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Court of Appeals No. 53920-5-1

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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.

**ANSWER OF RESPONDENTS CITY OF SEATTLE,
SEATTLE PUBLIC UTILITIES, AND CHUCK CLARKE
TO PETITION FOR REVIEW**

THOMAS A. CARR
Seattle City Attorney
William H. Patton, WSBA #5771
Assistant City Attorney
Attorneys for Respondents

Seattle City Attorney's Office
600 - 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

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I. INTRODUCTION

The Ventenbergs plaintiffs opposed three motions to publish the Court of Appeals opinion in this matter on the grounds that the opinion “does not meet the criteria for publication under RAP 12.3(d).”¹ RAP 12.3(d) provides the criteria as follows:

(1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

RAP 12.3(d).²

These criteria parallel the considerations governing acceptance of review by the Supreme Court:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision

¹ Plaintiffs/Appellants’ Response to Motions to Publish of Rabanco, Ltd. and Waste Management of Washington, Inc., dated March 8, 2005, attached as Appendix A.

² Based on the Ventenbergs plaintiffs’ opposition to publication, it can only be assumed that they believe the Court of Appeals opinion (1) **did not** determine an unsettled or new question of law or constitutional principle; (2) **did not** modify, clarify or reverse an established principle of law; (3) **was not** of general public interest or importance; or (4) **did not** conflict with a prior opinion.

of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Based on these parallel criteria, the Ventenbergs plaintiffs' own brief opposing publication of the Court of Appeals opinion argues against this Court now taking review:

. . . "Opinions of the Court of Appeals Should not be Published . . . where the decision, whether an affirmance or reversal, is determined by following a legal principle or principles well-established by previous decisions." *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971).

This Court's February 14 decision simply adopts the reasoning of the cases cited by Defendants/Appellees and follows the "legal principle[s]" determined therein. . .

Appendix A at 3.

Seattle agrees that the "legal principles" sustained by the Court of Appeals in this matter are "well established" under Washington law – (1) under the Washington statutory structure for solid waste disposal, Washington municipalities enjoy broad authority to operate their solid waste disposal as they see fit, as a proper exercise of their police power, (2) Washington courts defer to this broad authority, and (3) the same types of actions that the Ventenbergs plaintiffs challenge have been explicitly

sanctioned. In fact, this is why Seattle did not file its own motion to publish the Court of Appeals opinion or join in the other motions to publish.³

It seems curious then, that mere days after responding to the motions to publish, the Ventenbergs plaintiffs would petition the Supreme Court⁴ to review this matter, alleging that the case raises “a significant question of law”⁵ and “involves an issue of substantial public interest.”⁶

³ The Court of Appeals denied the motion to publish on March 31, 2005. The Order Denying Motion to Publish is attached as Appendix B.

⁴ The doctrine of judicial estoppel precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *See, e.g., Cunningham v. Reliable Concrete Pumping, Inc.*, 2005 WL 518853, 108 P.3d 147 (Wn. App. Div. 1, March 7, 2005). Rather than pressing the issue of judicial estoppel, Seattle merely notes the inconsistency in the Ventenbergs plaintiffs’ positions.

⁵ Petition for Review at 8, 14.

⁶ Petition for Review at 8, 17.

II. ISSUES

The Ventenbergs plaintiffs have dropped their “impairment of contracts” argument. The Court of Appeals properly denied relief on all of their remaining claims as well:

A. The Court of Appeals properly affirmed that “CDL is waste” and that the City’s “regulation of solid waste hauling benefits public health because it ensures that waste is sent to designated landfills and environmental standards are maintained.” Court of Appeals Opinion at 5.

B. The Court of Appeals properly held that the “takings claim is frivolous” (Court of Appeals Opinion at 9), because Haider has no property rights to residential waste that is not his own waste.

C. The Court of Appeals properly refused to apply the procedural mandates of RCW 35.21.156 to this matter, because that statute does not apply to the commercial contracts challenged by Haider and Ventenbergs.⁷

D. Similarly, the Court of Appeals was correct in not analyzing *Grant County II* with respect to this matter, because this case involved no fundamental right.

⁷ The Court of Appeals also properly denied the Ventenbergs plaintiffs’ motion to impose sanctions against Seattle for providing legislative history in its brief regarding RCW 35.21.156, which documentation was subsequently authenticated.

III. RESTATEMENT OF THE CASE

A. Restatement of Facts and Factual History

Prior to April 1, 2001, the Washington Utilities and Transportation Commission (“WUTC”) regulated the collection of commercial solid waste within the City of Seattle. RCW 81.77.040; CP at 414, ¶ 6; Dep. at 89.⁸ Under WUTC regulation, two companies, Rabanco, Ltd. (“Rabanco”) and Waste Management of Washington, Inc. (“Waste Management”), had the only rights to collect commercial waste, including CDL, within the City of Seattle. CP at 414, ¶ 7.⁹

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. CP at 417, ¶ 22. These contracts became effective April 1, 2001. CP at 417, ¶ 23; CP at 214 and 314. Seattle then adopted Ordinance 120947 in October 2002, a clean-up ordinance which, among other definitional clarifications, amended Seattle Municipal Code Section 21.36.012(5) to be consistent

⁸ The only deposition taken in this case, that of Ray Hoffman, is in the record in its entirety, and is cited here, and in the Court of Appeals briefing, as “Dep.”

⁹ The WUTC had never authorized any of the Ventenbergs plaintiffs to haul solid waste, and none of the Ventenbergs plaintiffs had ever sought the required authorization from the WUTC. CP at 95-104.

with State law (RCW 70.95.030(22)) and with Seattle's commercial collection contracts by formally including CDL Waste in the Municipal Code's definition of "City's Waste." CP at 417, ¶¶ 27-28; CP at 200-206.

Despite the Ventenbergs plaintiffs' repeated, yet unsubstantiated allegation that Seattle was motivated only by money and a desire to avoid a lawsuit, Seattle's reasons for entering into these commercial solid waste contracts were decades in the making and involved environmental policy well within its police power authority. Since the 1980's, Seattle had begun to emphasize recycling and creating an environmentally responsible system of solid waste disposal. CP at 415, ¶¶ 9-10. The record in this case contained numerous references to these valid reasons.¹⁰

B. Procedural History

On May 13, 2003, Josef Ventenbergs and Ronald Haider, and their respective business entities, (the "Ventenbergs plaintiffs"), filed a Complaint for Declaratory and Injunctive Relief against the City of Seattle, Seattle Public Utilities, and Chuck Clarke ("Seattle") alleging "governmental favoritism" in violation of the privileges and immunities clause, and impairment of an oral contract. The Ventenbergs plaintiffs

¹⁰ See, e.g., *infra*, section IV.A.3., and footnote 25.

later amended the complaint to add Waste Management of Washington, Inc. (“Waste Management”) and Rabanco, Ltd. (“Rabanco”) as defendants. CP at 21-30.

On cross-motions for summary judgment by all parties, the trial court issued three rulings on February 23, 2004. In separate orders, the Court granted summary judgment for each of the three defendants (Seattle defendants, Waste Management, and Rabanco), and dismissed the Ventenbergs plaintiffs’ complaint with prejudice with respect to each defendant. CP at 1315-1320, 1321-1324, and 1343-1347. The Ventenbergs plaintiffs appealed to the Court of Appeals, seeking review of each of these rulings, as well as review of the trial court’s letter of explanation. CP at 1325-1329. Oral argument on the matter was held on January 7, 2005, and on February 14, 2005, the Court of Appeals issued an unpublished opinion affirming the trial court’s decision.¹¹

¹¹ The Unpublished Opinion is attached as Appendix A to the Ventenbergs plaintiffs’ Petition for Review.

IV. ARGUMENT

A. The Court of Appeals properly affirmed Seattle’s commercial solid waste contracts as a legitimate exercise of the police power.

1. The Court of Appeals applied the correct standard of review.

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.”¹² Laws enacted by a municipality are subject to the same rules of construction as statutes.¹³

Where a court is asked to review a legislative decision, the applicable standard of review is the ‘arbitrary and capricious’ test.¹⁴ An action is “arbitrary and capricious” only if it is found to be “willful and unreasoning in disregard of facts and circumstances.”¹⁵ In other words, a

¹² *Clark v. Dwyer*, 56 Wn.2d 425, 431, 353 P.2d 941 (1960) (citations omitted).

¹³ *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”).

¹⁴ *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985).

¹⁵ *Cox v. City of Lynnwood*, 72 Wn. App. 1, 863 P.2d 578 (1993).

legislative determination will be sustained if the court can reasonably conceive of *any* state of facts to justify that determination.¹⁶

2. The Court of Appeals appropriately applied Washington case law in deferring to Seattle’s municipal authority over solid waste.

The Washington legislature specifically provides that local government is primarily responsible for solid waste handling.¹⁷ The regulation of solid waste collection, including CDL waste,¹⁸ is a valid exercise of a City’s police power in Washington, where the ultimate responsibility for solid waste collection rests with local government.¹⁹

¹⁶ *Teter*, 104 Wn.2d at 232.

¹⁷ RCW 70.95.020.

¹⁸ Washington law makes no distinction between CDL waste and other types of solid waste, although the Ventenbergs plaintiffs continue their attempt to distinguish this case from the long history of cases upholding a City’s broad police power to manage its solid waste, by 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); *see also Spokane v. Carlson*, 73 Wn.2d 76, 80-81, 436 P.2d 454 (1968) (upholding an ordinance enacted to control the disposition of waste that is not injurious to the public health as nevertheless a valid use of the City’s police power). Where the legislature has defined “solid waste” to include CDL waste, the trial court and the Court of Appeals properly refused the Ventenbergs plaintiffs’ attempt to rule otherwise.

¹⁹ *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 40, 873 P.2d 498 (1994) (confirming that “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”).

Washington case law has repeatedly confirmed that the collection of garbage is a uniquely municipal function, regardless of who collects it.²⁰ Washington courts have long upheld the regulation of the collection and disposal of garbage as a valid exercise of a City's police power.²¹

Municipalities in Washington have expansive authority to manage and operate their solid waste handling systems as they see fit. Indeed, as this Court has confirmed, "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."²²

3. The Court of Appeals properly applied the facts from the record showing legitimate public health and safety reasons for Seattle's solid waste contracts.

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

²⁰ *Id.* 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."

²¹ *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).

²² *Spokane v. Carlson*, 73 Wn.2d at 79, quoting *Smith v. Spokane*, 55 Wash. at 221.

Court of Appeals properly affirmed the trial court's upholding of Seattle's commercial solid waste contracts. Contrary to the Ventenbergs plaintiffs' unsupported allegations of misfeasance on the part of Seattle,²³ 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 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)²⁴ and the only two companies that managed their own disposal sites (Dep. at 178-179). The record in this case showed that Seattle's reasons for deciding to contract with these

²³ The Ventenbergs plaintiffs continue to quote 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. Petition for Review at 11. 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, which it most certainly is not. The repeated reference to this citation highlights the Ventenbergs plaintiffs' flawed analysis - for the contracts to be constitutional, the reasons for the contracts need only be legitimate public health and safety reasons; they do *not* need to be *the only means* Seattle has to achieve such goals.

²⁴ 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.

two companies were directly related to the City's public health and safety concerns.²⁵

B. The Court of Appeals properly stated that the “takings” claim was frivolous.

In its petition for review, the Ventenbergs plaintiffs argue that the takings claim, which the Court of Appeals not only refused to consider but noted was “frivolous” (Opinion at 9), “raises a significant question of law under the Washington Constitution.” (Petition at 14).²⁶

Although it was not pled in either of their complaints, the Ventenbergs plaintiffs later argued that with respect to “residential CDL,” Seattle’s action constitutes a “taking” of Ronald Haider’s property. Yet in their own opening brief to the Court of Appeals, and in fact in their

²⁵ See, e.g., Dep. at 178: 17 – 180: 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.” Dep. at 159:20-23. 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, ¶ 20; Dep. at 72:12-17 and 74:9-16; CP at 447, ¶¶ 3-4; CP at 989, ¶¶ 3-4. 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. Dep. at 162:6 – 18.

²⁶ As to the Ventenbergs plaintiffs’ claim that a “significant question of law” exists, it appears that, curiously, the takings issue did not even raise an “unsettled or new question of law” (RAP 12.3(d)(1)) to them when they filed their Response to Motion to Publish on March 8, 2005, just 8 days before filing their Petition for Review. Appendix A at 2.

Petition for Review, the Ventenbergs plaintiffs confirm that they are not challenging the City's regulation of residential waste.²⁷ The trial court issued no ruling on the takings issue, because the issue was not properly before that court. Because Seattle's regulation of residential waste was not being challenged, and because the Ventenbergs plaintiffs never pled a cause of action under article 1, section 16 of the Washington Constitution, the Court of Appeals properly refused to rule on the issue, but noted that it was "frivolous."

Even if this issue had been properly before the court, 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 authority from the WUTC or a contract with Seattle, that is illegal under Washington law.

²⁷ Opening Brief at 5; Petition for Review at 4.

C. The Court of Appeals properly held that any issue relating to RCW 35.21.156 is moot.²⁸

The Ventenbergs plaintiffs next allege that the Court of Appeals erred in refusing to apply the “procedural mandates” of RCW 35.21.156 to this matter, and that this refusal “raises an issue of substantial public interest.” Petition for Review at 17.²⁹ The flaw in the Ventenbergs plaintiffs’ contention that RCW 35.21.156 imposes requirements on contracts for solid waste hauling is evident at first glance of this statutory section, and specifically, in one word, contained in the section’s first

²⁸ The Court of Appeals properly denied the Ventenbergs plaintiffs’ motion to impose sanctions against Seattle for providing legislative history in its brief, which legislative history was later authenticated. The Ventenbergs plaintiffs’ allegation that such material was “stricken by the trial court” is untrue. Rather, the Court of Appeals stated:

There is no rule against submitting additional legal authority on appeal. We must strike any portion of the City’s brief that cites appended materials *which cannot be verified independently*. But, doing so does not affect the outcome of plaintiff’s appeal. We will not issue sanctions.

Opinion at 9, n. 22 (*emphasis added*). The legislative history appended to Seattle’s Brief was verified by declaration of Seattle’s paralegal. See Declaration of Suzanne L. Smith in Response to Motion to Strike, attached here as Appendix C, at 6. This declaration confirmed that the documents appended to Seattle’s Brief as B-1 – B-6 were portions of legislative history of House Bill No. 1568 obtained by contacting the State Archives in Olympia. *Id.* at ¶ 6.

²⁹ Once again Seattle is left to wonder how an issue can be of “substantial public interest” and not be of “general public interest.” Eight days before filing their Petition for Review, the Ventenbergs plaintiffs argued that the Court of Appeals “correctly decided that the decision does not meet the criteria for publication under RAP 12.3(d),” (Appendix A at 2), – but one such criterion is “whether a decision is of general public interest or importance.” RAP 12.3(d)(3).

sentence – “may.” This is a *permissive* statutory section that sets forth an alternative means by which a city *may* enter into various contracts for solid waste handling systems, plants, sites, or facilities.³⁰ Reading further, subsections (2) and (3) of the statute begin: “*If* the legislative authority of the city or town decides to proceed with the consideration of qualifications or proposals, . . .”³¹ As this Court held in *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999), 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. The meaning of the words “may” and “if” is plain.

Washington courts have specifically held that a local government can issue a garbage collection contract to only one contractor through negotiation without any requirement for public bidding, in *Shaw Disposal Inc., v. Auburn*, 15 Wn. App. 65, 68, 546 P.2d 1236 (1976). *Shaw Disposal* confirmed that, in providing for solid waste collection on behalf of a city, there is no statutory or constitutional requirement in Washington

³⁰ “. . .the legislative authority of a city or town *may* contract with one or more vendors for one or more of the design, construction, or operation of, or other service related to, the systems, plants, sites, or other facilities for solid waste handling in accordance with the procedures set forth in this section.” RCW 35.21.156(1)(emphasis added).

³¹ RCW 35.21.156(2), (3)(emphasis added).

that a city issue a collection contract through competitive bidding. This Court relied upon *Shaw Disposal* and its reasoning in the 1994 case of *Weyerhaeuser v. Pierce County*, holding that Pierce County could not escape responsibility for a landfill by contracting with a private party.³² 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.³³

D. The Court of Appeals was correct in not analyzing *Grant County II*, because the present case does not involve a fundamental right.

There is no constitutional right to a government contract.³⁴

Specifically, 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.³⁵ Washington law provides authority for cities to

³² *Weyerhaeuser*, 124 Wn.2d at 40.

³³ *Id.*

³⁴ *Quinn Construction Co. v. King County Fire Protection Dist. No. 26*, 111 Wn. App. 19, 32, 44 P.3d 865 (2002), *reconsideration denied*.

³⁵ Section 1 of the commercial collection contracts with both Rabanco and Waste Management begin 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).

collect solid waste using their own employees.³⁶ 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.³⁷

Yet, by claiming to have a "fundamental right" to obtain a solid waste collection contract with Seattle, the Ventenbergs plaintiffs' argument is that a city, if it operates a solid waste collection service by contract, must offer city collection contracts to every company that wants one. Such an argument is contrary to years of Washington case law, about which *Grant County II*³⁸ changed nothing. In *Grant County II*, this Court held last year that, because no fundamental right was affected, "the power is entirely that of the legislature, which may delegate to cities."³⁹ Here, the legislative scheme for controlling garbage collection in Washington as set out in RCW Chapter 81.77 is just such a permissible delegation. And here, as in *Grant County II*, there is simply no fundamental right involved, no matter

³⁶ RCW 81.77.020.

³⁷ RCW 81.77.020, 040.

³⁸ *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004).

³⁹ *Id.*

how many times and how many different ways the Ventenbergs plaintiffs struggle to find one.

The Court of Appeals correctly found that the cases cited by the Ventenbergs plaintiffs regarding the right to pursue “specific private employment” 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. As noted above, 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. This Court’s decision in *Grant County II* provides no new basis for the Ventenbergs 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 in *Grant County I*. 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 or any other would-be-hauler.

V. CONCLUSION

Washington courts have confirmed that local governments have responsibility for solid waste.⁴⁰ The Ninth Circuit has also recognized the strong governmental interest in regulating garbage collection,⁴¹ and indeed, the United States Supreme Court has long declared and determined that garbage collection is “intrinsically local in nature.”⁴²

Grant County II did not overrule those prior cases. Rather, *Grant County II* pared back the previous findings of “fundamental rights” by the same court in *Grant County I*. 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.

The Court of Appeals correctly held that Haider’s “takings” claim was not properly pled. The Court was also correct in finding frivolous Haider’s allegation that his “right to freely alienate property” could somehow be transformed into a right to violate a specific Washington statute.

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

⁴¹ *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d at 391, 398 (9th Cir. 1995).

⁴² *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 petition for review should be denied.

DATED this 15th day of April, 2005.

THOMAS A. CARR
Seattle City Attorney

By:

A handwritten signature in black ink, appearing to read 'William H. Patton', written over a horizontal line.

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

APPENDIX A

COPY RECEIVED
05 MAR 14 AM 10:43
SEATTLE CITY ATTORNEY

No. 53920-5

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

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

Plaintiffs/Appellants,

v.

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, and RABANCO, LTD., a
Washington corporation,

Defendants/Respondents.

**PLAINTIFFS/APPELLANTS'
RESPONSE TO MOTIONS TO
PUBLISH OF RABANCO,
LTD. AND WASTE
MANAGEMENT OF
WASHINGTON, INC.**

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COURT OF APPEALS
DIVISION ONE
MAR 8 2005

After arguing that the outcome in this case was dictated by decades of well-settled case law, Rabanco, Ltd. ("Rabanco") and Waste Management of Washington, Inc. ("Waste Management") now seek to have this Court's February 14, 2005 decision published on the grounds that it "provides updated authority regarding the police power under which local authorities regulate the solid waste stream." Rabanco Motion at 1. However, this Court clearly agreed with the Defendants/Appellees that the

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outcome was determined by existing case law. This Court therefore correctly decided that the decision does not meet the criteria for publication under RAP 12.3(d) and the motions should be denied.

At both the trial court and before this Court, the Defendants/Appellees argued that the issue of the police power of municipalities to regulate solid waste was firmly decided by *Smith v. Spokane*, 55 Wash. 219, 104 P. 249 (1909), *Spokane v. Carlson*, 73 Wn.2d 76, 436 P.2d 454 (1968), *Shaw Disposal Inc., v. Auburn*, 15 Wn. App. 65, 546 P.2d 1236 (1976), *Weyerhauser v. Pierce County*, 124 Wn.2d 26, 40, 873 P.2d 498 (1994), and *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995), among others. See RP 34 (“So this question has long been answered in the state of Washington, and later upheld, that the City has the Authority to contract with the single contractor”). This Court agreed, ruling in the Defendants/Appellees’ favor and rejecting the Plaintiffs/Appellants’ attempts to distinguish those decisions. See Opinion at 5 (“Washington courts have repeatedly held that the regulation of solid waste is a valid exercise of police power.”).

Nonetheless, Rabanco and Waste Management now argue that publication is necessary “for interpreting an evolving question.” Waste Management Motion at 1. However, according to Rabanco and Waste

Management's previous arguments, and this Court's decision, there is no "evolving question" – just one that has already been answered and affirmed. "Opinions of the Court of Appeals Should not be Published ... Where the decision, whether an affirmance or reversal, is determined by following a legal principle or principles well-established by previous decisions." *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971).

This Court's February 14 decision simply adopts the reasoning of the cases cited by Defendants/Appellees and follows the "legal principle[s]" determined therein. As such, the decision does nothing to "provide additional guidance" or "updated authority," Rabanco Motion at 1, that does not already exist in Washington case law. The decision meets none of the criteria for publication under RAP 12.3(e) and the motions should therefore be denied.

RESPECTFULLY submitted this 8th day of March 2005.

INSTITUTE FOR JUSTICE
Washington Chapter

By 

William R. Maurer, WSBA #25451
Jeanette M. Petersen, WSBA #28299
Charity Osborn, WSBA #33782

811 First Avenue, Suite 625
Seattle, Washington 98104
(206) 341-9300
Attorneys for Appellants

DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington.

On March 8, 2005, a true copy of the foregoing Response was placed in envelopes addressed to the following persons:

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

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

James K. Sells
Ryan Sells Uptegraft, Inc. PS
9657 Levin Rd. NW, Ste. 240
Silverdale, WA 98383

Will Patton
Rebecca Earnest
Assistant City Attorney
The City of Seattle
600 Fourth Avenue
Fourth Floor
Seattle, WA 98104

David W. Wiley
Dana A. Ferestien
Williams, Kastner & Gibbs PLLC
Two Union Square
601 Union Street, Suite 4100
PO Box 21926
Seattle, WA 98111-3926

which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 8th day of March, 2005 at Seattle, Washington.


Yvonne Maletic

APPENDIX B

IN 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,

and

WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a Waste Management of Seattle, a Delaware Corporation,

and

RABANCO, LTD., a Washington corporation,

Respondents.

DIVISION ONE

No. 53920-5-1

ORDER DENYING MOTION TO PUBLISH

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SEATTLE CITY ATTORNEY

The Respondent, Rabanco, Ltd., having filed a motion to publish opinion, and the hearing panel having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed February 14, 2005, shall remain unpublished.

Done this 29th day of March, 2005.

Baker, J.

Judge

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

2005 MAR 29 PM 4:16

APPENDIX C

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IJ WA chapter

No. 53920-5-I

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,)

Plaintiffs/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, and RABANCO, LTD., a)
Washington corporation,)

Defendants/Respondents.)

) RESPONSE TO MOTION TO
) STRIKE

Seattle Defendants received notice that its brief contained incorrect margins on August 4, 2004. Seattle Defendants filed and served an Amended Brief on the morning of August 5, 2004, which contained the

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exact content as the original brief, including Appendices A and B. The cover letter to the court, a copy of which was served on all parties, makes it clear that there was no change in the content of the brief. Plaintiffs' characterization of this minor discrepancy as "purposeful delay" is not worthy of further comment.¹ The motion for sanctions for delay should be denied.

The remainder of the motion should similarly be denied. RAP 10.4(c) allows presentation of a variety of materials in an appendix, including material portions of the text of "a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like." None of the cases cited in the Motion to Strike is relevant because none involves RAP 10.4(c). Rather, the cases cited in the Motion to Strike involve:

- a party citing to a memorandum of law that was not part of the record (*Duffy v. King County Chiropractic Clinic*, 17 Wn. App. 693, 565 P.2d 435 (1977)),

¹ However, it should be noted that, like many of their arguments in this case, plaintiffs' motion is misleading in that it implies that Seattle Defendants stealthily added the Appendix only to the Amended Brief. This is not the case. See Smith declaration ¶ 3, 5. Moreover, the Court of Appeals did not "threaten [Seattle Defendants] with sanctions"; rather, it informed Seattle Defendants that failure to file a replacement brief by August 12, 2004 may result in sanctions. Seattle Defendants filed and served the replacement brief on August 5, 2004, within 24 hours of receiving this notice. Smith declaration, ¶ 5, Haralson declaration, ¶ 4-5.

- new affidavits containing substantive factual evidence and new allegations of harassment (*Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990)),
- memoranda containing new legal claims (*Nelson v. McGoldrick*, 127 Wn.2d 124, 896 P.2d 1258) (1995) (attempt to argue new theory of unjust enrichment)),
- extraordinary cases of blatant disregard of, and repeated violation of, the court rules (*Hurlbert v. Gordon*, 64 Wn. App. 386, 824 P.2d 1238) (1992) (brief contained 187 citations of legal authority and 413 references to the record, many of which were to nonexistent documents or those that were difficult or impossible to find)); *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn. App. 286, 991 P.2d 638 (1999) (90-page brief with 25-page appendix, including many references to issues not presented for review).

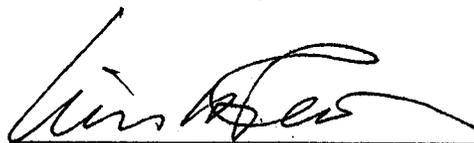
The purpose of the Rules of Appellate Procedure is to enable the court and opposing counsel “efficiently and expeditiously to review the relevant legal authority.” *Litho Color, Inc.*, 98 Wn. App. at 306 (citing *Hurlbert*, 64 Wn. App. at 400). In fact, Seattle Defendants appended relevant portions of the legislative history of RCW 35.21 for the Court’s

convenience², pursuant to RAP 10.4(c), just as Mr. Maurer appended various dictionary definitions, which were not part of the trial court record, to his opening brief. Plaintiffs' motion is beyond audacious and should be denied.

DATED this 12th day of August, 2004.

THOMAS A. CARR
Seattle City Attorney

By:



William H. Patton, WSBA # 5771
Assistant City Attorney

Attorneys for Seattle Defendants

² For purposes of clarification, the attached Smith declaration confirms that the legislative history was duly obtained from the State Archives in Olympia. Smith declaration, ¶ 6.

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IJ WA chapter
No. 53920-5-I

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,)

Plaintiffs/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, and RABANÇO, LTD., a)
Washington corporation,)

Defendants/Respondents.

) DECLARATION OF
) SUZANNE L. SMITH IN
) RESPONSE TO MOTION TO
) STRIKE

I, SUZANNE L. SMITH, declare under penalty of perjury under
the laws of the State of Washington as follows:

1. I am over the age of eighteen, competent, and make this
declaration based on personal knowledge and in support of the Seattle

¹
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Defendants' Response to Motion to Strike in this matter.

2. I am employed as a paralegal in the Utilities Section of the Civil Division of the Seattle City Attorney's Office.

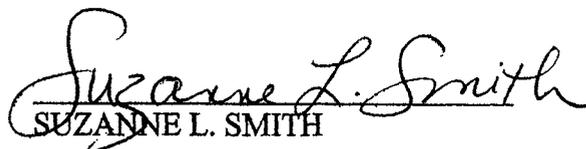
3. The Brief of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke, filed and served on July 28, 2004, contained Appendix A (pages A-1 – A-3) and Appendix B (pages B-1 – B-6).

4. On August 4, 2004, this office received notification from the Court of Appeals that the margins of the brief were incorrect.

5. On August 5, 2004, this office filed and served an Amended Brief of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke. There was no change in the content of the brief, or in Appendix A or Appendix B; only the margins were changed. I wrote a cover letter to the Clerk confirming that no content changes had been made, a copy of which was served with the Amended Brief on all parties.

6. On July 2, 2004, I contacted the State Archives in Olympia to order the legislative history of House Bill No. 1568. Relevant portions of this legislative history were appended to Seattle's Brief, and to Seattle's Amended Brief, as Appendix B-1 – B-6.

DATED this 12th day of August, 2004.


SUZANNE L. SMITH

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IJ WA chapter

No. 53920-5-I

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,)

Plaintiffs/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, and RABANCO, LTD., a)
Washington corporation,)

Defendants/Respondents.

)
) DECLARATION OF HAZEL
) HARALSON IN SUPPORT OF
) RESPONSE TO MOTION TO
) STRIKE
)

I, HAZEL HARALSON, declare under penalty of perjury under
the laws of the State of Washington as follows:

1. I am over the age of eighteen, competent, and make this

declaration based on personal knowledge and in support of the Seattle Defendants' Response to Motion to Strike in this matter.

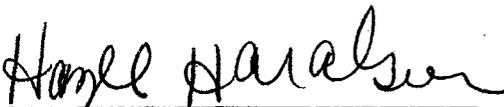
2. I am employed in the Utilities Section of the Civil Division of the Seattle City Attorney's Office.

3. On August 5, 2004, at approximately 11:00 a.m., I filed an original and one copy of the Amended Brief of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke in Division One of the Court of Appeals for the State of Washington.

4. Also on the morning of August 5, 2004, I attempted to personally serve the attorneys for the Ventenbergs plaintiffs, at the Institute for Justice, with a copy of the Amended Brief. The door was locked and there was no answer to my repeated knocks on the door.

5. Early in the afternoon of August 5, 2004, I called the Institute for Justice to make sure someone was present to accept service. I then served the Amended Brief, at approximately 2:00 p.m.

DATED this 12th day of August, 2004.


HAZEL HARALSON

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AUG 11 2003
IJ WA chapter

DECLARATION OF SERVICE

I, SUZANNE L. SMITH, declare under penalty of perjury that:

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.
2. On August 12, 2004, I hand-delivered a true copy of the foregoing "Response to Motion to Strike" and the attached declarations 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 12, 2004, I sent a true copy of the "Response to Motion to Strike" via U. S. Mail, first class postage prepaid, to:

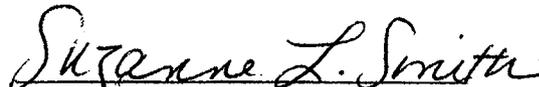
POLLY MCNEILL
Summit Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682

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

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

DATED this 12th day of August, 2004.


SUZANNE L. SMITH

COPY

CERTIFICATE OF SERVICE

I, SUZANNE L. SMITH, certify under penalty of perjury under the laws of Washington that on April 15, 2005, I caused to be delivered, via legal messenger, a true copy of the foregoing "Answer of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke, to Petition for Review"

to:

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

and that on April 15, 2005, I sent via U. S. Mail, first class, postage prepaid, a true copy of the foregoing "Answer of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke, to Petition for Review"

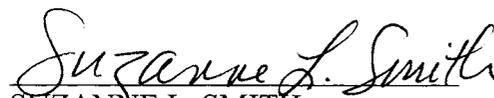
to:

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

DAVID W. WILEY
Williams, Kastner & Gibbs
Two Union Square, Ste. 4100
Seattle, WA 98111-3926

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801 Second Avenue, Suite 614
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JAMES K. SELLS
Ryan, Sells, Uptegraft, Inc.
9657 Levin Rd. NW, Ste. 240
Silverdale, WA 98383


SUZANNE L. SMITH