

No. 53920-5

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76954-1

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

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 SEATTLE RESPONDENTS

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ORIGINAL

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
RESTATEMENT OF THE CASE	2
A. City Negotiated with Only Rabanco and Waste Management to Avoid a Lawsuit	2
B. City Does Not Mandate Where Rabanco and Waste Management Dispose of CDL	4
C. City had Numerous Options Available Besides Restricting Market to Two Companies	5
ARGUMENT.....	7
A. Proper Standard of Review.....	7
B. City Misconstrues the Issues Before this Court	8
1. This Case Concerns Right to Hold Specific Employment and Engage in a Profession	8
a. <i>Quinn Construction</i> Does Not Control	8
b. City Was Obligated to Implement RCW 81.77.020 in a Constitutional Manner	9
2. Cases Cited by City Do Not Control	12
C. CDL Hauling Is Not a Governmental Function	15

	<u>Page(s)</u>
D. Existence or Nonexistence of a G-Certificate is Irrelevant in Issuing Municipal Contracts	17
E. City's Actions Exceed Authority and Violate the Mandates of RCW 35.21.....	19
1. The Legislature – Not Courts – Must Expressly Provide Municipalities with Authority	19
2. City Ignores Plain Language of RCW 35.21	21
F. City's Actions Constitute a Private Taking.....	22
1. City Does Not Refute Appellants' Takings Argument	22
2. Takings Argument is Properly Before Court....	23
CONCLUSION	25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>City of Walla Walla v. Walla Walla Water Co.</i> , 172 U.S. 1, 19 S. Ct. 77, 43 L. Ed. 341 (1898).....	19
<i>Dalton v. Clarke</i> , 18 Wn.2d 322, 139 P.2d 291 (1943)	15
<i>Eastside Disposal Co. v. Mercer Island</i> , 9 Wn. App. 667, 513 P.2d 1047 (1973).....	18
<i>Greaves v. Medical Imaging Systems, Inc.</i> , 124 Wn.2d 389, 879 P.2d 276 (1994).....	8
<i>Hillside Community Church v. City of Tacoma</i> , 76 Wn.2d 63, 455 P.2d 350 (1969)	17
<i>Kleenwell Biohazard Waste & General Ecology Consultants v. Nelson</i> , 48 F.3d 391 (9th Cir. 1995)	13, 14
<i>Makris v. Superior Court</i> , 113 Wash. 296, 193 P. 845 (1920)	10, 11
<i>Manufactured Housing Cmty’s v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000).....	23
<i>Mountain Park Homeowners Ass’n v. Tydings</i> , 125 Wn.2d 337, 883 P.2d 1383 (1994)	24
<i>Mowbray Pearson Co. v. E.H. Stanton</i> , 109 Wash. 601, 187 P. 370 (1920).....	4
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003)	16, 17
<i>Plumbers & Steamfitters Union v. Wash. Pub. Power Supply Sys.</i> , 44 Wn. App. 906, 724 P.2d 1030 (1986).....	10
<i>Port of Seattle v. Wash. Util. and Transp. Comm’n</i> , 92 Wn.2d 789, 597 P.2d 383 (1979).....	19

	<u>Page(s)</u>
<i>Puget Sound Gillnetters Ass'n v. Moos</i> , 92 Wn.2d 939, 603 P.2d 819 (1979).....	11
<i>Quinn Construction Co. v. King County Fire Prot. Dist. No. 26</i> , 111 Wn. App. 19, 44 P.3d 865 (2002).....	8, 9
<i>Shaw Disposal, Inc. v. Auburn</i> , 15 Wn. App. 65, 546 P.2d 1236 (1976).....	14, 15, 20
<i>Smith v. Spokane</i> , 55 Wash. 219, 104 P. 249 (1909).....	12
<i>Spokane v. Carlson</i> , 73 Wn.2d 76, 436 P.2d 454 (1968).....	12, 20
<i>State ex rel. Bacich v. Huse</i> , 187 Wash. 75, 59 P.2d 1101 (1936)	11
<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1985).....	7
<i>Wasser & Winters Co. v. Jefferson County</i> , 84 Wn.2d 597, 528 P.2d 471 (1974).....	23
<i>Water, Light & Gas Co. v. Hutchinson</i> , 207 U.S. 385, 28 S. Ct. 135, 52 L. Ed. 257 (1907).....	19

Constitutional Provisions

Wash. Const. art. I, § 12..... *passim*

Codes, Rules, and Statutes

RCW 35.21	<i>passim</i>
35.21.120.....	21, 22
35.21.152.....	21, 22
35.21.156.....	15, 22
35.23.352.....	14
35A.40.200.....	14
81.77.....	9, 18
81.77.020.....	<i>passim</i>

	<u>Page(s)</u>
Wash. AGO 1996 No. 18.....	15
Wash. AGO 1984 No. 2.....	15

Other Publications

Robert F. Utter, <i>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</i> , 7 U. Puget Sound L. Rev. 491 (1984).....	2
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INTRODUCTION

The City of Seattle's Amended Brief in Response ("Amended Brief") seriously misconstrues Appellants' arguments. It is therefore necessary to clarify what this case is not about. This case is not about whether the City of Seattle (the "City") may use its police power to regulate the rates, terms and conditions of service for construction, demolition and landclearing waste ("CDL") hauling. It is not about whether the City was justified in contracting with Rabanco and Waste Management – quite simply, Appellants do not care whether these companies haul CDL. It is not about whether the City could municipalize CDL hauling. And it is not about whether the City was required to follow the bidding procedures for noncharter code cities. Yet these are the straw men the City sets up and knocks down.

What this case is about is whether our state constitution still protects those without influence who wish to pursue their chosen occupations or whether the framers drafted the privileges or immunities clause in vain.

The City's avoidance of the fundamental facts and issues in this case illustrate how far afield the City has wandered from the original intent and purpose of our state constitution. While the City disparages Joe Ventenbergs for having the temerity to fight for his right to earn an honest

living in his chosen profession, the framers specifically designed the state constitution to protect people like Joe. From their experience with the Territorial Legislature and the states from which they originated, the framers understood the human costs of the government granting special privileges to well-connected corporations. See Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 518-19 (1984). For this reason, our framers crafted an explicit and strong constitutional provision to prevent the granting of such special privileges.¹ The City has violated this provision on its face and this Court should reverse the trial court.

RESTATEMENT OF THE CASE

The Amended Brief omits certain facts crucial to this Court's analysis of this case.

A. City Negotiated with Only Rabanco and Waste Management to Avoid a Lawsuit

The City asserts that it negotiated with only Rabanco and Waste Management because of concerns with the ultimate disposal of CDL.

Amended Brief at 31-32. The contemporaneous documentation concerning the choice of hauler does not mention the importance – or even

¹ Perhaps comprehending the magnitude of its divergence from the vision of the framers, the City makes no mention of the purpose, scope, or intent of article I, section 12.

the existence – of Rabanco and Waste Management’s landfill facilities.²

Rather, the evidence demonstrates that the primary reason for choosing Rabanco and Waste Management was a desire to avoid a lawsuit. CP 842.

Mr. Hoffman’s deposition also contradicts the City’s current arguments:

[By Mr. Hoffman]: The biggest [reason for negotiating only with Rabanco and Waste Management] was to avoid the possibility of one or both of those companies taking a legal action for confiscation under takings, and were the City to go out and negotiate with multiple companies beyond the certificated haulers, there was a discussion that focused on the risk to the City of litigation by the existing service providers for takings of property or, in other words, the value of the certificates, and we chose the way to address that was to, for the first round of asserting control, was to negotiate with the companies that had the certificates as to avoid litigation over takings.

Q: [By Mr. Maurer] Okay. So that’s – that’s why you chose those par – two particular companies. Was there any reason – did the City have a specific reason for only choosing two companies in general? Did – was there a – was there a specific goal that could only be achieved by having two companies?

A: No. The negotiations focused on minimizing legal risk associated with takings by focusing on those companies that had the certificates, so those were the companies we focused on.

...

² The City’s stated goals in negotiating these contracts were to secure flow control, integrate their solid waste management, and achieve lower rates for commercial customers. CP 842. However, the evidence indicates that these goals were attainable with haulers other than Rabanco and Waste Management. CP 842 (“We can [achieve these goals] through negotiations with the current WUTC franchise holders or we can go out to bid.”) (emphasis added).

The City chose to negotiate with the certified haulers for the provision of service to reduce and/or eliminate the risk of litigation associated with takings.

CP 903-04 (emphasis added). The City has since admitted that any such lawsuit would have been meritless. RP 42.

Thus, contrary to the assertions in the Amended Brief, there was one controlling reason to negotiate with Rabanco and Waste Management and foreclose all others from providing CDL hauling services – avoidance of a meritless lawsuit.

B. City Does Not Mandate Where Rabanco and Waste Management Dispose of CDL

The City maintains that it has received “assurances” from Rabanco and Waste Management that CDL will go to each company’s respective landfill. Amended Brief at 31-32. Simple “assurances” do not constitute enforceable, bilateral contracts.³ CP 445, 989. Importantly, the City has not chosen to enforce those portions of the contracts with Rabanco and Waste Management requiring each company to dispose of CDL in its respective landfills. CP 217, 315, 905. In contrast to the position it took in its Amended Brief, the City has no idea where CDL, regardless of its source, is ultimately disposed.

³ Contracts lacking mutuality are not obligatory on the party with the option not to perform. *See Mowbray Pearson Co. v. E.H. Stanton*, 109 Wash. 601, 603, 187 P. 370 (1920).

Q: [By Mr. Maurer] For CDL that's picked up in the city of Seattle, either by a self-hauler, by one of the contracted companies, or by an independent hauler, the City really doesn't have any idea where CDL ultimately ends up, does it?

A: [By Mr. Hoffman] I don't believe we track the transport and disposal of CDL.

CP 934. Further, the City does not mandate that Rabanco and Waste Management dispose of CDL in any particular location.

Q: [By Mr. Maurer] But the City doesn't have – the City doesn't mandate where Rabanco or Waste Management ultimately dispose of CDL; is that correct?

A: [By Mr. Hoffman] That – that is correct.

CP 890. In contrast, the City mandates where residential and commercial waste (excluding CDL) is disposed. CP 761-2, 764, 879-80.

While the ultimate disposal of CDL is allegedly important enough to restrict the market to two companies and drive independent haulers out of business, it is apparently not important enough for the City to either enforce the contractual provisions mandating environmentally responsible disposal or track where CDL is actually disposed.

C. City had Numerous Options Available Besides Restricting the Market to Two Companies

The City maintains that it had legitimate reasons for restricting the market to only two companies. Amended Brief at 28, 32. Again, the evidence does not support this claim. Mr. Hoffman repeatedly stated that

the City could achieve its goals with more than two companies. *See* CP 903-04 (“Q: [W]as there a specific goal that could only be achieved by having two companies? A: No.”); CP 904 (“Q: [S]o there was no magic number to two companies. It was – just happened to be the number of companies that had certificates at the time. . . A: That was the number of companies that had certificates.”); CP 923 (“A: The City can achieve its solid waste goals by contracting with one or more companies.”); CP 924 (“Q: Of the goals you listed under your public health and safety justifications, which ones can only be achieved through limiting competition to two entities? A: I don’t know that any of them are dependent on that.”).⁴ Importantly, Mr. Hoffman suggested that the City could address its goals without restricting the market at all:

I believe there could be a variety of ways of addressing public health and safety issues associated with the collection and disposal of solid waste. The number of companies is one. Punitive regulatory standards and fines is another. Regular reporting requirements is a third. Required vehicle inspections is a fourth. Wage requirements would be a fifth. So I believe there’s a number of other mechanisms that could be put in place that would allow you to attempt to address health and safety.

CP 932.

The evidence omitted from the Amended Brief clearly establishes the following facts: (i) the City chose to negotiate with only Rabanco and

⁴ These statements are clear on their face, despite the City’s contention that quoting Mr. Hoffman’s sworn statements is somehow misleading. *See* Amended Brief at 1.

Waste Management and restrict the market to these two companies to avoid a meritless lawsuit, (ii) the City has no idea where CDL is ultimately disposed and does not mandate that Rabanco and Waste Management dispose of CDL in a particular location, and (iii) the City could have addressed its public health and safety goals with a wider market or by strict regulation, or both. The City's assertions to the contrary are not consistent with the evidence.

ARGUMENT

A. Proper Standard of Review

Citing *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985), the City asserts that this Court must find that the ordinances in question were “arbitrary and capricious” before striking them down. Amended Brief at 14. This is not the applicable standard. In *Teter*, landowners challenged as unreasonable Clark County's “determination that appellants' properties are located within the Burnt Bridge Creek drainage basin” *Id.* at 228. The court held that this factual determination was to be analyzed under the “arbitrary and capricious” test. *Id.* at 234-25.

Here, Appellants have not challenged any factual determination by the City. Because the City's factual findings are simply not at issue, the “arbitrary and capricious” standard does not apply and the *de novo*

standard is appropriate. *Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 392, 879 P.2d 276 (1994).

B. City Misconstrues the Issues Before this Court

The City argues that this case involves the right to obtain a municipal contract. The City also cites a number of cases that it argues require judgment for Respondents. These arguments misconstrue the issues before this Court because the City has failed to grasp the precise right it has violated. As this is a case of first impression, none of the cases cited by the City are determinative of the issues before this Court.

1. This Case Concerns Right to Hold Specific Employment and Engage in a Profession

The City asserts that Appellants have no right to a government contract. Amended Brief at 26. This is not the right Appellants seek to vindicate. Appellants seek to vindicate their right “to pursue their livelihoods free from the interference of unreasonable and illegal government favoritism.” CP 22 (Plaintiffs’ First Amended Complaint).

a. *Quinn Construction* Does Not Control

The City cites *Quinn Construction Co. v. King County Fire Protection District No. 26*, 111 Wn. App. 19, 44 P.3d 865 (2002), as support. In *Quinn*, a bidder on a public construction project⁵ objected to

⁵ Unlike the government entity in *Quinn*, the City here failed to comply with the statutory requirements for issuing a contract. See Section E.2, *infra*.

the district's award of a contract to a bidder that filed its bid five seconds late. Quinn claimed that granting the contract to the late bidder deprived it of a property interest without due process. The court concluded that "competitive bidding laws give the public a right to frugal state contracting through competition; they do not give low bidders a vested right to state contracts." *Id.* at 32.

Quinn does not apply. *Quinn* did not involve a law making it illegal for all but the winning bidder to perform construction services within the district. Rather, the losing bidder was permitted to compete on equal terms to receive the ability to perform the contract work. In *Quinn*, the winning bidder merely received the government contract and the losing bidder did not. Thus, the government's actions in *Quinn* did not have the same effect on Quinn's constitutional rights as the City's actions here have on Appellants' fundamental rights.

b. City Was Obligated to Implement RCW 81.77.020 in a Constitutional Manner

Through its implementation of RCW 81.77.020, the City's issuance of contracts for CDL hauling unreasonably interferes with Ventenbergs' ability to hold specific private employment.⁶ In

⁶ The City asserts that Appellants are challenging the constitutionality of RCW 81.77. Amended Brief at 23. RCW 81.77 may or may not be constitutional – that issue is not before this Court. Rather, it is the City's implementation of RCW 81.77.020 that is unconstitutional.

Washington, “The right to hold specific private employment and follow a chosen profession free from *unreasonable* government interference is a fundamental right which comes within the liberty and property concepts of the Fifth Amendment.” *Plumbers & Steamfitters Union Local 598 v. Washington Pub. Power Supply Sys.*, 44 Wn. App. 906, 915, 724 P.2d 1030 (1986) (underline emphasis added). Therefore, the City’s issuance of contracts pursuant to RCW 81.77.020 must be consistent with Ventenbergs’ right to hold specific employment as protected by article I, section 12 of the Washington Constitution.

In *Makris v. Superior Court*, 113 Wash. 296, 193 P. 845 (1920), Tacoma sought to revoke the business license of Makris, who operated a soda shop. Tacoma created its licensing scheme pursuant to a state statute that granted the city authority “to grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefore [*sic*], and to provide for revoking the same.” *Id.* at 308 (quoting Rem. Rev. Code § 7507). Makris sued, claiming that the Tacoma ordinance granted unbridled authority to determine who could operate a business in the city. In spite of the broad language of the enabling statute, the Washington Supreme Court concluded that Tacoma violated Makris’ rights:

Nor do we hold such [enabling] provision to be unconstitutional; for we are quite convinced that it does not mean anything more than that the city may, in a lawful and

constitutional manner, provide for the granting and revoking of licenses.

Makris, 113 Wash. at 308 (emphasis added).

Similarly, here RCW 81.77.020 exempts from the state regulatory scheme haulers that have a “contract of solid waste disposal with any city or town.” This does not give a municipality carte blanche, as the City suggests, to violate the rights of citizens who wish to engage in the profession of CDL hauling. Rather, as in *Makris*, this statute means nothing more than that the City may, in a lawful and constitutional manner, provide for the issuance of solid waste contracts.

Consistent with the Washington Constitution, the City may only distinguish between those who may haul CDL based 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, 83-4, 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). Here, the City restricted CDL hauling to two companies only to avoid a meritless lawsuit. The City has articulated no reasonable ground for excluding Kendall Trucking because the City did not even consider granting Kendall Trucking (or any other hauler) hauling privileges. The evidence demonstrates that the reason for restricting the market – avoiding a lawsuit

– was not the result of any real and substantial difference bearing a natural, reasonable and just relation to CDL hauling.

2. Cases Cited by City Do Not Control

The City attempts to frame this case as one that is governed by decades of well-settled law. Amended Brief at 45. However, even the most cursory review of the cases relied upon by the City demonstrates that these cases do not resolve the issue before this Court.

The City claims that *Smith v. Spokane*, 55 Wash. 219, 104 P. 249 (1909) and *Spokane v. Carlson*, 73 Wn.2d 76, 436 P.2d 454 (1968) grant it “expansive authority to manage and operate their solid waste handling systems as they see fit.” Amended Brief at 17. While both cases contain general language concerning the regulation of “garbage collection” as an exercise of a city’s police power, both involve a waste disposal system under which the city reserved to itself the exclusive right to collect garbage and refuse in the city. Despite the City’s characterization of this fact as “irrelevant,” Amended Brief at 20, it distinguishes both *Smith* and *Carlson* from the instant case because the City here has not municipalized its system of waste disposal. To the contrary, it has granted exclusive franchises to two companies, thereby implicating the privileges or immunities clause of the Washington Constitution. No such grant to private companies exists in the cases relied upon by the City.

The City also claims that *Kleenwell Biohazard Waste & General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995) stands for the proposition that “the strong local governmental interest in regulating garbage collection” is “a governmental interest which is not restricted by the United States Constitution.” Amended Brief at 27. This mischaracterizes the scope and holding of *Kleenwell*.

The Ninth Circuit expressly noted the limited nature of its holding at the outset of its discussion:

[W]e begin by noting the limits of our decision. *Kleenwell* premised its challenge to the state regulatory scheme entirely upon its belief that a state may not impose a certification requirement upon a waste disposal firm engaged in interstate commerce. It did not contend that the state’s refusal to grant it a permit was improper, or that the regulation was invalid, for any reason other than the asserted impact upon interstate commerce. . . . Accordingly, we merely evaluate the general structure and purpose of the state’s regulatory scheme and do not consider whether the specifics of its operation would withstand constitutional scrutiny.

Kleenwell, 48 F.3d at 399 (emphasis added). *Kleenwell* did not address whether Washington’s regulatory system of waste disposal comported with the dictates of the federal constitution. And it did not address whether an exclusive grant of franchises to two corporations violated Washington’s privileges or immunities clause. Rather, the court merely held that a state may “impose a certification requirement upon a firm

engaged in interstate commerce.” *Kleenwell*, 48 F.3d at 392.

Accordingly, the City’s characterization of *Kleenwell* as disposing of “the federal constitutional issues of exclusive municipal solid waste collection,” Amended Brief at 45, is simply unsupported.

The City contends 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.” Amended Brief at 21-22 (citing *Shaw Disposal, Inc. v. Auburn*, 15 Wn. App. 65, 546 P.2d 1236 (1976)). Again, this case does not go as far as the City wishes.

The *Shaw Disposal* court specifically stated, “[I]t is clear that Auburn . . . may contract for garbage disposal without restriction unless prevented by the constitution, general law, or ordinance.” *Shaw Disposal*, 15 Wn. App. at 66 (emphasis added). After a thorough analysis of the particular statutes at issue,⁷ the court held that such statutes did not require a code city to conduct a public bidding process to extend a waste collection contract. *Id.* at 66-67. Importantly, the court specifically noted

⁷ *Shaw Disposal* involved the applicability of RCW 35A.40.200 and RCW 35.23.352, two statutory provisions not at issue in the instant case. As discussed below, RCW 35.21 governs this case and explicitly details the numerous public process requirements that are required of the City.

that the case did not involve a constitutional challenge to the city's extension of its contract. *Id.* at 66.

Despite the City's argument to the contrary, *Shaw Disposal* does not stand for the proposition that there is no statutory or constitutional provision requiring a city to comport with procedural requirements when executing solid waste collection contracts. Amended Brief at 21-22. Rather, *Shaw Disposal* and its progeny stand for the simple and unremarkable proposition 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; Wash. AGO 1984 No. 2 at 3. *See also Dalton v. Clarke*, 18 Wn.2d 322, 329, 139 P.2d 291 (1943).

The City's execution of contracts for the collection and disposal of solid waste must comport with both the privileges or immunities clause of the Washington Constitution and RCW 35.21.156. Neither were at issue in *Shaw Disposal*, which does not give the City the authority to violate the Washington Constitution or disregard the applicable legislative mandates.

C. CDL Hauling Is Not a Governmental Function

For the first time at oral argument before the trial court, the City characterized CDL hauling as a "city service," thereby allegedly freeing the City from the mandates of the Washington Constitution. Instead of

responding to Appellants' argument that this term is not defined in case law, statutes or ordinances, or by the City itself, the City merely retorted that it was a "boorish attempt on [Appellants'] part to appear dense." Amended Brief at 17.

Unfortunately, the City has again resisted the opportunity to define this term and inform this Court and the parties how classifying something as a "city service" negates the application of the express and mandatory provisions of the Washington Constitution. This is likely because the trial court's conclusion on this point – that CDL hauling is a "city service" and therefore a "government function" unaffected by the operation of the privileges or immunities clause -- is wrong under Washington law. *See CP 1331.*

In *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), the City took the opposite argument it advances here, arguing that the provision of street lighting is a proprietary function.⁸ *Okeson* addressed whether the provision of street lighting is a governmental function (the costs of which should be shared by all) or a proprietary function (the costs of which should be borne by ratepayers). The court reasoned:

⁸ It appears that the City's definition of a government function depends solely on which definition benefits the City during litigation.

[T]his court long ago determined that water rates are not taxes because the “consumer pays for a commodity which is furnished for his comfort and use.” The same reasoning applies to electric utility customers. A utility will not provide electricity to a customer that does not request service. Thus, the electric utility is a proprietary function of government.

Providing streetlights, however is a governmental function because they operate for the benefit of the general public, and not for the “comfort and use” of individual customers. City Light customers have no control over the provision or use of streetlights.

Id. at 550 (internal citation omitted) (emphasis added).

Similarly, CDL hauling is a proprietary function, as service is only provided when a customer specifically requests service. CP 552, 559-60, 883. Hauling CDL is not like providing streetlights, which shine whether residents want them to or not. Quite simply, the trial court’s conclusion that CDL hauling is a government function unrestricted by the operation of article I, section 12 is incorrect. The provision of a proprietary service does not insulate the government from the operations of the constitution. “The general rule of law is that a state or municipality cannot avoid the constitutional limitations upon state action by claiming the shield afforded proprietary functions.” *Hillside Community Church v. City of Tacoma*, 76 Wn.2d 63, 65, 455 P.2d 350 (1969).

D. Existence or Nonexistence of a G-Certificate is Irrelevant in Issuing Municipal Contracts

The City makes much of the fact that Rabanco and Waste Management held certificates of convenience and necessity (“G-certificates”) prior to the City’s exercise of jurisdiction. Amended Brief at 10, 23, 28. Yet the existence or nonexistence of a G-certificate is utterly irrelevant under Washington law when a municipality exercises jurisdiction over solid waste hauling.

Washington courts have held that a municipality’s right to exercise its authority to contract for waste collection service supersedes the rights of a certificate holder. *Eastside Disposal Co. v. Mercer Island*, 9 Wn. App. 667, 675, 513 P.2d 1047 (1973) (holding that ordinance granting non-certificated holder right to collect waste to the exclusion of existing certificate holder, “by the express provisions of RCW 81.77, supersedes the otherwise existing right to collect garbage . . . conferred upon holders of certificates of public convenience and necessity”). Further, courts have recognized that RCW 81.77.020 does not require a city to offer contracts for solid waste disposal to those companies holding existing certificates within such city. *Id.* at 674. Thus, under the holding of *Eastside Disposal*, Rabanco, Waste Management, Kendall Trucking, and every other hauler started with a “clean slate” for purposes of consideration by the City. Rather than consider each hauler on its merits, however, the City merely began negotiating with Rabanco and Waste Management.

E. City's Actions Exceed Authority and Violate the Mandates of RCW 35.21

1. The Legislature – Not Courts – Must Expressly Provide Municipalities with Authority

The City erroneously contends that Appellants' "argument that express authority was required for the City to enter into its contracts with Rabanco and Waste Management ignores Washington law." Amended Brief at 38.

Municipalities have only those powers expressly granted, necessarily or fairly implied, or those incident to the powers expressly granted, or essential to the declared objects and purposes of the municipality. *Port of Seattle v. Washington Util. and Transp. Comm'n*, 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979). The United States Supreme Court has held that if the legislature does not expressly provide municipal corporations with the power to grant an exclusive franchise, such a grant by the municipality is impermissible. *Water, Light & Gas Co. v. Hutchinson*, 207 U.S. 385, 397, 28 S. Ct. 135, 52 L. Ed. 257 (1907); *see also City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 14, 19 S. Ct. 77, 43 L. Ed. 341 (1898) ("Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect.").

The City points to no portion of RCW 35.21 – or any other legislative authority – that expressly grants it the right to restrict the CDL hauling market to two companies. Instead, it points to distinguishable case law to support its claim that courts have “upheld cities’ authority to enter into exclusive contracts for solid waste collection” Amended Brief at 38 (citing *Shaw Disposal*, 15 Wn. App. at 68, and *Spokane v. Carlson*, 73 Wn.2d at 79). With due deference to our courts, the United States Supreme Court has made clear that it is the legislature – not the courts – that must expressly provide municipal corporations with the power to grant exclusive franchises.

Moreover, the record here belies any argument that exclusivity is indispensable to the exercise of the City’s powers. CP 923 (“The City can achieve its solid waste goals by contracting with one or more companies.”) (emphasis added); RP at 52 (By Mr. Patton: “[I]s this absolutely the only way to accomplish this? Well, no.”).⁹ The City therefore admits that exclusivity is not indispensable to its goals.

⁹ In a remarkable lack of candor, the City argues, “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.” Amended Brief at 27 (citing Appellants’ Brief at 24-25). Had the City accurately quoted Appellants’ brief, it would have been clear that the passage attributed to Appellants is actually a verbatim quotation of a remark made by the City’s counsel at oral argument, which proved the existence of alternatives. For purposes of clarity, the quotation of the City’s statement is included again above.

No Washington statute expressly provides or necessarily implies that the City possesses the authority to restrict the CDL hauling market to two companies. Thus, the City's reliance on case law to establish its claim of unfettered authority to dole out exclusive franchises without regard to any express grant of legislative authority must fail.

2. City Ignores Plain Language of RCW 35.21

Pointing to basic rules of statutory construction, the City argues that where a statute is unambiguous, the court should not engage in statutory construction past the plain meaning of the words.¹⁰ Amended Brief at 39. Appellants agree and demonstrate that the plain language of RCW 35.21 establishes that the City exceeded its power by granting exclusive franchises.

RCW 35.21.120 authorizes a city or town to award contracts for "any service" related to solid waste handling systems and, by its terms, specifically references RCW 35.21.152. Similarly, RCW 35.21.152 provides municipalities with the authority to enter into agreements with public or private parties to "[c]onstruct, lease, purchase, acquire, manage,

¹⁰ The City's argument that this Court should follow the plain language of RCW 35.21 is contradicted by its inclusion of several new unidentified documents (not considered by the trial court or included in the Clerk's Papers) that are purportedly "legislative history." See Amended Brief at 41-44. In fact, the bulk of the City's response to Appellants' statutory argument focuses on "interpreting" this new evidence. Appellants have moved to strike this material and the arguments based upon it. This Court has yet to rule on Appellants' motion. Regardless, this Court should reject the City's attempt to ignore the plain language of RCW 35.21.

maintain, utilize, or operate publicly or privately owned or operated solid waste handling systems, plants, sites, or other facilities” (emphasis added). However, RCW 35.21.152, like RCW 35.21.120, does not specify the process by which a city exercises its authority.

The mandatory process governing a city’s solid waste handling system is memorialized in RCW 35.21.156.¹¹ The statute creates an exhaustive list of requirements that must be met before a city is permitted to execute contracts pursuant to RCW 35.21. Here, it is undisputed that the City failed to comply with any of the procedural mandates of RCW 35.21.156. Instead, it simply began negotiating with Rabanco and Waste Management and awarded exclusive contracts to these two corporations. CP 903-04, 920.

Because the City failed to comply with any of the procedural mandates of RCW 35.21.156, this Court should hold that the City exceeded its authority in executing the contracts with Rabanco and Waste Management.

F. City’s Actions Constitute a Private Taking

1. City Does Not Refute Appellants’ Takings Argument

Appellants have demonstrated that Appellant Ron Haider enjoys all incidents of ownership over CDL produced at his worksites. CP 560

¹¹ Importantly, RCW 35.21.156 requires reference to *both* RCW 35.21.120 and 35.21.152.

(“I am free to possess, use, enjoy, sell or dispose of the waste produced at [residential] sites and refused by the customers.”). The chief incidents of ownership of property are the right to possession, use, enjoyment, and the ability to sell or dispose of property. *Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597, 599, 528 P.2d 471 (1974). The City’s transfer of Haider’s right to dispose of his property to Rabanco and Waste Management, two private entities, violates the prohibition on private takings found in article I, section 16 of the Washington Constitution. *See Manufactured Housing Cmty’s v. State*, 142 Wn.2d 347, 371-72, 13 P.3d 183 (2000).

Nevertheless, the City – without explanation – asserts that Haider does not own the CDL. Amended Brief at 44. It is without legal consequence that Haider would pay someone to take away this property. Haider has a right to dispose of his property and the City cites no authority establishing that paying for disposal of one’s property negates one’s property rights. The City’s arguments rest on no viable legal or factual grounds and should be disregarded.

2. Takings Argument is Properly Before Court

The City suggests that Appellants’ takings argument is not properly before this Court. The City is incorrect.

Because this Court's review is *de novo*, it may consider any theory established by the pleadings and supported by the proof. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994). Appellants established the issue in their Reply to the City's Counterclaim for Injunctive Relief and proved it in Appellants' Motion for Summary Judgment. CP 428, 476-77. Both the City and Respondent Waste Management responded substantively in their respective Responses and the trial court granted some, but not all, of the relief specifically sought by the City. CP 1333. Appellants are aggrieved by this order, and the fact that Appellants did not add the takings argument until the City sued Appellants has no practical effect.

In that regard, the City asserts that because its request for injunctive relief sought by its counterclaim was "presumably the basis" for Appellants' takings claim, the issue was resolved when the trial court denied the City's request for injunctive relief. This presumption is wrong. In its Amended Answer and Counterclaim for Injunctive Relief, the City requested relief on four separate grounds, including judgment, dismissal with prejudice, and a permanent injunction. The City's request for relief did not differentiate between relief sought solely in response to the complaint and relief sought in the City's counterclaim. CP 62. Appellants answered by claiming that an order granting the counterclaim and the

injunctive relief sought would violate the takings clause. CP 428 (“Any order granting the Counterclaim and the injunctive relief sought therein would violate article I, section 12 of the Washington Constitution”) (emphasis added). Some of the relief sought by the City (judgment and dismissal) was granted. The takings issue is therefore properly before this Court.

CONCLUSION

The City has violated Appellants’ fundamental rights by restricting the market in CDL hauling for reasons unrelated to public health and safety and has acted beyond its statutory and constitutional authority. For these reasons, this Court should reverse the decision of the trial court.

RESPECTFULLY submitted this 27th day of August 2004.

INSTITUTE FOR JUSTICE
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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 August 27, 2004, a true copy of the foregoing Reply was placed in envelopes addressed to the following persons:

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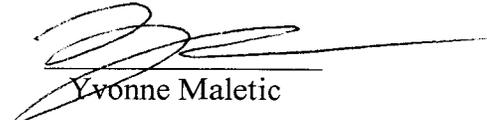
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which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

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


Yvonne Maletic