW 35A.11.020 and RCW 35A.82.020, the City of Algona argued that it was vested with legislative authority to impose a tax on King County for revenues generated from the operation of the solid waste transfer station. *Id.* The *Algona* Court examined the pertinent statutes and then reasoned that the operation of a solid waste transfer station is a governmental function. *Id.* at 794. The Court then concluded that, unless there was express statutory authority to levy a tax, the doctrine of governmental immunity prevented the City of Algona from lawfully imposing the tax. *Id.*

Relying on *King County v. City of Algona, supra*, the trial court inaccurately concluded that the City must have express legislative authority to tax the District water revenues regardless of whether the District is operating in a governmental or proprietary capacity. CP 61-67. Examining *City of Algona* in detail, however, reveals an important component in the analysis of the Court's decision in that case. The *Algona* Court did not end

the inquiry relative to the taxation issue on the question as to whether or not there is express authority for the City of Algona to levy the tax; instead, the Court took its analysis a step further as it also examined whether King County was operating in a governmental or proprietary capacity. *Id.* at 794. The *Algona* Court then went on to hold that because King County was operating in a governmental capacity it could not be subject to the City of Algona's business and occupation tax absent express statutory authority:

Where the primary purpose in operating the transfer station is public or governmental in nature, the county cannot be subject to the city B & O tax, absent express statutory authority. **We hold that King County was operating in a governmental function.**

King County v. City of Algona, 101 Wn.2d. at 794 (emphasis added).

Thus, if the inquiry regarding the authority of one municipality to tax another is exclusively limited to whether there is express statutory authority to impose a tax, the *Algona* Court would not have analyzed the taxing issue through the lens of the governmental immunity doctrine. The trial court in the present case, however, concluded that the right to levy a tax should not be dependent on the distinction between proprietary and governmental functions. CP 65. This is contrary to the analysis provided in *Algona*.

Although law is scarce relative to the legal basis concerning the power of one municipality to tax another municipality, cases other than

King County v. City of Algona, supra, have touched on the issue. For example, in its decision the *Algona* Court overruled *Bellevue v. Patterson*, 16 Wn. App. 386, 556 P.2d 944 (1976), which allowed the City of Bellevue to levy and collect a tax on several different water Districts both of which were municipal corporations. The *Bellevue v. Patterson* case is distinguishable from the present case, however. First, the application of law challenged in *Bellevue, supra*, concerned RCW 35.23.440, a law permitting a license tax which is not as broad and sweeping as RCW 35A.82.020. Secondly, and more importantly, the *Bellevue* court did not analyze the power and authority to levy a tax from a governmental immunity standpoint; rather, the Court examined the issue from a tax exemption standpoint—governmental immunity was never raised in the case.

In another case relating to a municipality's grant of authority to tax another municipality, the Court in *City of Seattle v. State of Washington*, 59 Wn.2d 150, 367 P.2d 123 (1961) examined a controversy involving a tax imposed by the State of Washington on the City of Seattle for revenues derived from park recreational activities. *Id. City of Seattle* focused on the business and occupation tax in RCW 82.04 et. seq., and the issue was whether the City of Seattle should be included in the definition of "person" under RCW 82.04.030 for taxing purposes. *Id.* at 153. The Court found it unnecessary to consider whether the City of Seattle's activities were

proprietary or governmental because the Court determined that the definition of “person” in RCW 82.04.030, was intended to include the City of Seattle. *Id.* at 154. As a result, express authority existed for the State of Washington to levy taxes against the City of Seattle, and thus, no need for the Court to examine whether or not the City of Seattle was immune from being taxed. *Id.*

Although RCW 35A.82. et seq. does not define “business” or “occupation” it is clear the legislature intended to give cities broad power to levy taxes on all lawful business activity. The plain language of RCW 35A.82.020 provides that cities may tax “all occupations . . . and any other lawful activity.” That the term “municipality” is not included in RCW 35A.82.020 does not mean the city cannot tax a municipality if the municipality is acting as a proprietor. As the *Algona* Court pointed out, the City of Algona could not tax King County because the county was acting in sovereign capacity and thus RCW 35A.82.020 was insufficient authority to impose the business and occupation tax. *King County v. City of Algona* 110 Wn.2d at 793-94. Furthermore, RCW 35A.82. et. seq. does not define the terms such as “production”, “commerce”, “entertainment”, “exhibition”, “trades”, and “professions” which are identified in RCW 35A.82.020. Yet, the City is authorized by the plain language of RCW 35A.82.020 to impose such taxes on the foregoing.

There is no need for the legislature to include “municipality” in RCW 35A.82.020 because the legislature intended to confer to code cities the broadest power to tax unless expressly preempted. RCW 35A.11.020. The legislature could have included in RCW 35A.82 preemptive legislation precluding code cities from taxing municipalities under RCW 35A.82.020, but it refrained from doing so.

The Attorney General has also offered an opinion on this subject. *See AGO 1990 No. 3*. The Attorney General, relying on *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) opined that city B did not have authority to impose a tax on city A for business related to the provision of electricity. *Id.* The Attorney General erroneously determined that City B needed express statutory authority for the levy of such a tax, failing in its analysis to consider whether the activity being taxed was governmental or proprietary in nature. *Id.* The court in *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007) recognized the Attorney General’s omission:

Relying on *Algona*, the Washington Attorney General’s office issued an advisory opinion that a city could not impose a utility tax on another city’s electric utility. . . . *Algona*, however, arguably is distinguishable on both facts and the law. . . . *Algona* involved a solid waste facility, the operation of which is a governmental, not proprietary activity. . . . **In *Algona* we concluded that the doctrine of**

**governmental immunity from taxation
barred the City of Algona from levying a
tax on King County's solid waste facility.**

Id. at 159-160 (emphasis added).

The City acknowledges that there must be express statutory authority to levy taxes against the District if the tax levied is for activities that are governmental in nature. However, when the District is operating as a proprietor, as it is here, it is subject to taxes as any other private business or occupation so long as there is authority such as RCW 35A.82.020 to levy a tax. *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984).

The following provision from McQuillan's *The Law of Municipal Corporations* illustrates why the District is subject to the City's business and operation tax like any other business while it is acting in its proprietary capacity:

When acting in their public or governmental capacity, municipal corporations are an agency of the state for conducting the affairs of government. Although it has been said that the character and nature of municipal corporations remain at all times the same, in their public or governmental capacity they act as the agent of the state for the benefit and welfare of the state as a whole, but when acting for the peculiar and special advantage of their inhabitants they act in a private or **proprietary** capacity. When acting in their private or **proprietary** character, they are a

separate entity acting for their own purposes, and not a subdivision of the state, and they represent those **proprietary** interests that appertain to them in common with other corporations. (emphasis theirs)

1 McQuillan Mun. Corp. §2:13 (3rd Ed.)

Comparing RCW 35A.82.020 with that of RCW 54.28.070³, which permits cities to levy and collect taxes on gross revenues from the sale of electricity within the city corporate limit does not resolve the issue against the City. Although RCW 54.28.070 expressly gives cities authority to tax electricity, that statute was adopted in 1941, more than twenty-five years before the legislature passed RCW 35A.82.020, which permits code cities to levy a tax on all occupations, trades, professions, and any other lawful activities. By virtue of enacting RCW 35A.82.020, it was unnecessary for the legislature to adopt a similar statute to RCW 54.28.070 for the provision of water because RCW 35A.82.020 conferred on cities the broad power to levy taxes for such revenue, and as pointed out in section C below, Washington has historically treated the provision of water as a proprietary activity. Of course if the nature of the business

³ RCW 54.28.070 provides: Any city or town in which a public utility district operates works, plants or facilities for the distribution and sale of electricity shall have the power to levy and collect from such district a tax on the gross revenues derived by such district from the sale of electricity within the city or town, exclusive of the revenues derived from the sale of electricity for purposes of resale. Such tax when levied shall be a debt of the district, and may be collected as such. Any such district shall have the power to add the amount of such tax to the rates or charges it makes for electricity so sold within the limits of such city or town.

activity is one that inheres in the sovereign the tax is inapplicable. *See e.g. King County v. City of Algona*, 101 Wn.2d 789, 794, 681 P.2d 1281 (1984).

Washington is not alone in permitting municipalities to tax one another. Other jurisdictions permit the levy of such taxes. For example, in *Town of Somerton v. Moore*, 119 P.2d 239 (1941), a case dealing with taxes on a town's water system, the Arizona Supreme Court concluded that except when exercising purely governmental functions, a corporate municipality is subject to the same liability for taxes as a private corporation or individual. *Id.* at 239. The Arizona Court in *Town of Somerton* declared the tax on a water system as permissible. *Id.* Also, in *Town of Mulga v. Town of Maytown*, 502 So.2d 731 (1987) the Supreme Court of Alabama reasoned that a municipality may impose a tax on another municipality where the municipality engages in the business of furnishing electricity, lights, or gas to the public because it is not discharging or exercising governmental functions or powers, but rather is operating within its proprietary or business powers. *Id.* at 734.

In the present case the City has legislative authority to tax the District under RCW 35A.82.020. The District is not immune from the business and occupation because of an absence of express legislative authority to tax the District water revenue; rather RCW 35A.82.020

permits the City to tax the District as any other private business when acting as a proprietor.

C. The Sale of Water by the District is a Proprietary Function.

The trial court did not determine the nature of the District's activity as to the provision of water to paying customers. CP 61-67. The trial court concluded that such a distinction was not necessary. CP 65. Nevertheless, the City argues that the governmental immunity doctrine is a critical component in deciding whether the City can tax the District under the general business and occupation tax scheme outlined in RCW 35A.82.020. The distinction is critical because when a municipality acts in a proprietary capacity, it is viewed almost the same as a private individual. *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 590, 269 P.3d 1017 (2012); *see also City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 694, 743 P.2d 793 (1987).

Municipalities rely on the governmental immunity doctrine as a shield from liability when acting in their sovereignty (i.e. as an arm of the State) in lieu of a business or proprietary capacity. *See e.g. Okeson v. City of Seattle*, 159 Wn.2d. 436, 150 P.3d 556 (2007). Whether a municipality is operating in a governmental-sovereign capacity or a proprietary capacity depends on the specific facts of each case. *Washington Public Power Supply System v. General Electric Company*, 113 Wn.2d 288, 778

P.2d 1047 (1989). Relevant to the analysis is “whether the activity or its purpose is normally associated with private or sovereign concerns.” *Id.* at 296. In the context of utilities, the Court’s focus is on whether the “utility action serves the general public or the individually billed customer.” *Okeson v. City of Seattle*, 159 Wn.2d. 436, 451, 150 P.3d 556 (2007). For example, where a municipality provides electricity for public streetlights, or alternatively provides fire hydrants, the action inheres in the sovereign. *See e.g. Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) (operation of streetlights is a governmental function); *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008) (providing hydrants is a governmental function). On the other hand, where the action serves a billed customer, such as providing domestic water, the corporate municipality action is proprietary. *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951).

In *Russell v. City of Grandview*, the court, while examining the issue as to the City of Grandview’s liability for injuries sustained by the plaintiff as a result of gas leakage in the city water system, declared that the operation of a water system is a proprietary function. *Id.* at 553. Also in *Public Utility District No. 1 of Pend Oreille County v. Town of Newport*, 38 Wn.2d 221, 228 P.2d 766 (1951), the Court determined that the operation of gasworks, electric light plants and waterworks are

proprietary functions. That the operation of a municipal water system is traditionally viewed to be a proprietary activity was also affirmed in *City of Moses Lake v. United States*, 430 F.Supp.2d 1164 (2006). The *City of Moses Lake* court, relying on *Russell, supra*, maintained that the supply of domestic water is a proprietary activity and expressed that when a municipality is “permitted by the state to engage in activities normally provided by a private enterprise they depart from their governmental functions.” *Id.* at 1174. Additionally, other jurisdictions conclude that the sale of water by a corporate municipality is a proprietary function. See e.g. *Salt River Project Agriculture Improvement and Power District v. City of Phoenix*, 631 P.2d 553, 555 (1981) (sales of water by cities to consumers are held to be proprietary business activities of the cities, rather than governmental acts); *Town of Somerton v. Moore*, 119 P.2d 239 (1941) (operation of a waterworks system is proprietary in nature).

The District is a municipal corporation. CP 4. See *Seattle Mortgage Company, Inc. v. Unknown Heirs of Gray*, 133 Wn. App. 479, 489, 136 P.3d 776 (2006) (“a public utility district is a municipal corporation under Washington statutory and constitutional law”). Also, the District is engaged in selling water to paying customers residing in the City. CP 4. As pointed out above, Washington courts have long held that water supply by a municipality to customers is a proprietary function.

Russell v. City of Grandview, supra. The District by virtue of selling water to customers in the City exercises its proprietary powers, not governmental.

D. Distinguishing Between Governmental and Proprietary Functions is Necessary for Ascertaining Taxing Authority.

The City disagrees with the trial court's conclusion that distinguishing between governmental and proprietary functions is not determinative when it comes to the constitutional provisions and the need for express statutory authority to levy a tax. In *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984), the court did not simply look at whether the City of Algona had express statutory authority to levy a tax against King County; rather, the court examined the activity in which King County was engaged to fully determine whether King County was subject to the tax imposed by the City of Algona. *City of Algona v. King County* 101 Wn.2d at 794. The inquiry as to the nature of the activity taxed was relevant in the *City of Algona* case, and it was also touched upon by the court in *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007) where the Court, in dicta, indicated that one municipality's ability to impose a utility tax on another is an unresolved question of law. *Id.* at 160. By ascertaining, analyzing and discussing the type of activity in which King County was involved, the *Algona* Court, and the *Burns* Court, demonstrated the question

of governmental immunity is a component to whether a municipality may legally tax another municipality.

Notwithstanding that the *City of Algona, supra*, distinguished between governmental and proprietary functions when wrestling with the tax issue in that case, the District makes the argument that distinguishing between governmental and proprietary is too cumbersome and speculative, and therefore, distinguishing between the two is unnecessary to determine whether a corporate municipality may tax another corporate municipality. To support its argument the District points to *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008). CP 44-45. The *Lane v. City of Seattle* case involved payment responsibility for the provision of fire hydrants in the City of Seattle and its suburbs. *Id.* The *Lane* Court focused its analysis on whether requiring rate payers to pay for hydrants was a tax or a fee; the *Lane* Court did not focus on the legal basis that permits one municipality to tax another municipality. Importantly, however, the *Lane* Court said, “We treat governments differently if they are acting as governments or as businesses.” *Id.* at 882. The *Lane* Court determined that the provision of fire hydrants is a governmental function. *Id.* at 883.

A distinction can be made between the provision of fire hydrants and that of providing water to consumers. In the latter, the consumer has the ability to control how much water he or she will put to use, but the

consumer cannot control the provision for hydrants, nor can the consumer control when and for how long street lamps will be lit. Thus, distinguishing between governmental and proprietary functions is not a cumbersome and speculative task. Indeed, Washington has created a test to distinguish between governmental activities and proprietary activities. In *Okeson v. City of Seattle*, 159 Wn.2d 436, 105 P.3d 556 (2007) the Court said the test is “whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity.” *Id.* at 447. Providing fire hydrants and street lamps is for the common good of all. *Lane, supra*, at 882. Additionally, the Court in *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) pointed out that a municipality’s use of water partly for fire protection does not remove that activity from being a proprietary act and turn it into a governmental function. Washington courts have historically held that provision for water is proprietary. *See e.g. Russell v. City of Grandview*, 39 Wn.2d 551, 236 P.2d 1061 (1951), *Public Utility District No. 1 of Pend Oreille County v. Town of Newport*, 38 Wn.2d 221, 228 P.2d 766 (1951), and *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164 (2006).

There is no reason to treat the District differently in this case than that of a proprietor. The District sells water to paying customers within

the City limits; therefore, it should not be immune to the business and occupation tax which the City is authorized to levy.

V. CONCLUSION

The trial court erred by ignoring the distinction of whether the District is acting in a proprietary capacity versus a government capacity and the application of the governmental immunity doctrine as it relates to the taxing authority imposed by one municipality on another municipality. Distinguishing between governmental activities and proprietary activities is a component to the analysis. The District, by providing water to paying customers is acting in a proprietary capacity. When acting in a proprietary capacity, the District is no longer an agency of the state and is viewed the same as a private individual or private corporation. Therefore, the City is authorized to levy a business and occupation tax against the District's revenues it generates from selling water within the corporate limits of the City. The City respectfully requests that the Court reverse the trial court's order thereby allowing the City to tax the District as a proprietor under RCW 35A.82.020.

DATED: November 29, 2012.

Respectfully submitted,

By: 

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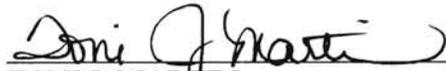
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12 TONI J. MARTIN

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23 DECLARATION OF SERVICE

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