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STATE OF WASHINGTON

No. 76954-1
(Court of Appeals No. 53920-5-I)

IN THE SUPREME COURT
OF 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.

**SEATTLE'S ANSWER TO AMICUS CURIAE MEMORANDUM
OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON**

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TABLE OF CONTENTS

Page(s)

I.	INTRODUCTION.....	1
II.	ARGUMENT.....	1
	A. BIAW challenges the constitutionality of a state law, but has failed to follow jurisdictional requirements for doing so.....	1
	B. Washington law includes CDL waste in its definition of solid waste, and Ventenbergs' hauling of CDL was always illegal under Ch. 81.77 RCW.....	2
	C. BIAW's analogy to WUTC deregulation in the motor carrier of household goods industry may be arguments for suggesting legislative changes to state law, but the law governing CDL has not changed.....	3
	D. BIAW is misguided in its attempt to distinguish this case from the long line of Washington cases upholding the collection and disposal of garbage as a valid exercise of a municipal government's police power.....	5
	E. There is no fundamental right to seek a municipal contract to haul solid waste.....	6
	F. Under the "reasonable relationship" test, the City's contracts need not be 'absolutely the only way' to accomplish the City's goals.....	7
III.	CONCLUSION.....	10

TABLE OF AUTHORITIES

Page(s)

CASES

AGG Enterprises v. Washington County,
281 F.3d 1324 (9th Cir. 2002).....4

Bellevue v. Lorang,
140 Wn.2d 19, 992 P.2d 496 (2000).....8

*California Reduction Co. v. Sanitary Reduction Works
of San Francisco*, 199 U.S. 306, 26 S. Ct. 100,
50 L. Ed. 204 (1905).....10

*Grant County Fire Protection District No. 5 v.
City of Moses Lake*, 150 Wn.2d 791,
83 P.3d 419 (2004).....7

*Kleenwell Biohazard Waste and
General Ecology Consultants, Inc. v. Nelson*,
48 F.3d 391 (9th Cir.1995).....10

*Quinn Construction Co. v. King County Fire
Protection Dist. No. 26*, 111 Wn. App. 19,
44 P.3d 865 (Div. I, 2002),
reconsideration denied.....6

Shaw Disposal Inc., v. Auburn,
15 Wn. App. 65, 546 P.2d 1236 (1976).....7

Smith v. Spokane,
55 Wash. 219, 104 P. 249 (1909).....5

Spokane v. Carlson,
73 Wn.2d 76, 436 P.2d 454 (1968).....4, 5

Weyerhaeuser v. Pierce County,
124 Wn.2d 25, 873 P.2d 498 (1994).....4, 6, 10

WASHINGTON STATUTES

RCW 7.24.110.....1
RCW 70.95.020.....4
RCW 70.95.030(22).....2
RCW 81.77.020.....1, 3, 6, 7
RCW 81.77.040.....3, 7

I. INTRODUCTION

Underlying Ventenbergs' argument in this case has always been an implicit attack on the constitutionality of the State's regulatory system for garbage collection as set forth in RCW Chapter 81.77. The Building Industry Association of Washington's (BIAW) amicus brief makes this attack explicit by specifically challenging the constitutionality of RCW 81.77.020.¹

This Court and other Washington courts, however, have repeatedly upheld the statutory system for garbage collection. BIAW can bring no new arguments to an issue that has been addressed and conclusively resolved.

II. ARGUMENT

A. BIAW challenges the constitutionality of a state law, but has failed to follow jurisdictional requirements for doing so.

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

¹ Amicus Curiae Memorandum of BIAW, at 2 (Issue 1).

never been a party in this case, nor has service been made on the Attorney General. BIAW's arguments must be rejected for that reason alone.

B. Washington law includes CDL waste in its definition of solid waste, and Ventenbergs' hauling of CDL was always illegal under Ch. 81.77 RCW.

BIAW argues that, before the City action being challenged, "contractors like Haider freely contracted with Ventenbergs to haul their private CDL waste."² While it may be true that Haider and Ventenbergs felt "free" to enter into such contracts, those contracts, as the hauling itself, were always illegal under state law.

Washington law makes no distinction between CDL waste and other types of solid waste. Under Washington law, "solid waste" 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).

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

² Amicus Curiae Memorandum of BIAW, at 4.

public convenience and necessity require such operation.” RCW 81.77.040. Ventenbergs had no such certificate.³ 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.

Under state law, it is illegal to haul solid waste without meeting one of these three requirements. But, Ventenbergs never had a certificate from the WUTC, nor did it have a contract to collect CDL on behalf of Seattle. Thus, both before and after the City enacted the ordinance being challenged, it was illegal for Ventenbergs to haul CDL waste.

C. BIAW’s analogy to WUTC deregulation in the motor carrier of household goods industry may be arguments for suggesting legislative changes to state law, but the law governing CDL has not changed.

BIAW next argues that the policy concerns that led to the WUTC’s deregulation in the motor carriers of household goods industry are the same concerns it has with respect to the hauling of CDL waste. But even if the concern is the same, that is where this disingenuous analogy ends. The WUTC adopted rules regarding its regulation of household goods (i.e.,

³ 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).

property) in response to changes in federal law that had preempted intrastate regulation of such property. Yet CDL is solid waste, not property, and no such rules or laws have been enacted in the solid waste industry. In fact, the Ninth Circuit has specifically held that the same motor carrier preemption provision that led the WUTC to change its rules regarding household goods does not preempt state regulation of garbage.⁴

On the contrary, the hauling and disposal of solid waste has always been considered a public health and safety issue. RCW 70.95.020 assigns “primary responsibility for adequate solid waste handling to local government, reserving to the state, however, those functions necessary to assure effective programs throughout the state.”⁵ Washington courts have consistently upheld local government regulation so long as such action is reasonable.⁶ It is not Ventenbergs’ duty, but rather that of the City, to determine the means by which it protects the public health, safety and

⁴ *AGG Enterprises v. Washington County*, 281 F.3d 1324, 1329-30 (9th Cir. 2002) (holding that garbage and refuse are not considered “property;” that garbage collectors are unaffected by the preemption provision because they are not considered “motor carriers of property;” and that “Congress’ intent *not* to preempt the area of solid waste collection is unambiguous.”)

⁵ That the ultimate responsibility for solid waste handling rests with local government was confirmed by this Court in *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 40, 873 P.2d 498 (1994): “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.”

⁶ *E.g., Spokane v. Carlson*, 73 Wn.2d 76, 436 P.2d 454 (1968) (upholding Spokane’s exclusive collection of all solid waste in the city, including cardboard).

welfare of its citizens. It is the City's duty and responsibility to weigh issues such as consumer choice against health and safety concerns such as environmental protection assurances that waste will go to environmentally-sound landfills⁷ and the City's concern that CDL materials collected for recycling will actually be recycled.⁸

D. BIAW is misguided in its attempt to distinguish this case from the long line of Washington cases upholding the collection and disposal of garbage as a valid exercise of a municipal government's police power.

Washington courts have long upheld the regulation of the collection and disposal of solid waste, including CDL waste, as a valid exercise of a City's police power.⁹ Municipalities in Washington have expansive authority to manage and operate their solid waste handling systems as they see fit.¹⁰ BIAW's attempt to distinguish this long line of Washington cases by arguing that CDL collection is not a "city service" in Seattle, because it is not performed by Seattle employees, is particularly

⁷ CP at 415, ¶ 9; CP at 416, ¶ 20; CP at 447, ¶¶ 3-4; CP at 989, ¶¶ 3-4; CP at 1505: 12-17; CP at 1507: 9-16; and CP at 1592: 20-23.

⁸ CP at 1595: 6-18.

⁹ *Smith v. Spokane*, 55 Wash. 219, 104 P. 249 (1909) (upholding an ordinance making it unlawful for any person other than those authorized by the city to carry garbage through the streets, over plaintiff's challenge that he was deprived of his right to engage in a lawful occupation; and holding that an individual's property rights are subordinate to the general good and to the City's police power).

¹⁰ Indeed, as this Court has confirmed, "[o]rdinances 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 at 79, quoting *Smith v. Spokane*, 55 Wash. at 221.

misguided. Washington case law has repeatedly confirmed that the collection of garbage is a uniquely local government function, whether or not it is done by government employees.¹¹

In addition, section 1 of each of the challenged commercial collection contracts begins by emphasizing the fundamental principle that this is the City's own service for the collection of commercial waste.¹²

E. There is no fundamental right to seek a municipal contract to haul solid waste.

As explained in detail in the City's Answer to the Petition for Review, there is no constitutional right to a government contract.¹³ Specifically, there is no fundamental right under Washington law to a contract with the City of Seattle to provide the City's own garbage collection service. Washington law provides authority for cities to collect solid waste using their own employees.¹⁴ As explained above, under Washington's restrictive statutes governing garbage collection, the only other two ways to legally haul any type of solid waste (including CDL

¹¹ *Weyerhaeuser v. Pierce County*, 124 Wn.2d at 41: "Thus, regardless of whether the County deals with a private company, the collection and disposal of solid waste is the County's responsibility." *Id.*

¹² "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).

¹³ *Quinn Construction Co. v. King County Fire Protection Dist. No. 26*, 111 Wn. App. 19, 32, 44 P.3d 865, *reconsideration denied* (2002).

¹⁴ RCW 81.77.020.

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.¹⁵ There is no fundamental right to circumvent this legislative scheme for controlling garbage collection in Washington.

The Court of Appeals correctly found that the cases regarding the right to pursue specific private employment, or regarding liberty to follow a chosen profession, are irrelevant. Solid waste collection is not merely a private business; rather, it is a classic governmental activity that is critical to public health and safety. Washington courts long ago addressed the constitutional issues of exclusive city collection of solid waste, as well as the issue of negotiated and exclusive garbage collection contracts.¹⁶

F. Under the reasonable relationship test, the City's contracts need not be "absolutely the only way" to accomplish the City's goals.

Given the presumption of constitutionality, and given municipalities' expansive authority over solid waste in Washington, the

¹⁵ RCW 81.77.020, 040.

¹⁶ *Shaw Disposal Inc. v. Auburn*, 15 Wn.App. 65, 546 P.2d 1236 (1976). This Court's decision in "*Grant County II*" (*Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004)), provides no new basis for challenging the constitutionality of either the Seattle ordinance or the state solid waste statutory scheme, whose basic precepts the City merely followed when it adopted the challenged ordinance.

Court of Appeals properly affirmed the trial court's decision upholding Seattle's commercial solid waste contracts. Yet BIAW argues in effect that, in order for the contracts to be constitutional, contracting with Rabanco and Waste Management should have been "absolutely the only way to accomplish" the City's goals.¹⁷ BIAW's flawed analysis becomes apparent when BIAW actually states the test for a valid exercise of police power. As argued by BIAW, to be valid, the action must "bear a reasonable and substantial relationship to accomplishing its purpose."¹⁸ For the contracts to be constitutional, therefore, the reasons for them need only be legitimate public health and safety reasons; they do not need to be the only means Seattle has to achieve such goals.

Seattle's solid waste contracts fulfill a legitimate public health and safety interest by enhancing recycling and assuring adequate environmental control over the disposal of commercial solid waste. Seattle had other reasonable grounds for contracting with Waste Management and Rabanco, the only two companies legally hauling solid waste in Seattle at the time (CP at 1556: 17-21) and the only two companies that managed

¹⁷ Amicus Curiae Memorandum of BIAW, at 6 (arguing that Seattle's statement during oral argument that contracting with the two hauling companies was not "absolutely the only way to accomplish" its goals, is somehow an admission that Seattle's action did not "bear a reasonable and substantial relationship to accomplishing its purposes").

¹⁸ *Id.* (citing *City of Bellevue v. Lorang*, 140 Wn.2d 19, 27, 992 P.2d 496 (2000)).

their own disposal sites (CP at 1611: 20 – 1612: 23). Mr. Ventenbergs and Kendall Trucking, on the other hand, admit doing this work illegally for years.¹⁹ There should be no question that Seattle had reasonable grounds for contracting with companies who act legally as opposed to illegally.

Seattle's reasons for deciding to contract with these two companies were directly related to the City's public health and safety concerns. *See, e.g.*, CP at 1611: 17 – 1613: 2. Specific public health and safety reasons appear throughout the record. For example, 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." CP at 1592: 20-23. 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.²⁰ Seattle also wanted to ensure that all CDL material being collected for recycling was in fact being recycled, because there was concern that some CDL material being collected for recycling was instead either being burned or landfilled.²¹

¹⁹ *See supra*, footnote 3.

²⁰ CP at 415, ¶ 9; CP at 416, ¶ 20; CP at 447, ¶¶ 3-4; CP at 989, ¶¶ 3-4.

²¹ CP at 1595: 6 – 18.

III. CONCLUSION

Washington courts have underscored the principle that local governments have responsibility for solid waste.²² The Ninth Circuit has also recognized the strong governmental interest in regulating garbage collection,²³ and indeed, the United States Supreme Court has long declared that garbage collection is “intrinsically local in nature.”²⁴

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 services. The Court of Appeals properly affirmed the trial court’s upholding of the contracts.

DATED this 1st day of July, 2005.

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²² See, e.g., *Weyerhaeuser*, 124 Wn.2d at 40-41.

²³ *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d at 391, 398 (9th Cir. 1995).

²⁴ *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306, 318, 26 S. Ct. 100, 50 L. Ed. 204 (1905).

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CERTIFICATE OF SERVICE

I, SUZANNE L. SMITH, certify under penalty of perjury under the laws of the state of Washington that on July 1, 2005, I sent via U.S. Mail, first class, postage prepaid, a true copy of the foregoing "Answer to Amicus Curiae Memorandum of Building Industry Association of Washington" to:

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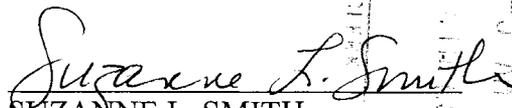
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