

No. 53920-5

(King County Superior Court No. 03-2-25260-3 SEA)

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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,

RABANCO, LTD., a Washington corporation,

Defendants/Respondents.

APPELLANTS' REPLY TO RABANCO

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INTRODUCTION

The City of Seattle (the “City”) executed contracts with Rabanco, Ltd. (“Rabanco”) and Waste Management, Inc. (“Waste Management”), granting the exclusive right to collect and haul construction, demolition and landclearing waste (“CDL”) in Seattle. Thirteen months after the contracts became effective, Rabanco complained to the City that it was losing “forty percent” of its market share to haulers without similar contracts. CP 845. In a free market – or even in a market with more than two service providers – Rabanco would have had to respond to the needs of Seattle consumers by providing better, more efficient, and more responsive service so consumers would actually have wanted to use Rabanco’s services. However, because Rabanco enjoys a government monopoly, it responded as monopolists do: instead of providing the improved service sought by consumers, it pressured the government to enforce its monopoly. CP 846. Thus, “at the bequest [*sic*] of the commercial haulers who were watching a large – a good portion of their market being, quote, taken away by folks that weren’t supposed to have access to it,” CP 573, the City passed the ordinances now at issue to enforce Rabanco’s and Waste Management’s monopolies. CP 574.

Rabanco operates under the same misconceptions as does the City of Seattle. For instance, Rabanco suggests that because only it and Waste Management held certificates of convenience and necessity from the Washington Utilities and Transportation Commission (“WUTC”) prior to the City’s exercise

of jurisdiction, Joe Ventenbergs permanently lost his right to specific employment and his right to pursue a chosen profession. Rabanco Brief at 2-3. But the state legislature can neither overturn the privileges or immunities clause of the state constitution nor empower the City of Seattle to do so. This is not “romanticizing” or “explaining away” the state legislative scheme. It is merely an acknowledgement that our state constitution specifically protects people, including Joe Ventenbergs, who do not have the ability to influence the government to restrict competition, either at the state or local level. That Joe Ventenbergs could not benefit from a system from which he has always been excluded¹ does not negate his constitutional rights – rather, it makes the vindication of those rights all the more important.

RESTATEMENT OF THE CASE

Like the City, Rabanco omits certain facts crucial to this Court’s analysis.

Those facts are described at length in Appellants’ Reply to the City.

ARGUMENT

A. Rabanco Confuses Two Different Types of Waste In Its Discussion of CDL

Rabanco argues that the City is justified in regulating CDL collection because “common sense tells us” that CDL “can and often will include”

¹Certificates of convenience and necessity to operate in the City were all distributed in 1961–before Joe Ventenbergs was even born. CP 554, 811. Joe Ventenbergs should not lose his constitutional rights simply for having the bad luck to be born after 1961. See CP 812 (as of 1992, “[s]ince 1961, no new firm has entered the field of municipal solid waste collection in Washington State *except by purchasing one of the existing certificates [of convenience and necessity]*”).

inherently dangerous waste including leaded paint and “asbestos-impregnated materials.” Rabanco Brief at 4. Rabanco’s “common sense” argument, however, is belied by the prodigious amount of state, local, and federal law that explicitly prohibits the inclusion of such dangerous wastes in common waste – including CDL.

If Rabanco hauls the dangerous wastes it claims are commingled with CDL, it is doing so in violation of the law. The Seattle Municipal Code (“SMC”) specifically excludes “unacceptable waste” and “special waste” from its definition of “city’s waste” – which encompasses CDL. SMC 21.36.012(5). “Unacceptable waste” is defined as including “radioactive, dangerous, hazardous or extremely hazardous waste,” and “special waste” includes, among other things, asbestos and contaminated soil. SMC 21.36.016(23); SMC 21.36.016(17).

Dangerous waste² must be handled and disposed of differently than other types of waste because it is subject to extensive local, state, and federal regulations. Rabanco could not, as it suggests, commingle asbestos with CDL or other city waste and deliver it to a transfer station. Asbestos is considered a

² “Dangerous waste” may be characterized by ignitability, corrosivity, reactivity and/or toxicity. WAC 173-303-090. Thus, “dangerous waste” would include the harmful by-products of construction cited by Rabanco. Moreover, state and City definitions of CDL specifically exclude plaster and other material likely to produce gases or leachate during decomposition, as well as asbestos. SMC 21.36.012(13)(b); WAC 173-304-100(19).

“dangerous waste” by the State of Washington, and thus is governed by over one hundred “dangerous waste regulations” contained in WAC 173-303.³

Ironically, entry into the market for hauling such dangerous waste is not restricted to solely two companies, like the City’s CDL hauling scheme here. Moreover, the same dangerous waste Rabanco argues mandates City regulation of CDL to promote public health and safety—asbestos, lead paint, and other dangerous by-products of construction excluded in the definition of CDL—is not the kind the City is actually regulating here. Those who wish to transport dangerous waste are merely required to obtain a current EPA/state identification number and comply with the requirements of WAC 173-303. *See* WAC 173-303-240. But CDL hauling – which is not dangerous by definition – requires an exclusive City contract.

B. Rabanco Expands the Scope of the Police Power Beyond Constitutional Limits

Rabanco argues that the police power permits the City to grant it special privileges and deny Joe Ventenbergs’ right to specific employment in violation of article I, section 12. Not only is the City’s police power constrained by the

³ Asbestos removal and disposal are also addressed in Article 4 of Regulation No. 3 of the Puget Sound Clean Air Agency, in 40 C.F.R. 61, Subpart M of the federal government’s “National Emission Standard for Asbestos,” and SMC 21.36.028. Pursuant to those regulations, a party wishing to remove and dispose of asbestos must (1) notify the Puget Sound Air Pollution Control Agency before starting the project; (2) wet down the asbestos-containing material during its removal, seal the material into leak-tight containers or in plastic bags with a thickness of 6 ml or more, and identify the containers with a warning label; and (3) ensure that the packages are delivered only to sites designated by the Director of Seattle Public Utilities and approved by the Seattle-King County Department of Public Health. The procedures are detailed and deliberate, ensuring that asbestos is not mingled with other waste or disposed of by more typical avenues.

affirmative mandates of the Washington Constitution, such police power is not as extensive as Rabanco suggests.

1. Rabanco's Precedent Recognizes that the Police Power Is Constrained by the Constitution

Rabanco argues that the City's police power is not constrained by the operation of article I, section 12. Rabanco Brief at 9. But the cases Rabanco relies upon specifically recognize that the exercise of the police power is constrained by the Washington Constitution. *See Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615 (1936) (police power is limited by the requirement "that it must tend to reasonably correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution") (emphasis added); *see also CLEAN v. State*, 130 Wn.2d 782, 805, 928 P.2d 1054 (1996) (police power "must reasonably tend to promote some interest of the State, and not violate any constitutional mandate") (emphasis added).

As the supreme court observed, "first class cities may exercise powers that do not violate a constitutional provision, legislative enactment, or the city's own charter." *Chemical Bank v. Wash. Pub. Power Supply Sys.*, 99 Wn.2d 772, 792, 666 P.2d 329 (1983) (emphasis added). And even Rabanco acknowledges that courts must interpret the constitution as a whole so that no provision is ignored or rendered meaningless. *City of Seattle v. McConahy*, 86 Wn. App. 557, 563, 937 P.2d 1133 (1997). Here, Appellants have demonstrated that the City limited the

market to two companies for reasons unrelated to public health and safety and, in so doing, granted a special privilege to Rabanco and Waste Management in violation of article I, section 12 of the constitution. Moreover, none of Respondents or amicus refuted Appellants' demonstration in its opening brief that the City has violated the express provisions of its own charter. Appellants' Brief at 38. Consequently, the City's actions fall squarely within the recognized exceptions to the police power.

2. City Operated Outside its Legitimate Police Power

Even if the police power somehow trumps the direct, affirmative mandates of our state constitution, the City's actions do not constitute a legitimate exercise of that power. The trial court here correctly concluded that closing the market for fear of a lawsuit was not a legitimate exercise of the police power, a conclusion with which the City agreed:

THE COURT: Let me interrupt you and ask all three counsel, Mr. Patton and counsel for Waste Management and Rabanco. My gut tells me that the City shouldn't be making decisions on this kind of thing because they are afraid of a lawsuit. That's not what the police power is all about, is it?

MR. PATTON (for the City): Your Honor, I agree with you. That's not the purpose of making a decision to contract with Waste Management or Rabanco.

RP 41-42.

“The grant of police power to a city carries with it the necessary implication that its exercise must be reasonable.” *Patton v. City of Bellingham*, 179 Wash. 566, 572, 38 P.2d 364 (1934). While the power is broad when it is exercised for the public good, it is not unlimited:

While the interest of the public may be likened unto an irresistible force which compels where it requires, it nevertheless must, under constitutional provisions, both federal and state, respect the rights of the individual. While the latter may not occupy the fixity of an immovable object, they nevertheless have the protection and sanction of the fundamental law of the land, and they recede before no less a force than that of public necessity.

Id. at 573.

In this regard, *City of Tukwila v. City of Seattle*, 68 Wn.2d 611, 414 P.2d 597 (1966) is determinative of the case before this Court. In *Tukwila*, the city granted non-exclusive franchises for electric service to both a private company and Seattle City Light. Tukwila then changed the franchises to create exclusive franchise zones in the city. Seattle City Light sued, arguing the opposite of what it argues here – that Tukwila did not have the police power to enforce this restriction because there was no connection between the city’s actions and public safety.⁴ Tukwila argued that its decision to create franchise zones was authorized by the police power because it would eliminate facility duplication and hazards of electrical distribution.

⁴ The City is apparently a police power absolutist up until that power is actually applied against the City itself. Appellants should have the same protection against unrestrained government power that the City has once sought for itself.

The supreme court agreed with Seattle City Light. Turning first to the argument that the creation of exclusive zones would bring in greater tax revenue, the court concluded, “we see no way in which the city of Tukwila can look to the economics of the matter in support of its exercise of the police power, and no authority has been shown in sustaining that proposition.” *Id.* at 614.

The court then addressed Tukwila’s safety concerns. In so doing, the court concluded the ordinances went beyond Tukwila’s legitimate safety goals and were not to be “countenanced as an exercise of the police power to protect the citizenry from the dangers of electrical transmission and distribution.” *Id.* at 614-15. The court noted that Tukwila’s claim that the zones were related to public health and safety was undercut by the fact that Seattle City Light intended to comply with all safety requirements:

There was no claim here that Seattle has not or will not comply fully with all state safety regulations and rules or those of Tukwila pertaining to the generation, transmission and distribution of electrical energy or the construction and maintenance of all related facilities.

Id. at 615.

The court specifically observed that a generalized concern for public health and safety permitted the city to regulate safety, but did not warrant Tukwila going as far as it did:

If the city believes that Puget Sound Power & Light Company and Seattle City Light pursue practices increasing the hazards of electrical distribution, it may, by

the adoption of the uniform rules applicable to all public utilities within its boundaries, legislate directly against the hazards feared.

This case, however, does not involve legislation designed to increase the safety factors or limit the dangers. It does not involve an electrical safety code, nor prescribe minimal standards for equipment, construction and safety devices but, instead, prohibits the exercise of the franchise in a substantial area of the franchised territory. It prohibits rather than protects.

Id. at 617.

Here, the City has not simply regulated CDL hauling services. Instead, it has closed the market for reasons unrelated to public health or safety. The City's actions prohibit rather than protect. Joe Ventenbergs has made clear that he has and will comply with environmental regulations regarding CDL hauling, belying the City's claim that these ordinances promote public health and safety. CP 555. In that regard, the generalized policy concerns of the City do not invest the City's actions with the requisite level of reasonableness because such policy concerns could be achieved with more than two haulers. *See* Appellants' Brief at 24-26.

The City's actions in restricting the market to just two companies were not designed to increase safety or limit dangers. The actions were, instead, designed to protect the City from a meritless lawsuit. CP 842, 903-04. The desire to avoid a meritless lawsuit – that is, the economics of the matter – cannot support the City's exercise of the police power here.

3. Federal Equal Protection Standards Do Not Apply

Rabanco argues that the appropriate level of scrutiny for Appellants' article I, section 12 claim is the same as the federal "rational basis" test under the equal protection clause. However, the cases relied upon by Rabanco predate the Washington Supreme Court's decision in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), which conclusively held that article I, section 12 requires an independent analysis from the federal equal protection clause when the issue concerns favoritism.

In *Grant County*, the supreme court clearly indicated that Washington courts are to interpret article I, section 12 independently from the federal provision and in a manner that focuses on the award of special privileges rather than on the denial of equal protection. *Id.* at 805-11. The court specifically concluded, "we hold that article I, section 12 of the Washington State Constitution requires an independent constitutional analysis from the equal protection clause of the United States Constitution." *Id.* at 811. Thus, Rabanco's attempt to graft federal equal protection standards onto Appellants' claims regarding the City's grant of special privileges directly contradicts the holding of *Grant County*.⁵

Rabanco also claims that Appellants argue that the City's ordinance must be analyzed with "strict scrutiny." Rabanco Brief at 12. Appellants do not seek strict scrutiny review. In *Grant County*, the supreme court relied upon a number

⁵ Notably, Rabanco does not cite *Grant County* in its brief.

of early cases to determine that article I, section 12 provides independent protections from that of the equal protection clause. Pursuant to these cases, legislation involving classifications must satisfy two requirements: (1) it must apply alike to all persons within the designated class; and (2) reasonable grounds must exist for distinguishing between those who fall within the class and those who do not. *Cotten v. Wilson*, 27 Wn.2d 314, 320, 178 P.2d 287 (1947).

Specifically, regulatory statutes that grant an economic benefit must rest on “real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act.” *State ex rel. Bacich v. Huse*, 187 Wash. 75, 84, 59 P.2d 1101 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass’n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979).

This is neither strict scrutiny nor the rational basis test. In an article relied upon by the *Grant County* court, one commentator described the correct standard in the following manner:

The *Huse* case is one decision in a long and well-elaborated line of authority in which the Washington Supreme Court has applied a cautiously interventionist, “reasonable ground” review to regulatory classifications challenged under article I, section 12. . . . It is important to note that, under the doctrine, the court generally deferred to the legislature’s choice of regulatory “ends,” heeding the rule that “every reasonable presumption is in favor of the constitutionality of a law or ordinance. Nonetheless, the court has applied a relatively stringent “reasonable ground” analysis to challenged regulatory classifications. “Reasonable ground” review assured that challenged regulatory classifications – especially exemptions from

regulations – rested on some ground of difference germane to the apparent or asserted regulatory purpose of the legislation rather than merely on the political power of the class enjoying the alleged privilege or immunity under the regulation.

Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?* 69 Temp. L. Rev. 1247, 1264-65 (1996) (emphasis added). As the supreme court observed in *Grant County*, "one might expect that the state provision would have a harder 'bite' where a small class is given a special benefit, with the burden spread among the majority." *Grant County*, 150 Wn.2d at 807.

Following the *Grant County* standard, the City's actions fail. The City restricted the CDL hauling market to Rabanco and Waste Management for reasons unrelated to CDL hauling. This Court should apply the proper standard as set forth in *Huse* and reaffirmed in *Grant County*, and reverse the trial court.

C. No Law Made CDL Hauling Illegal Until the City Passed the Challenged Ordinances

Rabanco justifies the City's impairment of the contract between Appellants Kendall Trucking and Haider Construction by arguing that the contract was illegal. Rabanco Brief at 17. However, for eighteen months, there existed no state jurisdiction over solid waste hauling in Seattle and no City ordinance that

made it illegal to haul CDL. During that time, Appellants' oral contract was valid.

The City correctly views the WUTC's jurisdiction in a municipality as terminating once the municipality executes solid waste contracts. *See* CP 572-73, 922. The contracts with Rabanco and Waste Management, which memorialized the exercise of City jurisdiction over solid waste hauling in Seattle, became effective April 1, 2001. CP 588. The City did not amend SMC 21.36.012(5) to make it illegal for anyone but Rabanco and Waste Management to haul CDL in Seattle until October 2002, over eighteen months later. CP 588. Thus, for eighteen months, the WUTC no longer exercised jurisdiction within the City and no City ordinance prohibited Appellants from hauling CDL through City streets. Therefore, no law prohibited the oral contracts between Kendall Trucking and Haider Construction.

Rabanco and the City attempt to have it both ways and suggest that Kendall Trucking remained subject to the jurisdiction of the WUTC following the execution of the City's contracts with Rabanco and Waste Management, despite the fact that the WUTC did not possess jurisdiction over solid waste hauling in Seattle. Rabanco Brief at 17; RP 23. But it would be highly unlikely that the WUTC would grant a certificate to a hauler operating in a municipality with

exclusive hauling contracts.⁶ CP 1599-1601. Although the contracts between the City and Rabanco and the City and Waste Management contain exclusivity provisions, CP 596, 680, Appellants were not parties to these contracts. The oral contracts between Kendall Trucking and Haider Construction were therefore valid from April 1, 2001 until November 2002, and the City's subsequent ordinances substantially impaired these contracts by making them violations of City law. *Margola Assoc. v. Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993) (impairment is substantial if the complaining party relied on the supplanted part of the contract).

Moreover, even when an area is heavily regulated, the contract clause will protect an impaired contract if the impairment is not justified by "a broad societal purpose." *Birkenwald Dist. Co. v. Heublein, Inc.*, 55 Wn. App. 1, 8, 776 P.2d 721 (1989). "[E]ven minimal impairment of contractual expectations violates the contract clause where there is no real exercise of police power to justify the impairment." *Id.* at 9. Special interest legislation with no showing of an attempt to address an important general social problem cannot stand under the contract clause. *Id.* Further, purely financial obligations of a state do not come within the ambit of the police powers. "If they did, the contract clause would be simply

⁶ Because it is the City's enforcement of SMC 21.36.012(5) and 21.36.030 and its contracts with Rabanco and Waste Management that prevent Kendall Trucking from obtaining a certificate from the WUTC to haul CDL within the City, Respondents cannot now fault Kendall Trucking for failing to obtain such certificate. See *Orion Corp. v. Washington*, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985) (recognizing that courts will not require vain and useless acts).

guttled.” *Caritas Serv’s, Inc. v. Department of Social and Health Serv’s*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994).

Here, there is no public health or safety justification to restrict the market to Rabanco and Waste Management. There was no “broad societal purpose” to the City’s actions; rather, it merely wished to avoid a lawsuit. CP 842, 903-04. Such simple financial considerations do not fall within the ambit of the City’s police power. *Caritas*, 123 Wn.2d at 413. Moreover, the ordinances constituted special legislation in favor of Rabanco and Waste Management – without any attempt to address an important general social problem – that cannot stand under the contract clause.

CONCLUSION

The City overstepped its constitutional boundaries when it enacted the ordinances granting special privileges to Rabanco and Waste Management and deprived Joe Ventenbergs of his right to specific employment. Rabanco asks this Court to protect its monopoly that harms, rather than protects, the interests of Seattle consumers and hard-working entrepreneurs like Joe Ventenbergs. Appellants ask that this Court reverse the trial court and hold that such unjust and unconstitutional regulations cannot stand.

RESPECTFULLY submitted this 27th day of August 2004.

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DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 27th day of August 2004 at Seattle, Washington.



Yvonne Maletic