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No. 53920-5

**DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

JOSEF VENTENBERGS, KENDALL TRUCKING, INC., a Washington Corporation, RONALD HAIDER, and HAIDER CONSTRUCTION, INC., a Washington corporation,

Appellants,

vs.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE PUBLIC UTILITIES, and CHUCK CLARKE, in his official capacity as Director of Seattle Public Utilities, WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a Waste Management of Seattle, a Delaware Corporation, RABANCO, LTD., a Washington corporation,

Respondents.

**AMENDED BRIEF OF RESPONDENTS CITY OF SEATTLE,
SEATTLE PUBLIC UTILITIES, AND CHUCK CLARKE**

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I. INTRODUCTION

Ventenbergs plaintiffs' appeal repeats arguments from the trial court level based on several fallacies, including: (1) a false differentiation between CDL and other commercial waste, (2) a quotation by a City employee taken out of context and framed so as to mislead the court about its meaning, and (3) an incorrect assumption that the City rather than state law made the relationship between the plaintiffs illegal.

Similarly, the Ventenbergs plaintiffs' appeal ignores, obscures, or attempts to avoid any mention of, four critical factors: (1) the Washington state regulatory structure for solid waste disposal, (2) Washington municipalities' broad authority to operate their solid waste disposal as they see fit, as a proper exercise of their police power, (3) Washington courts' long history of deferring to this broad authority, and (4) Washington courts' explicit sanction of the same type of actions that the Ventenbergs plaintiffs challenge.

While the fighting words and metaphors contained in the plaintiffs' brief certainly add drama, they also highlight plaintiffs' misunderstanding of a court's standard of review with respect to such a constitutional challenge, especially a challenge not involving a fundamental right. In a City's exercise of its police power and broad authority to regulate solid

waste, the constitution does not require “the precision of a scalpel” (Brief of Appellant, hereinafter “Brief” at page 30) or even a “carefully crafted solution” (Brief at 29). Rather, the Ventenbergs plaintiffs have the burden of proving that the City’s means of disposal is not reasonably related to its public health and safety goals. As the Ventenbergs plaintiffs have not and cannot show that the City’s actions were unreasonable, the trial court orders must be affirmed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court properly find that the privileges and immunities clause of the Washington constitution does not apply where there is no constitutionally protected property interest in being awarded a government contract for a uniquely municipal service and function? (Assignments of Error 1 and 2)
2. Did the trial court properly hold that Seattle has authority under Washington law to provide for the collection and disposal of solid waste either by using its own employees or by exclusive contracts? (Assignment of Error 3)
3. Did the trial court properly rule that Seattle could not have impaired an alleged oral contract between the plaintiffs that was already

illegal under state law and therefore contrary to public policy?

(Assignment of Error 6)

4. Did the trial court properly hold that RCW 35.21.156 does not apply to the commercial contracts challenged by Haider and Ventenbergs?

(Assignment of Error 4)

5. Is Haider's "takings" argument properly before this court, where such a claim has not been pled in either complaint, and where the trial court ruled against Seattle's request for injunctive relief? (Assignment of Error 5)

6. Does Haider have any property rights to residential waste that is not his own waste? (Assignment of Error 5)

III. RESTATEMENT OF THE CASE

A. Restatement of Facts and Factual History

Effective April 1, 2001, the City of Seattle contracted for municipal control of all solid waste generated in the city, including commercial waste and construction, demolition and land clearing waste ("CDL"). CP at 417, ¶¶ 22-23. Prior to that date however, from approximately 1962 until April 2001, Seattle did not assert municipal control of the commercial waste stream. CP at 414, ¶ 5. During that forty-year period, Seattle neither engaged in direct municipal collection of commercial waste nor did it enter into contracts for municipal collection

of commercial waste. CP at 414, ¶5. But during that same time Seattle did provide for collection of residential solid waste by means of a series of municipal collection contracts with various private firms, including Waste Management and Rabanco and their predecessors. CP at 414, ¶ 3, Deposition of Ray Hoffman (hereinafter “Dep.”) at 87.¹

During the forty-year period of time when Seattle did not collect commercial waste in the City, the Washington Utilities and Transportation Commission (“WUTC”) regulated the collection of commercial solid waste within the City of Seattle. CP at 414, ¶ 6, Dep. at 89. Under WUTC regulation, two companies, Rabanco, Ltd. (“Rabanco”) and Waste Management of Washington, Inc. (“Waste Management”), through a series of acquisitions and consolidations, ended up with the only rights to collect commercial waste, including CDL, within the City of Seattle. CP at 414, ¶ 7. The WUTC granted this authority to these two companies by issuing each of them a certificate of “public convenience and necessity,” commonly called a “G”-certificate. CP at 414, ¶ 8.

¹ On June 29, 2004, the Seattle Defendants filed a Supplemental Designation of Clerk’s Papers, which included the entire transcript of the deposition of Ray Hoffman, taken on December 12, 2003. As of the time of the filing of this brief, however, the clerk of the trial court has not yet indexed or numbered the supplemental designations. Therefore, the deposition and other documents designated by the Seattle Defendants are referenced separately.

Following closure of both of Seattle's landfills, Kent Highlands and Midway, in the 1980s, Seattle embarked on an innovative program to deal with its solid waste disposal problem. CP at 415, ¶¶ 9-10. After considering and rejecting the possible construction of a garbage incinerator in the City, the City chose to put its financial and political emphasis on recycling and on an environmentally responsible system for dealing with the solid waste that would inevitably remain, despite an emphasis on recycling. CP at 415, ¶¶ 9-10.

In 1989, the City entered into a series of new residential solid waste collection contracts which provided for curbside garbage collection and a separate recycling collection as well as a separate yard waste collection. CP at 415, ¶ 11. The elimination of all yard waste and a substantial amount of recyclable material from the waste stream substantially reduced the amount of solid waste that need to be disposed of. CP at 415, ¶¶ 12-13.

To deal with the ongoing disposal problem of the residual solid waste, Seattle issued a Request for Proposals for a system of long haul rail disposal that would transport the residual solid waste to the arid portions of either Washington or Oregon, east of the Cascades. CP at 415, ¶ 14; Dep. at 59-60. In addition, Seattle insisted on adding a margin of environmental safety by requiring any company responding to the RFP to

build a landfill in eastern Washington or Oregon to the higher standards established for a landfill in the damp climate west of the Cascades. CP at 415, ¶ 15; Dep. at 59-60. After nearly a year of negotiation, Seattle entered into a long-term, long-haul disposal contract with Waste Management, which agreed to transport all of Seattle's garbage, including commercial waste collected by the two "G" certificate holders, in compacted solid waste containers shipped by rail to a landfill site in Gillam County, Oregon. CP at 415-16 ¶ 16; Dep. at 50.

After implementing what was the first successful long-haul disposal contract of its kind in the United States, Seattle in 1992 began to consider taking back control of the commercial waste stream by issuing municipal contracts for collection of commercial waste in the City. CP at 416, ¶ 17. The objective of reasserting municipal control of commercial collection was at that point twofold: first, to reduce the collection rates to commercial generators of solid waste, and second, to better promote recycling in the commercial sector, where much of the potential for greater recycling was available. CP at 416, ¶ 18; Dep. at 108-109, 115, and 165.

Following the U.S. Supreme Court's ruling in *C & A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994), however, a third objective arose: to assure Seattle's control over the disposal of all solid waste generated in the City, including commercial

waste, to be sure that the environmental protections established in the 1991 long-haul disposal contract remained in place. CP at 416, ¶¶ 19-20. In *Carbone*, the U.S. Supreme Court had ruled that where a town, such as the defendant Clarkstown, New York, did not have a municipal system of collection, but rather relied on private companies to pick up garbage through individual contracts with customers, the town could not insist on directing the garbage to the town's own transfer station, even though it had financed that transfer station with revenue bonds.

The City of Seattle was therefore vulnerable to a decision by either certificate hauler of commercial waste in the City to decide to take the commercial waste to some disposal site that did not have the extra environmental protections built into it as had the Gillam County site built by Waste Management pursuant to Seattle's long-haul disposal contract. CP at 416, ¶¶ 20; Dep. at 115 and 159.

After nearly eight years of consultation and negotiation, Seattle eventually entered into municipal contracts with Rabanco and Waste Management for the collection of commercial waste in the City. CP at 417, ¶ 22. These contracts became effective April 1, 2001. CP at 417, ¶ 23; CP at 214 and 314. Contemporaneously with the effective date of the new municipal collection contracts Seattle enacted commercial collection rates for all commercial generators of solid waste in the City. CP at 177-

199. The contracts with Rabanco and Waste Management require each company to provide commercial municipal solid waste (“MSW”) collection on behalf of the City in their respective primary collection zones. CP at 417, ¶24. In addition, each company also provides municipal collection of CDL on behalf of the City throughout the City, without regard to the primary and secondary zones for collection of commercial MSW. CP at 417, ¶ 25.

Following implementation of the commercial collection contracts in place of WUTC regulation, the City adopted Ordinance 120947 in October 2002. CP at 417, ¶ 27. That clean-up ordinance, among other definitional clarifications, amended Seattle Municipal Code Section 21.36.012(5) to be consistent with State law (RCW 70.95.030(22)) and with the City’s commercial collection contracts by formally including CDL Waste in the Municipal Code’s definition of “City’s Waste.” CP at 417, ¶ 28; CP at 200-206.

The ordinance also clarified the meaning of “materials destined for recycling.” CP at 417, ¶ 29; CP at 202. Prior to passage of the ordinance, it had been discovered that in many cases, firms that were purportedly collecting recyclable CDL were in fact not recycling most of the material. CP at 417, ¶ 30; Dep. at 162. Instead, a large amount of the material was being landfilled. CP at 417, ¶ 31. The adopted legislation addressed this

problem by setting a limitation that collected material contain no more than 10 percent non-recyclable material in order for it to be considered “recyclable material” and therefore fall outside of the City contracts. CP at 417, ¶ 32; Dep. at 175-176. The 10 percent standard derives from the State’s own standard in WAC 173-350-310(2)(b)(ii) for exempting material recovery facilities that accept source-separated recyclable materials not exceeding 10 percent residual waste per load. CP at 417, ¶ 32; Dep. at 175.

B. Procedural History

On May 13, 2003, Josef Ventenbergs and Ronald Haider, and their respective business entities, (“Ventenbergs plaintiffs”), filed a Complaint for Declaratory and Injunctive Relief against the City of Seattle, Seattle Public Utilities, and Chuck Clarke (“Seattle Defendants”). In their complaint, the Ventenbergs plaintiffs alleged that the City’s actions in amending its municipal code constituted “governmental favoritism” and deprived them of their civil rights under Article I, Section 12 of the Washington State Constitution (“privileges and immunities clause claim”). CP at 4, 9-10, 22, and 27-28. They also alleged that the City’s actions impaired their contractual rights in violation of Article 1, Section 23 of the Washington State Constitution (“impairment of contracts claim”). CP at 4, 10-11, 22, and 28-29. The complaint states that, as owner of Kendall

Trucking, Ventenbergs “wishes to continue operating his business by hauling CDL.” CP at 9, 27.

The City confirmed through discovery that none of the Ventenbergs plaintiffs ever had legal authority to haul solid waste of any kind within the City of Seattle, even prior to the challenged amendment to SMC 21.36.012(5). CP at 95-96, and 100-101. Before the City entered into contracts for municipal collection of commercial waste, the WUTC regulated commercial waste collection within the City of Seattle. RCW 81.77.040. The WUTC, however, never authorized any of the Ventenbergs plaintiffs to haul solid waste. Furthermore, none of the Ventenbergs plaintiffs ever sought the required authorization from the WUTC. CP at 95-104.

On October 21, 2003, the Ventenbergs plaintiffs amended their complaint to add Waste Management of Washington, Inc. (“Waste Management”) and Rabanco, Ltd. (“Rabanco”) as defendants. CP at 21-30.

On November 14, 2003, the Seattle defendants moved for summary judgment dismissing Ventenbergs plaintiffs’ claims with prejudice. CP at 63-85. The crux of Seattle’s argument was that Ventenbergs plaintiffs had no constitutionally protected property interest

in a City contract for solid waste collection, because they never had legal authority to haul solid waste in Seattle. Ch. 81.77 RCW provides that a solid waste collection business may operate in the State only by having either a certificate of public convenience and necessity issued by the WUTC or a contract with a city for collection of solid waste. The Ventenbergs plaintiffs had neither. Seattle also argued that an invalid contract based on continuing illegal conduct could not be used to substantiate a claim of impairment of contracts. In addition, Washington courts have upheld the authority of municipalities to negotiate rather than bid out exclusive contracts for municipal solid waste collection.

On December 23, 2003, the additionally named defendants, Waste Management and Rabanco, also moved for summary judgment. CP at 440-445; and CP at 449-454. The Ventenbergs plaintiffs filed a cross-motion for summary judgment on December 26, 2003. CP at 455-478. Oral argument was held on all four motions on January 23, 2004. *See* Report of Proceedings (hereinafter “RP”).

On January 29, 2004, the Washington Supreme Court decided *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 83 P.3d 419 (2004) (*Grant County II*). CP at 1240-1262. The Seattle defendants provided a copy of the new decision to the Court that same morning. On

February 2, 2004, at the Court's request, the Seattle defendants provided the court with a copy of the entire transcript of the deposition of Ray Hoffman, taken on December 12, 2003.

By letter and telephone conference with all parties on February 9, 2004, the Court requested additional briefing on specific issues about the privileges and immunities claim. The supplemental briefs were submitted on February 20, 2004. CP at 1288-1302.

The Court issued three rulings on February 23, 2004. In each ruling, the Court denied the Ventenbergs plaintiffs' motion for summary judgment. In separate orders, the Court granted summary judgment for each of the three defendants, (Seattle defendants, Waste Management, and Rabanco), and dismissed Ventenbergs plaintiffs' complaint with prejudice with respect to each defendant. CP at 1315-1320, 1321-1324, and 1343-1347. The Court also faxed a letter to all parties explaining its rulings. CP at 1330-1332. The letter from the trial court is attached as Appendix A for the convenience of this Court. The Ventenbergs plaintiffs appealed and sought review of each of these rulings, as well as review of the Court's letter of explanation. CP at 1325-1329.

IV. STANDARD OF REVIEW

A. An appellate court reviews an order of summary judgment de novo.

An appellate court reviews a grant of summary judgment de novo. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Defendants are entitled to summary judgment when there are no genuine issue of fact supporting an essential element of a plaintiff's claim. CR 56(c).

B. A legislative enactment, whether state or municipal, is presumed to be constitutional.

In challenging the constitutionality of Seattle's actions, the Ventenbergs plaintiffs have the burden of showing that Seattle's actions were unconstitutional beyond a reasonable doubt. A legislative enactment is always presumed to be constitutional, "unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt." *Clark v. Dwyer*, 56 Wn.2d 425, 431, 353 P.2d 941 (1960) (citations omitted). Laws enacted by a municipality are subject to the same rules of construction as statutes. *Mount Spokane Skiing Corp. v. Spokane*, 86 Wn. App. 165, 172, 936 P.2d 1148 (1997), *review denied*, 133 Wn.2d 1021 (holding that a "[m]unicipally enacted law is subject to the same rules of construction as statutes" and "if possible, an enactment must be interpreted in a manner which upholds its constitutionality").

Furthermore, where a court is asked to review a legislative decision, the applicable standard of review is the ‘arbitrary and capricious’ test. *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985). An action is “arbitrary and capricious” only if it is found to be “willful and unreasoning in disregard of facts and circumstances.” *Cox v. City of Lynwood*, 72 Wn. App. 1, 863 P.2d 578 (1993). In other words, a legislative determination will be sustained if the court can reasonably conceive of *any* state of facts to justify that determination. *Teter*, 104 Wn.2d at 232.

V. SUMMARY OF ARGUMENT

Under Washington law, there is no fundamental right to a contract with the City of Seattle to provide the *City’s own* garbage collection service. Solid waste collection is not necessarily a private business. Rather, it is a classic governmental activity that is critical to the public health and safety in which state law provides authority for cities to collect solid waste using their own employees. RCW 81.77.020. Under Washington’s restrictive statutes governing garbage collection, the only other two ways to legally haul any type of solid waste (including CDL waste) in Washington are (1) to obtain a certificate of public convenience

and necessity from the WUTC, or (2) to have a contract with a City. RCW 81.77.020, 040.

Seattle operates its own solid waste utility for the collection and disposal of both residential and commercial solid waste under the authority of Washington law, including RCW 35.21.120 and RCW 81.77.020. Seattle fulfills a legitimate public health and safety interest by provide commercial solid waste collection service on behalf of the City in order to achieve more economical service as a whole to commercial generators of solid waste, including enhanced recycling and to assure adequate environmental control over the disposal of commercial solid waste.

Washington case law confirms the expansive nature of municipal authority over solid waste. The collection of garbage is a uniquely municipal function. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 40-41, 873 P.2d 498 (1994). There is no constitutional right to a government contract. *Quinn Construction Co. v. King County Fire Protection Dist. No. 26*, 111 Wn. App. 19, 32, 44 P.3d 865 (2002), *reconsideration denied*. And, a local government can issue a garbage collection contract to only one contractor through negotiation without any requirement for public bidding. *Shaw Disposal Inc., v. Auburn*, 15 Wn. App. 65, 68, 546 P.2d 1236 (1976).

VI. ARGUMENT

A. The trial court properly dismissed Ventenbergs plaintiffs' privileges and immunities claim.

1. The regulation of solid waste collection is a valid exercise of a City's police power in Washington, where the ultimate responsibility for solid waste collection rests with local government.

Washington courts have long upheld the regulation of the collection and disposition of garbage as a valid exercise of a City's police power. *Smith v. Spokane*, 55 Wash. 219, 104 P. 249 (1909). In *Smith*, the court upheld an ordinance making it unlawful for any person other than those authorized by the city to carry garbage through the streets. The plaintiff in *Smith*, just as the Ventenbergs plaintiffs here, challenged the ordinance, arguing that it deprived him of his right to engage in a lawful occupation to earn a livelihood for himself and his family. The court sustained the ordinance, stating that the subject matter of the ordinance was clearly within the City's police power, and that property rights of individuals must therefore be subordinated to the general good. *Id.* at 221.

The *Smith* Court emphatically endorsed broad municipal authority:

But that the removal and destruction of the noxious, unwholesome substances mentioned in these ordinances tends directly to promote the public health, comfort, and welfare *would seem to be beyond question*. If so an ordinance which tends to accomplish these results is a *proper exercise of the police power, and from this power is necessarily implied the duty to determine the means and agencies best adapted to the end in view*. That that object can best be attained by intrusting the work in hand to some responsible

agency under the control of the city, possessing the facilities for carrying it on with dispatch, and with the least possible inconvenience, must be apparent to all.

Id. (emphasis added).

Municipalities in Washington thus have expansive authority to manage and operate their solid waste handling systems as they see fit. Indeed, as the Supreme Court confirmed nearly 60 years after *Smith*, “ordinances conferring the exclusive right to collect garbage and refuse substances upon some department of the city government, or upon a contractor with the city, have almost universally been sustained.” *Spokane v. Carlson*, 73 Wn.2d 76, 79, 436 P.2d 454 (1968), quoting *Smith v. Spokane*, 55 Wash. at 221.

In light of both *Smith v. Spokane* and *Spokane v. Carlson*, the Ventenbergs plaintiffs’ claim that they do not know what the term “city service” means represents a boorish attempt on their part to appear dense in order to obscure a crucial point in this case – that the collection contracts issued by Seattle provide for the municipal solid waste collection service on behalf of Seattle.²

² Section 1 of the commercial collection contracts with both Rabanco and Waste Management begins by emphasizing the fundamental principle that this is the City’s own service for the collection of commercial waste: “The purpose of this contract is to provide for the collection of Commercial Waste *by the City* through this Contract. . . ” CP at 214; 312 (emphasis added).

The contracts Seattle issued for commercial solid waste collection were not aimed at securing garbage collection service for its own buildings but were negotiated for the purpose of providing a City service to all generators of commercial solid waste in Seattle. The responsibility for what happens to the solid waste ultimately remains with the City. In *Weyerhaeuser v. Pierce County*, the Washington Supreme Court reemphasized its holding that the ultimate responsibility for garbage collection rests with local government. Thus there needs to be wide latitude given to local government to best fulfill this responsibility. *Weyerhaeuser, supra* 124 Wn.2d at 40. The *Weyerhaeuser* Court stated:

RCW 70.95.020 provides that while private entities may contract with local government for solid waste handling, the primary responsibility is that of the local government.

Id. The consequence of this principle was then reinforced when the Court concluded that the County retained responsibility for the garbage regardless of who collected it:

Thus, regardless of whether the County deals with a private company, the collection and disposal of solid waste is the County's responsibility.

Id. at 41.

2. Washington law makes no distinction between CDL waste and other types of solid waste.

The Ventenbergs plaintiffs next attempt to distinguish this case from the long history of cases upholding a City's broad police power to manage its solid waste, arguing that CDL Waste is a different type of waste that should be addressed separately. Under Washington law, however, a municipality's broad authority to control "solid waste" applies to all types of solid waste, which in Washington includes "all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, *demolition and construction wastes*, abandoned vehicles or parts thereof, and recyclable materials." RCW 70.95.030(22) (emphasis added).

In fact, in *Spokane v. Carlson*, the Washington Supreme Court confirmed that the courts should not delve too deeply into such arguable distinctions. In that case, the Supreme Court held that an ordinance enacted to control the disposition of waste that is not injurious to the public health is nevertheless a valid use of the City's police power and not unconstitutional. *Spokane v. Carlson*, 73 Wn.2d at 80. The challenge was to a Spokane ordinance that required that the city's own collection system be enforced as the sole legal means for collecting cardboard in the city. The Court reasoned that the control of the disposition of all waste is necessary for the protection of the public health and sanitation:

It is a matter of common knowledge that inorganic refuse is frequently mixed with organic refuse. The legislative body of the city could reasonably determine that the possibility of such mixture renders it advisable that all refuse, whether innocuous in itself or not, be dealt with in a controlled and uniform manner.

Id. at 80-81.

Here, where the legislature has defined “solid waste” to include CDL waste, the trial court properly refused the Ventenbergs plaintiffs’ attempt to rule otherwise. Similarly, the Ventenbergs plaintiffs’ latest claim, that CDL hauling is proprietary, as opposed to all other waste hauling, which is governmental, has no basis in law. It represents a desperate attempt to distinguish this case from the decades of Washington case law that have upheld a municipality’s broad authority to regulate waste as it sees fit. It is not for the courts to decide what constitutes “waste” when the legislature has already defined the term.

3. Washington courts have upheld municipal authority to negotiate exclusive contracts for the regulation of solid waste.

At the trial court level, the plaintiffs attempted to distinguish Seattle’s system of solid waste collection from Spokane’s system in *Spokane v. Carlson* because Spokane uses its own employees to collect the garbage. But the fact that Seattle operates its municipal collection service through municipal collection is irrelevant to the issues raised in this

appeal. RCW 35.21.120 and RCW 81.77.020 both specifically provide for municipal collection by contract as well as by using a city's own employees. Further, the contracts a city chooses to enter into for solid waste collection and processing may be accomplished through direct negotiation with a single contractor (or in Seattle's case – two contractors) without going through any type of public bidding process. In *Shaw Disposal Inc., v. Auburn*, Division I of the Court of Appeals upheld Auburn's right to extend its garbage collection contract with R.S.T. Disposal without competitive bidding. *Shaw Disposal, supra*, 15 Wn. App. at 64. The *Shaw* court held that there was indeed good reason for not requiring Auburn to engage in any public process requirement, 15 Wn. App. at 66, and added:

The collection and disposal of garbage and trash by the city constitutes a valid exercise of the police power and a governmental function which the city may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens.

Shaw Disposal, 15 Wn. App. at 68, quoting *Davis v. City of Santa Ana*, 239 P.2d 656 (Cal. Dist. Ct. App. 1952) (city could let stand a contract for trash collection without competitive bidding).

Shaw Disposal confirmed that, in providing for solid waste collection on behalf of a city, there is no statutory or constitutional

requirement in Washington that a city issue a collection contract through competitive bidding.³ The Washington Attorney General has more than once cited to *Shaw Disposal* as an example of the Washington Courts' affirmation of the principle that "a municipal corporation is not required to award a particular contract through a competitive bidding process unless there is a constitutional, statutory or charter provision requiring that it do so." Wash. AGO 1996 No. 18 at 5, citing *Dalton v. Clarke*, 18 Wn.2d 322, 139 P.2d 291 (1943). Wash. AGO 1984 No. 2 at 3, also cites to both *Dalton* and *Shaw Disposal* for the same proposition.

The Washington Supreme Court relied upon *Shaw Disposal* and its reasoning in a 1994 case holding that Pierce County could not escape responsibility for a landfill by contracting with a private party. *Weyerhaeuser*, 124 Wn.2d at 40. In *Weyerhaeuser*, the Supreme Court cited with approval the *Shaw Disposal* holding that cities do not have to offer garbage collection contracts through bidding rather than negotiation. *Id.*

³ Despite Ventenbergs plaintiffs' attempts to find such requirements, none exists for solid waste collection contracts. *See infra* section C.2.

4. Ventenbergs plaintiffs do not have a fundamental right to obtain a city contract to collect solid waste as Seattle's agent.

By illegally engaging in commercial garbage collection for years without a certificate of public convenience and necessity from the WUTC, and then attacking Seattle's exclusive contracts for providing the City's own commercial collection services, the Ventenbergs plaintiffs actually seek to attack the constitutionality of the State's own regulatory system for garbage collection as set forth in RCW Chapter 81.77.⁴ Their argument seems to be that a city, if it operates a solid waste collection service by contract, must offer city collection contracts to every company that wants one. This argument is not only contrary to the *Shaw Disposal* decision of the Court of Appeals, but is also contrary to the Supreme Court's holding in *Weyerhaeuser* that local governments retain ultimate responsibility for garbage collection and disposal, even if they undertake those responsibilities through contract.

The logical extension of the argument is also that the WUTC would likewise be required to issue a certificate of convenience and necessity to any hauling company that asks for one. Yet, there is no case law whatsoever holding that the WUTC restriction of such certificates to a

⁴ Service on the Attorney General is a jurisdictional requirement to challenging the constitutionality of a statute. RCW 7.24.110.

limited number of companies is not in accord with that agency's regulatory powers or in violation of the Washington Constitution. Upholding the assertion that both the WUTC and any City would have to offer either a "G" certificate or a contract respectively to any company that wanted one would quickly undermine any health and safety oversight the WUTC or city might hope to secure.

Accordingly, the trial court quite properly dismissed Ventenbergs plaintiffs' claim that they have a right to a city collection contract under the privileges and immunities standard as set forth in *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 83 P.3d 419 (January 29, 2004) (*Grant County II*), and under *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) (*Grant County I*). In *Grant County I*, the Supreme Court held that voting on annexations was a fundamental right guaranteed by the Washington Constitution. In *Grant County II*, the Supreme Court reversed its holding on the fundamental nature of voting for annexations. *Grant County II*, 83 P.3d at 429. Since no fundamental right was affected, the court held that "the power is entirely that of the legislature, which may delegate to cities." *Id.*

The legislative scheme for controlling garbage collection in Washington as set out in RCW Chapter 81.77 is just such a permissible

delegation. The cases cited by the plaintiffs regarding the right to pursue “specific private employment” are irrelevant here. Solid waste collection is not merely a private business (like photography, for example); rather, it is a classic governmental activity that is critical to public health and safety. As noted above, Washington courts long ago addressed the constitutional issues of exclusive city collection of solid waste in *Smith v Spokane* and *Spokane v. Carlson*, as well as the issue of negotiated and exclusive garbage collection contracts in *Shaw Disposal* and *Weyerhaeuser*. The Supreme Court’s decision in *Grant County II* provides no new basis for the plaintiffs to challenge the constitutionality of either the Seattle ordinance or the state solid waste statutory scheme, whose basic precepts the City merely adopted in the challenged ordinance. In fact, the effect of *Grant County II* was to pare back the classification of “fundamental rights” the Supreme Court had previously decided. Where the legislature has delegated the responsibility for garbage collection to local governments, there is simply no fundamental right of citizenship that would require Seattle to issue a commercial collection contract to Ventenbergs and any other would-be-hauler.

And even if cities were required to issue garbage collection contracts to provide a city service through competitive bidding, the plaintiffs would still not be able to claim that a fundamental right was

affected. Washington appellate courts have held that there is no constitutionally protected property interest in being awarded a government contract. *Quinn Construction Co. v. King County Fire Protection Dist. No. 26, supra*, 111 Wn. App. at 32. In *Quinn Construction*, a second bidder on a government construction contract sought to enjoin a contract offered to a tardy bidder whose bid was lower. The Court of Appeals affirmed the trial court's denial of injunctive relief, holding that the plaintiff would have had no property interest, even if it had been the low bidder. *Id.* The bidding requirements are instead a protection to ensure frugal government operation, not to protect any private interests. The Court of Appeals concluded its discussion by holding as follows: "Accordingly, we hold that a bidder on a public works contract has *no constitutionally protected property interest in being awarded a government contract.*" *Id.* (emphasis added).⁵

In addition, the Ninth Circuit Court of Appeals has rejected the same type of constitutional claim that there is an interstate commerce right to collect solid waste. *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir.1995). In *Kleenwell*,

⁵ The Ventenbergs plaintiffs' failure to acknowledge any of this pertinent Washington case law in its allegation of a privileges or immunities violation is telling in its absence, especially in light of the law they do cite, which includes law from the Sixth Circuit, Idaho, and Utah. *See infra*, section C.1

the Ninth Circuit affirmed recognition of the strong local governmental interest in regulating garbage collection, a governmental interest which is not restricted by the United States Constitution. Similarly, the United States Supreme Court had long before rejected constitutional challenges to highly restrictive municipal garbage collection contracts, observing that

[o]ne could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community.”

California Reduction Co. v. Sanitary Reduction Works of San Francisco,
199 U.S. 306, 318, 26 S. Ct. 100, 50 L. Ed. 204 (1905).

The Ventenbergs plaintiffs continue to cling to the wrong assumption that the City’s contracts must be “absolutely the only way to accomplish” its health and safety goals. *See, e.g.*, Brief at 24-25. What is required, however, is a *reasonable relationship* to the City’s health and safety goals. For example, the Ventenbergs plaintiffs continue to quote (more than once in their Brief, in fact) Mr. Hoffman’s deposition answer stating that he did not know whether any of the City’s public health and safety goals can be achieved *only* through its contracts with Rabanco and Waste Management. Not only is this reference misleading, in that Mr. Hoffman stated only that he *does not know* whether there are other ways that the City *may* meet its health

and safety goals; but the statement is incorrectly portrayed as an admission that the City violated the constitution.

5. Even if the privileges and immunities clause did apply, the record reflects that Seattle acted reasonably in applying its police power.

As repeatedly emphasized by Washington courts, Seattle is fully responsible for adequately, safely and effectively disposing of its solid waste. It therefore becomes quite evident that Seattle had “reasonable grounds” for contracting with Waste Management and Rabanco, the only two companies legally hauling solid waste in Seattle at the time (Dep. at 123) and the only two companies that managed their own disposal sites (Dep. at 178-179). Seattle’s reasons for deciding to contract with these two companies were directly related to the City’s public health and safety concerns, as shown in the record:

- Q. Mr. Hoffman, can you provide the City’s public health and safety reasons for restricting the market in CDL to two entities in the city of Seattle?
- A. By knowing which companies are collecting the material and where the material goes, the City has a much higher degree of confidence that it’s going to end up in landfills that meet the standards that we want them to meet, and that is the standards for both the Roosevelt landfill by Allied/Rabanco and the Clellam [sic] – or Gillam County landfill by Waste Management.

Public health and safety are issues that are fundamental to the local jurisdictions' exercise of their powers. The whole concept of regulating the collection of solid waste, regardless of its forms, has to deal with the exposure of the public to undue levels of – of risk. This comes out of the City's historic failure to address everything from sewage and sanitation to the collection of garbage and how to deal with dead animals.

And so the local jurisdictions have been granted broad authority in most states to set up systems to pursue those goals. And, quite frankly, materials that are destined for disposal absent some fairly strict degree of control tend to wander to places that they're not supposed to be.

Q. Okay. Any other goals?

A. Well, I think public health and safety is a real good goal.

Q. Well, which specific – you outlined the –

A. Disposal in the wrong places or at unacceptable landfills, illegal dumping, substandard safety procedures or service delivery containers, trucks, things along those lines. We have the ability to document the service, equipment, and standards of the folks who provide services for us because they're under contract with us. We don't have that ability to do it if folks aren't under contract with us.

Dep. at 178: 17 – 180: 2.

Even more specific public health and safety reasons appear throughout the record. First, after the closure of both Seattle landfills in the 1980s, Seattle “had a motivation that future waste would go to a

facility where the outcome would be assured to not be a Superfund site, to be an environmentally-sound landfill.” Dep. at 159:20-23. The Ventenbergs plaintiffs’ allegations that “the City does not mandate where the material is taken or ultimately disposed” (Brief at 7) and that Seattle “does not exert any control over (or even monitor) where CDL is ultimately disposed” (Brief at 9) are both misleading; and the allegation that “the City has no idea where such waste ultimately ends up” is simply false. The record demonstrates that Seattle sought and was provided assurance from Waste Management and Rabanco that the residual CDL waste would go to appropriate landfills in eastern Oregon and eastern Washington. CP at 415, ¶ 9 and CP at 416, ¶ 20⁶; Dep. at 72:12-17 and 74:9-16; CP at 447, ¶¶ 3-4; CP at 989, ¶¶ 3-4.

Second, Seattle wanted to ensure that all CDL material being collected for recycling was in fact being recycled. Seattle had reason to be concerned that some CDL material being collected for recycling was instead either being burned or landfilled, as Mr. Hoffman testified:

[S]taff followed containers of CDL that was supposedly being collected for recycling to a facility down in Tacoma known as Recovery 1, where the material was separated into a variety of

⁶ It should be noted that Mr. Hoffman’s declaration was filed with Seattle’s Motion for Summary Judgment on November 14, 2003, almost one month prior to the taking of his deposition on December 12, 2003.

different waste streams, including a large amount for hog fuel or incineration, which does not qualify as recycling under the City's code, another portion of which was separated and used as alternative daily covers at the landfill, meaning it was going into the landfill, which also does not qualify as recycling under the City's code. So our observations of staff were that a large fraction of what was being collected was being burned or landfilled, neither of which constitute recycling under the City's code.

Dep. at 162:6 – 18.

Third, one of Seattle's goals was to lower rates, again as explained by Mr. Hoffman:

[T]he City had both a short-term and a long-term goal to make sure that the rates charged to the customers were as cost-effective as possible, and when the contracts went into effect, a significant number of dumpster customers received rate reductions, which vary according to what level of service and what size dumpster they were receiving.

Dep. at 163:12 – 18.⁷

The Ventenbergs plaintiffs next argue that “no reasonable ground exists between companies that have contracts to haul CDL and those that do not” (Brief at 24). This allegation could not be further from the truth. Besides the assurances given to Seattle from the contractors that the waste

⁷ Mr. Hoffman then went on to, again, emphasize Seattle's recycling initiatives:

And since this contract has gone into effect, the City has taken the first steps at looking at opportunities for recycling within the commercial sector, including expansion of the small business recycling program that I mentioned to you. So both are still in place.”

Dep. at 163: 19 – 23.

would go to their very own landfills, Rabanco and Waste Management were also the only two companies that had certificates of public convenience and necessity from the WUTC, so they were the only companies legally hauling CDL waste prior to the City taking over commercial collection. Dep. at 123:14-21.⁸ Mr. Ventenbergs and Kendall Trucking, on the other hand, admit doing this work illegally for years. CP at 550, ¶ 3; CP at 95-96, and 100-101 (confirming that neither Ventenbergs nor Kendall Trucking ever had a certificate of public convenience and necessity from the WUTC). There should be no question of Seattle’s “reasonable grounds” for contracting with companies who act legally as opposed to illegally.

Contrary to the Ventenbergs plaintiffs’ allegations, the record reflects that Seattle had considered reasons for restricting the market to two rather than multiple companies. This reasoning was based in part on a review of regulatory schemes in other cities:

We reviewed and evaluated the City of Portland, Oregon’s approach to providing solid waste collection services, which at one point I believe had close to a hundred service providers. What we found there was high levels of confusion among customers, no uniform standards for collection equipment or containers, no uniform standard for the services being provided.

⁸ In fact, even when the challenged ordinance was passed, Seattle was not aware that companies were performing these services illegally. Dep. at 187:17 – 21.

Our determination was that the number should be great enough to promote competition, small enough to establish uniform service delivery standards, and large enough for the companies to achieve economies of scale.

Dep. at 183: 22 – 184-7.

Furthermore, contrary to Ventenbergs plaintiffs' allegations, an additional reason for choosing two service providers instead of one, was to foster competition and "more cost-effective service delivery." Dep. at 121. This is precisely the argument the Ventenbergs plaintiffs make for opening the market to *all* potential haulers. Since there is no constitutional or statutory requirement to do so, Seattle's goal of fostering competition proves, at the very least, that Seattle did not act unreasonably.

B. The trial court properly held that there can be no impairment of a contract where there is no valid contract and no reasonable expectation of a valid contract.

1. Ventenbergs plaintiffs never had authority, pursuant to the requirements of Ch. 81.77 RCW, to haul solid waste in Seattle.

Ch. 81.77 RCW sets forth the requirements that solid waste collection companies must meet in order to haul solid waste for compensation. In order to haul solid waste, a solid waste collection company is required to obtain from the WUTC a "certificate declaring that public convenience and necessity require such operation." RCW 81.77.040. The statute only exempts from this requirement any "company

under a contract of solid waste disposal with any city or town” as well as “any city or town which itself undertakes the disposal of solid waste.” RCW 81.77.020.

2. Because any contracts between the plaintiffs were illegal, the plaintiffs had no valid expectation of contractual rights to form a basis for an impairment of contract claim.

Any contract between the Ventenbergs plaintiffs was and is subject to the state legislation and regulation limiting the authority to haul solid waste, including CDL, in the City of Seattle. Therefore, the Seattle code amendment did not substantially impair any valid contractual relationship between the parties, and certainly did not unconstitutionally impair the obligations of such a contract. *See Margola Associates v. Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993).

Any contract the Ventenbergs plaintiffs entered into for hauling CDL in Seattle would have been a violation of State law both before and after the passage of Seattle’s clarifying ordinance. A contract entered into in violation of law is invalid. *Mincks v. Everett*, 4 Wn. App. 68, 72, 480 P.2d 230 (1971). Because the Ventenbergs plaintiffs could not meet the first prong of the impairment of contracts test, this cause of action was properly dismissed.

Ventenbergs plaintiffs next contend that, because the clarifying Seattle ordinance they challenge did not become effective until November 2002, the ordinance impaired their contracts between April 1, 2001 and November 2002. Again, the Ventenbergs plaintiffs fail to understand state law. Under Washington state law, there are only three ways that a solid waste collection business may operate: (1) obtain a certificate of public convenience and necessity (“G” certificate) from the WUTC, (2) have a contract with the City, or (3) be an employee of a City that has chosen to undertake the disposal of solid waste itself. RCW 81.77.020, 040. The timing is irrelevant.⁹ At no time did the trucking plaintiffs have the authority to haul solid waste. Therefore, they never had a legally valid contract, nor did they have any expectation of obtaining such a contract.

The *Birkenwald* case cited by the Ventenbergs plaintiffs is distinguishable in at least two significant aspects. *Birkenwald Distrib. v. Heublein, Inc.*, 55 Wn. App. 1, 5-6, 776 P.2d 721 (1989). First, the oral contract in *Birkenwald* was not based on a continuing violation of existing state law. On the contrary, the parties in that case had a valid contract that

⁹ As the court correctly held, any assertions to the contrary are a red herring. The fact that there was no city ordinance making it illegal to haul CDL Waste in Seattle between April 1, 2001 and November 2002 is irrelevant, because state statutes already made it illegal in the absence of affirmative authority from the WUTC or the City to haul waste. RCW 81.77.020, 040. See Appendix A.

preexisted the legislation. Second, the regulation that would have impaired the contract in *Birkenwald* was not foreseeable when the parties contracted. *Id.* at 7-8. Here, by contrast, Washington law (RCW 81.77 and RCW 35.21) specifically sets out the options of city regulation of solid waste. And here, the Ventenbergs plaintiffs cannot even meet the threshold requirement that a valid contractual expectation was impaired. Without having a “G” certificate from the WUTC, their actions had always been illegal. The trial court correctly dismissed the Ventenbergs plaintiffs’ impairment of contracts claim.

C. Washington statutory and case law provides broad legislative authority for municipalities to control solid waste disposal, which includes contracting with two companies.

1. Idaho and Utah cases both are inapposite and demonstrate the underlying weakness of Ventenbergs plaintiffs’ argument.

In their motion for summary judgment and in their responses to defendants’ motions for summary judgment at the trial court level, the Ventenbergs plaintiffs prominently cited an Idaho case in which the Supreme Court of Idaho had found that a City did not have power to grant an exclusive solid waste franchise. On rehearing, however, the Idaho Supreme Court reversed itself last February, and instead affirmed the district court’s ruling in favor of the city. *Plummer v. City of Fruitland*, 87

P.3d 297 (Idaho, February 27, 2004). On rehearing, the Idaho Supreme Court held that the city's regulation of sanitation by the granting of an exclusive solid waste collection franchise was a constitutionally derived exercise of police power, which did not conflict with general laws of the state of Idaho. *Id.*

No longer able to cite the Idaho case, the Ventenbergs plaintiffs have now looked farther afield to Utah. They now affirmatively ignore the Idaho decision and cite a Utah case from 1975, which allegedly supports their argument that Seattle exceeded its legislative authority in Washington. *Parker v. Provo City Corporation*, 543 P.2d 769 (Utah 1975). This newly found Utah case is as irrelevant to this appeal as the *Plummer* case was. It underscores the Ventenbergs plaintiffs' need to reach beyond Washington case law, statutes, and history. In *Parker*, the challenged ordinance made a "definite distinction between garbage and waste" in its definition section. *Parker*, 543 P.2d at 770. The Supreme Court of Utah found that the challenged ordinance was not reasonably related to the public health because there was "no showing that the material collected or the method of hauling is, in any way, detrimental to the public health." *Id.* Whereas in Utah, courts and legislatures distinguish between waste that is deleterious to the public health and waste that is not, Washington courts have specifically held that the regulation of

all waste, even waste that may not necessarily be injurious to the public health, is nevertheless a valid use of a City's police power. *Spokane v. Carlson*, 73 Wn.2d at 80-81; *See also supra* Section A.2, pages 19-20. Furthermore, as discussed above, the record in this case reflects more than a reasonable relation between the City's actions and public health and safety. *See supra* section A.5.

Similarly, the Ventenbergs plaintiffs' argument that express authority was required for the City to enter into its contracts with Rabanco and Waste Management ignores Washington law. Again, unlike Utah or Idaho, in Washington, courts have expressly acknowledged and upheld cities' authority to enter into exclusive contracts for solid waste collection and disposal without competitive bidding. *Shaw Disposal*, 15 Wn. App. at 68; *Spokane v. Carlson*, 73 Wn.2d at 79. Moreover, in Washington, municipal corporations have authority not only to those powers expressly granted, but also to those powers "necessarily or fairly implied in or incident to the powers expressly granted." *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 692, 743 P2d 793 (1987). It is undisputed that in Washington, a city has the authority to enter into contracts for the collection and disposal of solid waste. RCW 81.77.020. Fairly implied in or incident to this power is the authority to grant "exclusive collection and disposal privileges to one or more persons by contract." *Shaw Disposal*,

15 Wn. App. at 68. In fact, the Washington Supreme Court has specifically stated that “the duty to determine the means and agencies” of solid waste disposal is “necessarily implied” from a City’s police power. *Smith v. Spokane*, 55 Wash. at 221.

2. **Ventenbergs plaintiffs’ analysis of Ch. 35.21 RCW is flawed**

Not finding any bidding requirements for entering into contracts for solid waste hauling, Ventenbergs plaintiffs seek to incorporate the requirements for solid waste handling *systems* and impose these requirements on contracts for solid waste hauling. Such an interpretation not only goes against logic but is contrary to the rules of statutory construction. Where a statute is unambiguous, the court should assume the legislature means what it says and should not engage in statutory construction past the plain meaning of the words. *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999).

RCW 35.21.120 provides in part that a “city or town may award contracts for any service related to solid waste hauling including contracts entered into under RCW 35.21.152.” (Emphasis added). Ventenbergs plaintiffs argue that this language should be interpreted to mean that every contract (even those not entered into under RCW 35.21.152) must satisfy the requirements of RCW 35.21.156. RCW 35.21.152, like RCW

35.21.156, provides authority to cities and towns related to solid waste handling facilities. If RCW 35.21.120 were intended, however, to apply only to contracts pursuant to RCW 35.21.152, as Ventenbergs plaintiffs' theory of construction suggests, then the term "including" in RCW 35.21.120 would be unnecessary, meaningless and superfluous.

In fact, if the term "including" has any reason to exist in RCW 35.21.120, it is to *distinguish* between those contracts entered into under RCW 35.21.152 (i.e., construct, operate, and design contracts for which the bidding requirements of RCW 35.21.156 apply), and hauling contracts such as those being challenged in this case, for which no statutory bidding process is required. Ventenbergs plaintiffs' argument is illogical and contrary to normal rules of statutory construction.

Ventenbergs plaintiffs next argue that, because RCW 35.21.120, 35.21.152, and 35.21.156 each refer to "solid waste handling systems," then the requirements of RCW 35.21.156 must be met when awarding a contract for solid waste hauling. Ventenbergs plaintiffs' theory is that the phrase "solid waste handling systems," is a common link that somehow necessitates incorporation of the requirements of RCW 35.21.156 into all contracts for which RCW 35.21.120 grants legislative authority. However, a review of legislative history makes it quite clear that RCW

35.21.152 is a grant of legislative authority that has nothing to do with city contracts for solid waste hauling, and it was certainly not intended to impose requirements on city contracts for solid waste hauling. Moreover, a review of the legislative history of RCW 35.21.156 makes it quite evident that the bidding requirements of this section apply to contracts for design, construction, or operation of such facilities, rather than the hauling contracts being challenged in this case. In fact, before a 1989 amendment, RCW 35.21.152 authorized cities “to enter into agreements providing for the maintenance and operation of systems and plants for the processing and conversion of solid waste.” In 1989, certain amendments were made to Washington statutes relating to solid waste pursuant to House Bill 1568, the reasons for which, according to the House Bill Summary, was “to clarify local government’s authority to manage and procure services for solid waste facilities.”¹⁰

The fact that House Bill 1568 changed the language of RCW 35.21.152 from “systems and plants for the processing and conversion of solid waste” to “solid waste handling systems, plants, sites, or other facilities,” did not expand this section to incorporate all solid waste contracts, such as the hauling contracts, authorized in RCW 35.21.120.

¹⁰ House Bill Analysis, HB 1568, (attached hereto as Appendix B-1).

Rather, the change was a clarifying measure to remove the potential for precisely the type of argument Ventenbergs plaintiffs try to make – “challenges to a government activity. . .on the grounds that the local government lacked the precise authority for the type of action taken..”¹¹

Ventenbergs plaintiffs’ argument that RCW 35.21.156 “requires reference” to RCW 35.21.120 and 35.21.152 is not credible. Again, it is quite clear from the legislative history of RCW 35.21.156 that this section applies to design, construction, and operation contracts for solid waste facilities. Prior to the 1989 amendments, this section was codified under RCW 35.92.024, and gave cities and towns authority “to contract with one or more private vendors for one or more of the design, construction, or operation function of systems and plants for solid waste handling.” The older version had confirmed that “[c]ontracts shall be for *facilities* that are in substantial compliance with the solid waste management plans prepared pursuant to chapter 70.95 RCW.” RCW 35.92.024 (emphasis added).

Contrary to Ventenbergs plaintiffs’ argument, nothing in RCW 35.21 *requires* a city to utilize the vendor selection procedures of RCW

¹¹ Local Government Solid Waste Facilities and Services Procurement Bill, Summary of Problems and Solutions, (attached hereto as Appendix B-2 – B-4). This summary confirms that at least one reason for the amendments was to clear up confusion: “The statutes related to the *various processes and services* covered by the term “solid waste handling” are located across several RCW chapters.” *Id.* at B-2 (emphasis added).

35.21.156. Rather, the statute was amended and recodified in order to clarify the alternative procurement procedure available to cities and towns:

The alternative procurement process set forth in RCW 35.92.024 (now recodified in Chapter 35.21 RCW) and RCW 36.58.090 is amended to permit a municipality to: request qualifications statements or proposals before it commits itself to build a facility; and request detailed requests for proposals from vendors after receiving qualifications statements or to request proposals directly.¹²

This change liberalized local government's authority to use the negotiated bid process as an alternative to two different competitive bid processes for design and construction contracts, where more than surface qualifications of a preferred vendor is needed, in order to better "manage and procure services for solid waste facilities."¹³ There is certainly nothing in the legislative history to suggest that this bill was intended to add new bidding requirements for hauling contracts that had never previously required any type of bidding. In fact, the history suggests quite the opposite – the amendments were made "to provide local governments with *greater flexibility* to procure solid waste facilities and services."¹⁴ As the trial court properly ruled, Seattle did not exceed its authority in executing its

¹² Proposed Amendments to Local Government Solid Waste Facilities and Services Procurement Laws, Summary, (attached as Appendix B-5 - B-6) at B-6.

¹³ Appendix B-1; Appendix B-3 – B-4.

¹⁴ Appendix B-1 (emphasis added).

commercial contracts for solid waste hauling with Rabanco and Waste Management, because Chapter 35.21 RCW imposes no bidding requirements for such contracts.

D. Ventenbergs Plaintiffs’ “takings” argument is neither grounded in fact or law.

Ventenbergs plaintiffs last argue that, with respect to “residential CDL,” Seattle’s action constitutes a “taking” of Ronald Haider’s property.¹⁵ There is no evidence in the record from which to conclude that Haider owns any residential CDL waste at any time. Nor is there evidence that Haider either sold CDL to Ventenbergs or gave it to him for free. In fact, there is extensive evidence in the form of contract documents and receipts that Haider *paid* Ventenbergs to haul the CDL away. It is that hauling of solid waste without either a “G” certificate from the WUTC or without a contract with the City of Seattle that is illegal under Washington law.

¹⁵ It should be noted that no such claim was made in either of Ventenbergs plaintiffs’ two filed complaints in this matter. The complaints relate only to the City’s actions taken in reasserting municipal control over *commercial* solid waste. In fact, in their own brief, plaintiffs state that they “have not challenged the City’s regulation of residential waste.” (Brief, page 5). As the trial court issued no ruling on this takings issue, because the issue was not properly before that court, the issue is not properly before this court. In fact, the trial court denied the Seattle Defendants’ motion for injunctive relief, which is presumably the basis for plaintiffs to have argued the “takings” issue in their subsequent memoranda. Because the City’s regulation of residential waste is not being challenged, and because the plaintiffs never pled a cause of action under article 1, section 16 of the Washington Constitution, the Court of Appeals should not consider this issue on appeal.

VII. CONCLUSION

The Washington Supreme Court has already addressed the issue of constitutional authority to have an exclusive city solid waste collection system in both *Smith v. Spokane* and *Spokane v. Carlson*. The Ninth Circuit has already addressed the federal constitutional issues of exclusive municipal solid waste collection in *Kleenwell*. The Washington Court of Appeals, the Washington Supreme Court and the Washington Attorney General have already addressed the right of cities to negotiate rather than bid out exclusive solid waste collection contracts in *Shaw Disposal*, *Weyerhaeuser* and AGO 1996 No. 18, respectively. *Grant County II* did not in any way overrule those prior cases. In fact, *Grant County II* pared back the previous findings of “fundamental rights” by the same court in *Grant County I*. In sum, the Ventenbergs plaintiffs have no fundamental right to receive a contract from the City of Seattle to conduct the City’s own solid waste collection service.

Even if it could somehow be argued that the Ventenbergs plaintiffs had some constitutional right to be considered for a City contract, Seattle had valid environmental (both disposal protection and recycling advancement) and economic reasons for contracting with Rabanco and Waste Management. Given those concerns, it is inconceivable that Seattle would be forced by any reading of either the Washington Constitution or Washington statutes to contract with companies who have demonstrated a

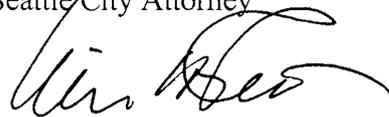
continuing determination to flout Washington law, when the City's primary purpose is to control the environmental handling of commercial solid waste.

Unlike food distribution,¹⁶ the Washington legislature specifically provides that local government is primarily responsible for solid waste handling. RCW 70.95.020. The Washington courts have confirmed that local governments have this responsibility,¹⁷ the Ninth Circuit has recognized the strong governmental interest in regulating garbage collection,¹⁸ and indeed, the United States Supreme Court has declared and determined that garbage collection is "intrinsically local in nature."¹⁹

DATED this 5th day of August, 2004.

THOMAS A. CARR
Seattle City Attorney

By



William H. Patton, WSBA #5771
Assistant City Attorney
Attorney for Seattle Defendants

¹⁶ During oral argument, Ventenbergs plaintiffs' counsel argued that, if the Court finds that garbage collection is a City service for which Seattle is ultimately responsible, then the "logical extension" would be that Seattle would also be allowed to restrict food distribution in Seattle to only one company, such as QFC. The Court disagreed, noting that "food distribution is not a City service. Garbage is a city service." RP at 97.

¹⁷ See, e.g., *Weyerhaeuser*, 124 Wn.2d at 40-41.

¹⁸ *Kleenwell*, 48 F.3d at 398.

¹⁹ *California Reduction Co.*, 199 U.S. at 318.

APPENDIX A

Douglas B. McProom

JUDGE OF THE SUPERIOR COURT
SEATTLE, WASHINGTON 98104-2381

DEPARTMENT TWENTY-TWO

February 23, 2004

VIA FACSIMILE

William Maurer 341-9311

Polly McNeill 281-9882

David W. Wiley 628-6611

Will Patton 684-8284

Dear Counsel:

Re: *Ventenbergs v. City of Seattle, et al; 03-2-25260-3S*

The explanation of my rulings on the motions of the parties and the request for injunctive relief is as follows:

1. Constitutional Issues

The plaintiffs' claim that the modification of the definition of "City's Waste" to include CDL Waste [SMC 21.36.012(5)] by the Seattle City Council in October, 2002 was state action which operated to discriminate against them without reasonable basis, interfered with their rights to contract with one another (and others similarly situated) and constituted governmental interference with their fundamental right to follow their chosen professions.

Mr. Ventenbergs ability to follow his chosen profession was particularly interfered because the ordinances [SMC 21.36.030 and SMC 21.36.012(5)] had the effect of restricting CDL Waste hauling to Rabanco and Waste Management put him out of the business of hauling CDL waste in the City.

The effect on Mr. Haider is no so dramatic, as he can, presumably, continue in the contracting profcssion utilizing haulers other than Mr. Ventenbergs.

As I have previously indicated, I find that the ordinances did not interfere with a valid contract between Mr. Ventenbergs and Mr. Haider. RCW 81.77.040 requires that a

hauler of solid waste (including CDL waste) have a certificate of convenience and necessity issued by the WUTC before he can "operate for the hauling of solid waste". Mr. Ventenbergs did not have and does not have this certificate.

When the City signed the April 2001 contracts with Rabanco and Waste Management, which did not specifically include hauling CDL waste in the contract or enabling ordinance, no "window" was created for non-certified haulers to collect this type of waste. RCW 81.77 still pertained and it remained a gross misdemeanor (RCW 81.77.090) for a non-certified hauler who did not have a contract with the City, to operate (RCW 81.77.020).

The fact that enforcement action pertaining to the WUTC certificate requirement was suspended after the City signed contracts with Rabanco and Waste Management in April 2001, did not, obviously, operate to repeal RCW 81.77 in the city. Thus, performance on the contract between Mr. Ventenbergs (who had neither certificate nor a contract with the city) and Mr. Haider during the April 2001 to October 2002 period, and thereafter, was in violation of state law and their contract for this performance was void as against public policy.

The plaintiffs' argument that the Seattle ordinances are in conflict with state law if the plaintiffs are held to the requirements of RCW 81.77.020 fails because when viewing RCW 81.77 as a whole, it is apparent that the WUTC would not issue a certificate to a hauler to do business in a city which had contracted with other haulers to transport solid waste. Although this may appear to be a "catch 22", it is not because the statute fulfills its' legitimate health and safety purpose of insuring regulation of all solid waste haulers by either the WUTC or the city.

It is conceded that the right to pursue some specific professions (i.e. solid waste hauling) may be infringed upon by the City if the purpose of the infringement is to achieve goals consistent with the public welfare. The assertion that waste collection is a city service involving the public welfare is not contested. The city may "municipalize" or contract for such service pursuant to its' police power.

The plaintiffs' principal argument is that no legitimate public goal is served when a city contracting for the service, restricts the market by choosing, without competitive bidding, one hauler over another-when the excluded hauler is subject to, and will comply with the same health and safety regulations as the contracted hauler.

This argument, while clearly applicable in cases involving attempted regulation of businesses which are not deemed city services, cannot hold up in the face of the overwhelming authority that solid waste haulage is a city function, directly impacting the public health and welfare, the contracting for which need not be the subject of competitive bidding.

Because in this state, solid waste collection is viewed by the courts as a government function which the government can control either by performing the function

itself or by contracting to have it done without a competitive bidding process (as opposed to Idaho), I have held that hauling solid waste within the City of Seattle is not a fundamental right to which the privileges and immunity clause would pertain.

Thus, while by contracting with two hauling companies and excluding another, the City did "play favorites" (legitimately or otherwise), the plaintiffs are not entitled to relief under the privileges and immunities clause.

The plaintiffs also allege that the City, by not entertaining a bidding process for hauling CDL waste violated RCW35.21.156. This statute sets forth requirements for bidding relating only to construction of capital facilities for waste transfer and disposal, not hauling. RCW 35.21.120 applies to "any service related to solid waste handling (including hauling)" and requires no such competitive process.

Because I have held that the plaintiffs' have not been deprived of fundamental rights under the privileges and immunities clause of the Washington State Constitution, and that they have had no legitimate contract right interfered with, it is not necessary to address the issue of whether the city had a reasonable basis for excluding Kendall Trucking from consideration when it awarded the contracts to Waste Management and Rabanco and enacted the ordinance which put CDL waste within the purview of that contract.

2. Injunctive Relief

The defendant City requests a permanent injunction against the plaintiffs but has filed no briefing on that issue. The court lacks knowledge on whether or not it has authority to enjoin parties from violating state law or city ordinances. It would seem that such an injunction would improperly shift enforcement responsibilities from the appropriate city or state law enforcement agency to the court.

For those reasons, the City's request for a permanent injunction was denied.

Very Truly Yours,



JUDGE DOUGLAS MCBROOM

APPENDIX B

Appropriation: _____
Revenue: _____
Fiscal Note: _____

HOUSE BILL ANALYSIS

HB 1568

BY Representatives Cooper, D. Sommers, Ebersole, Sprengle, May,
Pruitt and Ferguson

Revising requirements regarding procurement and solid waste
disposal.

House Committee on Environmental Affairs

House Staff: Rick Anderson (786-7114)

BACKGROUND:

Local governments sometimes have problems procuring solid waste services and facilities due to technical inconsistencies and uncertainties in current procurement statutes. Problems experienced by local governments include difficulty in contracting with vendors, letting bids, and obtaining bond financing.

The Seattle Chamber of Commerce's Solid Waste Task Force has worked for nearly two years to develop legislation to provide local governments with greater flexibility to procure solid waste facilities and services. The Chamber's Solid Waste Task Force consists of representatives from cities, counties, recyclers, waste haulers, attorneys, and disposal service vendors.

SUMMARY:

The bill makes a number of technical changes to clarify local government's authority to manage and procure services for solid waste facilities. Most of these changes relate to clarifying local government's authority to use the negotiated bid process as an alternative to the competitive bid process.

Two provisions in the legislation do expand local governments authority to manage and procure solid waste services. 1) Cities are authorized to use their eminent domain power to condemn solid waste processing and conversion plants. 2) Second, Third, and Fourth class cities are authorized to enter into contracts for periods greater than five years.

Fiscal Note: Not requested.

2/09/89

LOCAL GOVERNMENT SOLID WASTE FACILITIES
AND SERVICES PROCUREMENT BILL

SUMMARY OF PROBLEMS AND SOLUTIONS

Under current procurement law, local governments encounter a number of practical and technical problems in procuring solid waste handling facilities and services. King, Pierce, Clark, Spokane and Thurston counties have all encountered difficulty under the current statutes. The Local Government Solid Waste Facilities and Services Procurement Bill (the "Bill") was developed to address these problems by a Greater Seattle Chamber of Commerce Task Force composed of people on all sides of the table in solid waste procurements: cities, counties, haulers, recyclers and disposal service vendors. The Bill does not address substantive policy issues such as disposal priorities, control over recyclables, county powers over collection of solid waste or the relationship between counties and cities in solid waste planning. Instead, the Bill cleans up a number of inconsistencies in current statutes, clarifies the apparent intent of previous legislatures in several respects and makes the solid waste procurement process work more smoothly.

The laws amended relate to a range of solid waste handling services the private sector provides local governments including collection, recycling, transfer station operation, landfilling and resource recovery. The Bill affects all services equally and does not favor any particular form of solid waste handling. The Bill affects city and county statutes in substantially the same way, except that it does not broaden county powers over garbage collection.

A separate section-by-section analysis has been prepared that details every change contained in the Bill. Here are a few examples of specific problems local governments encounter under current law that are resolved by the Bill:

1. The statutes related to the various processes and services covered by the term "solid waste handling" are located across several RCW chapters. In RCW 35.21.120 cities and towns are given express authority to provide a "system of garbage collection and disposal." Later in that section cities and towns are authorized to enter into "contracts for solid waste handling." RCW 35.21.152 permits cities to construct systems and plants for solid waste "processing and conversion." RCW 35.92.020 grants cities authority to build and maintain "systems and

plants for garbage and refuse collection and disposal." RCW 35.92.024 enables cities to contract with vendors for the construction and operation of "systems and plants for solid waste handling." (Emphasis added.)

Problem: None of these assorted (and possibly conflicting) terms are defined.

Solution: In the Bill the term "solid waste handling" as defined in RCW 70.95.030 is used throughout the procurement statutes, thus removing the potential for challenges to a government activity or procurements on the grounds that the local government lacked the precise authority for the type of action taken.

2. Cities and counties routinely charge rates for the solid waste services they provide or contract for.

Problem: In contrast with many other utility statutes, counties have no express authority for that rate setting.

Solution: The Bill grants counties express authority to charge or enter into agreements to set rates for the solid waste services they directly or indirectly provide.

3. Under RCW 35.92.024 and RCW 35.58.090 local governments issue "requests for qualifications" for solid waste services and after receiving qualifications statements, pick the most qualified vendor and commence negotiations for a contract. Those negotiations continue until they are successfully concluded or until the local government terminates those negotiations and begins discussions with the next-ranked vendor.

Problem: Local governments need to know more than surface qualifications before selecting a preferred vendor; they need to know the specific equipment, personnel, methods, sites and costs proposed. To select a vendor before nailing down these basics puts local governments at a bargaining disadvantage. Currently municipalities use statutory language concerning "discussions regarding proposals" to obtain key details before picking a service contractor. Many

municipal lawyers would prefer a clearer statutory basis for this procedure.

Solution: The Bill gives local governments express authority to issue requests for qualifications, requests for proposals, or both, before picking a preferred vendor for negotiations.

These are a few of the practical and technical problems the Bill is designed to address. Please feel free to contact the following people for additional details:

Hugh Spitzer, 447-4400
Nyle Barnes, 624-3600
Pat Dunn, 447-0900 (754-3290 in Olympia)
Duane Woods, 447-0900
Mike Coan, 461-7232 (754-3290 in Olympia)
Aliza Allen, 447-4400

2886R

1/19
5:19pm

Bonnie

1/18/89

cl will discuss with you later - cl give a copy to Steve
Lundin -
w/ie
probably be before Envir. Affairs.
Pat Dunn

PROPOSED AMENDMENTS
TO LOCAL GOVERNMENT SOLID WASTE FACILITIES AND
SERVICES PROCUREMENT LAWS

SUMMARY

As part of the May, 1988, Report issued by the Solid Waste Task Force of the Greater Seattle Chamber of Commerce, the Legal and Financial Subcommittee of that Task Force recommended that Washington's solid waste facilities and services procurement law be amended to clarify that law and to provide municipalities greater flexibility in the procurement of solid waste handling contracts. The 1989 proposed amendments are meant to achieve these objectives.

First, the solid waste procurement laws are clarified and simplified in a number of ways:

- ° For cities and towns, RCW 35.92.022 is consolidated with and replaced by RCW 35.21.152, which, as amended, provides a more logical presentation of city and town authority over solid waste handling;
- ° RCW 35.92.024 is amended to clarify the alternative procurement procedure available to cities and towns and is recodified in Chapter 35.21 RCW, the chapter that includes general powers for cities and towns;
- ° For counties, RCW 36.58.040 is amended to provide clearer authority to counties for solid waste procurements; in addition, RCW 36.58.090 is amended to clarify the existing alternative procurement procedure available to counties;
- ° RCW 35.21.120 and 36.58.040 are revised to clarify that a put-or-pay provision is not required in solid waste handling contracts;
- ° The amendments expressly state that the procurement processes described in Chapters 35.21 and 39.34 RCW and RCW 36.58.090 are alternatives to competitive bidding methods;
- ° The amendments give municipalities express authority to set rates and charges for their own solid waste handling systems or to enter into agreements that set rates or charges for those systems owned by private or other public parties; and

- ° RCW 35.23.353 is repealed because it provides second, third and fourth class cities and towns no authority additional to that granted in Chapter 35.21 RCW and the repeal of the five-year contract length limitation provides second, third and fourth class cities and towns authority that is consistent with the authority of those cities and towns under other statutes and the authority of first class cities.

Second, the amendments are designed to give municipalities greater flexibility in solid waste handling:

- ° Several sections are amended to provide a more thorough description of the existing authority of municipalities. For example, the terms "facility" and "site" are added throughout to clarify that those solid waste disposal sites and solid waste facilities that might not qualify as a "system" or "plant" are included within the scope of the section; the term "solid waste handling" is used throughout to make clear the authority of cities, towns and counties over the functions included in that term as defined in RCW 70.95.030, although counties are not given authority over the collection of solid waste; and
- ° The alternative procurement process set forth in RCW 35.92.024 (now recodified in Chapter 35.21 RCW) and RCW 36.58.090 is amended to permit a municipality to: request qualifications statements or proposals before it commits itself to build a facility; and request detailed requests for proposals from vendors after receiving qualifications statements or to request proposals directly.

4 9 4 8 s

DECLARATION OF SERVICE

I, HAZEL HARALSON, declare:

1. I am not party in this action. I reside in the State of Washington and am employed by the Seattle City Attorney’s Office in Seattle, Washington.
2. On August 5, 2004, a true copy of the foregoing “Amended Brief of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke” was hand-delivered to:

WILLIAM R. MAURER
JEANETTE M. PETERSEN
CHARITY OSBORN
Institute for Justice, Washington Chapter
811 First Avenue, Suite 625
Seattle, WA 98104.

3. On August 5, 2004, a true copy of the foregoing “Amended Brief of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke” was delivered via legal messenger to the following parties:

POLLY MCNEILL
Summit Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682

DAVID W.WILEY
DANA A. FERESTIEN
Williams, Kastner & Biggs, PLLC
Two Union Square, Suite 4100
Seattle, WA 98111-3926.

2004 AUG 5 11:13 AM
CLERK OF COURT
SUPERIOR COURT
CLERK OF COURT

4. On August 5, 2004, a true copy of the foregoing “Amended Brief of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke” was sent via U. S. Mail, first class, postage prepaid, to:

ANDREW KENEFICK
Waste Management of Washington, Inc.
801 Second Avenue, Suite 614
Seattle, WA 98104-1599

JAMES K. SELLS
Ryan Sells Uptegraft, Inc., P.S.
9657 Levin Rd. NW, Suite 240
Silverdale, WA 98383

5. I declare under penalty of perjury that the foregoing is true and correct.



HAZEL HARALSON