53920-5 53920-5

NO. 53920-5-I

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,

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,

Respondents.

BRIEF OF RESPONDENT RABANCO, LTD.

David W. Wiley, WSBA #08614
Dana A. Ferestien, WSBA #26460
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondent Rabanco, Ltd.

Two Union Square
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, WA 98111-3926
(206) 628-6600

TABLE OF CONTENTS

I. INTRODUCTION; JOINDER IN CITY'S BRIEF 1

II. ARGUMENT 1

A. The Superior Court May Be Affirmed On Any Ground Supported by the Record 1

B. The Fact That Kendall Trucking Operated Outside the Law May Not Be Romanticized or Explained Away 2

C. Cities Are Just As Responsible for Demolition and Construction Wastes Generated Within Their Boundaries As They Are For Household Garbage Generated By Their Residents, and Have The Same Police Powers With Respect to Such Wastes 4

D. The City's Enactment and Enforcement of SMC § 21.36.012(5) and .030, Implements the City's Power to Make Exclusive Solid Waste Collection Contracts, And It Neither Denies Kendall Trucking Equal Protection of the Law Nor Impairs Any Constitutionally Protected Contract Right of Any of the Appellants 8

1. Appellants' arguments based on Wash. Const. Art. I, §§ 12 and 23 give short shrift to the City's police power under the same Constitution 8

2. Because it is rational for Seattle to discriminate between companies with which it has lawful exclusive contracts and those with which it does not have such contracts, SMC 21.36.012(5) and .030 do not operate to deny equal protection of the law to Kendall Trucking 11

3. SMC 21.36.012(5) and .030 do not violate Wash. Const. Art. I § 23, because they advance a legitimate municipal interest and because the contract they "impair" was illegal 16

4. It does not matter that "CDL" is not collected on regular scheduled routes, but rather is collected as needed 17

III. CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Alderwood Associates v. Washington Env. Council,
96 Wn.2d 230, 635 P.2d 108 (1981) 9

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978) 16

Asarco Inc. v. Department of Ecology,
145 Wn.2d 750, 43 P.3d 471 (2002) 7

Birkenwald Distributing Co. v. Heublein, Inc.,
55 Wn. App. 1, 776 P.2d 721 (1989) 16

CLEAN v. State,
130 Wn.2d 782, 928 P.2d 1054 (1996) 9

Citizens for Clean Air v. City of Spokane,
114 Wn.2d 20, 785 P.2d 447 (1990) 6

City Sanitary Services v. Rausch,
10 Wn.2d 446, 117 P.2d 225 (1941) 15

Clark v. Dwyer,
56 Wn.2d 425, 353 P.2d 941 (1960) 8

Griffith v. Connecticut,
218 U.S. 563, 31 S. Ct. 132, 54 L. Ed. 1151 (1910) 17

Johanson v. Department of Social and Health Services,
91 Wn. App. 737, 959 P.2d 1166 (1998), rev. denied,
137 Wn.2d 1010 (1999) 17

LaMon v. Butler,
110 Wn.2d 216, 751 P.2d 842 (1988), cert. denied,
493 U.S. 814 (1989) 1

Margola Associates v. City of Seattle,
121 Wn.2d 625, 854 P.2d 23 (1993) 16

Okeson v. City of Seattle,
150 Wn.2d 540, 78 P.3d 1279 (2003) 1, 17, 18, 19

Quinn Const. Co. v. King County Fire Prot. District No 26,
111 Wn. App. 19, 44 P.3d 865 (2002) 13

Ralph v. Wenatchee,
34 Wn.2d 638, 209 P.2d 270 (1949) 12-13

Samis Land Co. v. City of Soap Lake,
143 Wn.2d 798, 23 P.3d 477 (2001) 18, 19

Seeley v. State,
132 Wn.2d 776, 940 P.2d 604 (1997) 14

Shaw Disposal, Inc. v. Auburn,
15 Wn. App. 65, 546 P.2d 1236 (1976) 14, 15, 16

Shea v. Olson,
185 Wash. 143, 53 P.2d 615 (1936) 9, 11

Smith v. Spokane
55 Wash. 219, 104 P. 249 (1909) 15

State v. Brayman,
110 Wn.2d 183, 751 P.2d 294 (1988) 8

State v. Manussier,
129 Wn.2d 652, 921 P.2d 482 (1996) 12

State v. McConahy,
86 Wn. App. 557, 937 P.2d 1133, rev. denied,
133 Wn.2d 1018 (1997) 9, 10, 11

Teter v. Clark Cy.,
104 Wn.2d 227, 704 P.2d 1171 (1985) 18

Tunstall v. Bergeson,
141 Wn.2d 201, 5 P.3d 691 (2000) 12

Washington Federation of State Employees v. State,
101 Wn.2d 536, 682 P.2d 869 (1984) 16

Whitaker v. Spiegel Inc.,
95 Wn.2d 661, 623 P.2d 1147 (1981) 9

STATUTES, ORDINANCES AND RULES

RCW 35.21.120 ..... 14, 15

RCW 70.95.010 5

RCW 70.95.030(22) 3, 5, 15

RCW Ch. 81.77 3

RCW Ch. 81.77.010(7) 3

RCW Ch. 81.77.010(9) 3

RCW Ch. 81.77.020 ..... 2, 3, 14

RCW Ch. 81.77.090 3

SMC § 21.36.012(5) 8, 11, 16, 19

SMC § 21.36.030 ..... 8, 11, 16, 19

U.S. Const. Amend. 10 9

U.S. Const. Amend. XIV § 1 12

U.S. Const., Art. I § 10 16

Wash. Const. Art. I, § 1 ..... 8, 10

Wash. Const. Art. I, § 12 ..... 1, 8, 9, 11, 12

Wash. Const. Art. I § 23 ..... 1, 8, 16

Wash. Const. Art. XI § 11 ..... 8, 9, 10, 19

RAP 2.5(a) 1

I. INTRODUCTION; JOINDER IN CITY'S BRIEF

Rabanco, Ltd., a party to this case by reason of its interest in the contracts that would be affected if appellants' challenge to Seattle Municipal Code § § 21.36.012(5) and .030 were to succeed, adopts the statements of issues and facts in the City of Seattle's brief, and joins in the City's arguments. Rabanco also supplements, as follows, the City's responses to the arguments by appellants that are based on Wash. Const. Art. I, §§ 12 and 23.[1]

II. ARGUMENT

A. The Superior Court May Be Affirmed On Any Ground Supported by the Record.

The issues presented by this appeal concern constitutional powers and limitations as well as the scope of municipal regulatory authority under statutes. The issues therefore are ones of law to be decided *de novo* by this Court. Okeson v. City of Seattle, 150 Wn.2d 540, 548-49, 78 P.3d 1279 2003). The superior court may be affirmed on any ground supported by the record, including grounds upon which the superior court did not base its ruling. RAP 2.5(a); LaMon v. Butler, 110 Wn.2d 216, 223, 751 P.2d 842 (1988), cert. denied, 493 U.S. 814 (1989).

[1] Appellants also assert a "takings" argument, App. Br. at 44-46. Rabanco chooses not to add to what the City's brief has to say by way of response to that argument.

B. The Fact That Kendall Trucking Operated Outside the Law May Not Be Romanticized or Explained Away.

Appellants portray the activities of Kendall Trucking as the pursuit of his "chosen profession" by Josef Ventenbergs under the benign indifference and tacit consent of the Washington Utilities and Transportation Commission ("WUTC"). App. Br. at 1, 10-12, 20-21. It is no excuse, however, that Mr. Ventenbergs was unaware from 1994 until recently that state law made it unlawful for his company to collect solid waste without authority from the WUTC. Nor did the WUTC's failure to notice and stop his company's activity give Mr. Ventenbergs some sort of vested right to continue operating.

That Kendall Trucking operated illegally cannot seriously be disputed. Under RCW 81.77.020:

> No person, his lessees, receivers, or trustees, shall engage in the business of operating as a solid waste collection company in this state, except in accordance with the provisions of this chapter: PROVIDED, That the provisions of this chapter shall not apply to the operations of any solid waste collection company under a contract of solid waste disposal with any city or town, nor to any city or town which itself undertakes the disposal of solid waste.

For purposes of the above-quoted statute, a "solid waste collection company" is anyone "owning, controlling, operating or managing vehicles used in the business of transporting solid waste for collection and/or disposal for compensation, except septic tank pumpers, over any public

highway in this state whether as a 'common carrier' thereof or as a 'contract carrier' thereof." RCW 81.77.010(7). RCW 81.77.010(9) provides that the term "solid waste" in RCW 81.77.010(7) and in RCW 81.77.020 has the meaning given that term by RCW 70.95.030(22). Under RCW 70.95.030(22), "'solid waste' or 'wastes' means all putrescible and nonputrescible solid and semisolid wastes including, but not limited to . . . demolition and construction wastes. . ."

Thus, Kendall Trucking vehicles transported demolition and construction wastes over the public highways of the state for compensation. Therefore, Kendall Trucking engaged in the business of operating a solid waste collection company in Washington. Because it never held any certificate of authority to do so, it failed to comply with the provisions of RCW chapter 81.77. Because Kendall Trucking has never operated under a contract of solid waste disposal with any city or town, it may not contend that the provisions of RCW Ch. 81.77 may be ignored by virtue of the proviso to RCW 81.77.020, which applies only to companies under contract with a city or town.[2]

[2] RCW 81.77.090 provides that "Every person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provisions of this chapter . . . is guilty of a gross misdemeanor."

C. Cities Are Just As Responsible for Demolition and Construction Wastes Generated Within Their Boundaries As They Are For Household Garbage Generated By Their Residents, and Have The Same Police Powers With Respect to Such Wastes.

Appellants suggest that case law relating to the power of municipalities with regard to regulation of solid waste collection is somehow less pertinent to demolition and construction wastes because such wastes are collected on an as-needed/when-needed basis rather than using scheduled routes, and/or because Seattle has only recently become actively involved in overseeing the collection of such wastes, and/or because "CDL" is somehow a more benign type of waste than others. See App. Br. at 4-6, 36-37. None of these lines of argument are persuasive.

"CDL" contains not only land-clearing debris and sharp and dirty things such as chunks of lumber, rubble, and glass. Common sense tells us that it can and often will include all types of modern and older building materials, including treated lumber, particle board, insulation, adhesives, leaded paint, dusts of various kinds, and asbestos-impregnated materials. Getting rid of "CDL" properly is as important from a public health/safety/welfare standpoint as disposing properly of garbage or materials that businesses put in regularly-emptied dumpsters.

Even if the relative societal importance of "CDL" collection and "garbage" collection could be debated by academics, however, the matter

has been resolved by the Legislature. RCW 70.95.030(22) makes "CDL" a form of "solid waste," and the Legislature did not exempt "CDL" from statutes such as RCW 70.95.010, which makes rather clear its expectation that cities will actively regulate the collection, transport and disposal of all types of solid waste:

> The legislature finds:
>
> (1) Continuing technological changes in methods of manufacture, packaging, and marketing of consumer products, together with the economic and population growth of this state, the rising affluence of its citizens, and its expanding industrial activity have created new and ever-mounting problems involving disposal of garbage, refuse, and solid waste materials resulting from domestic, agricultural, and industrial activities.
>
> (2) ***Traditional methods of disposing of solid wastes in this state are no longer adequate to meet the ever-increasing problem. Improper methods and practices of handling and disposal of solid wastes pollute our land, air and water resources, blight our countryside, adversely affect land values, and damage the overall quality of our environment.***
>
> (3) Considerations of natural resource limitations, energy shortages, economics and the environment make necessary the development and implementation of solid waste recovery and/or recycling plans and programs.
>
> * * *
>
> (6)(a) It should be the goal of every person and business to minimize their production of wastes and to separate recyclable or hazardous materials from mixed waste.
>
> (b) ***It is the responsibility of state, county, and city governments to provide for a waste management***

> ***infrastructure to fully implement waste reduction and source separation strategies and to process and dispose of remaining wastes in a manner that is environmentally safe and economically sound. It is further the responsibility of state, county, and city governments to monitor the cost-effectiveness and environmental safety of combusting separated waste, processing mixed municipal solid waste, and recycling programs.***
>
> (c) ***It is the responsibility of county and city governments to assume primary responsibility for solid waste management and to develop and implement aggressive and effective waste reduction and source separation strategies.***
>
> (d) It is the responsibility of state government to ensure that local governments are providing adequate source reduction and separation opportunities and incentives to all, including persons in both rural and urban areas, and nonresidential waste generators such as commercial, industrial, and institutional entities, recognizing the need to provide flexibility to accommodate differing population densities, distances to and availability of recycling markets, and collection and disposal costs in each community; and to provide county and city governments with adequate technical resources to accomplish this responsibility.
>
> (7) Environmental and economic considerations in solving ***the state's solid waste management problems*** requires strong consideration by local governments of regional solutions and intergovernmental cooperation. . . . .

[Emphases added.]; and see Citizens for Clean Air v. City of Spokane, 114 Wn.2d 20, 35, 785 P.2d 447 (1990) ("The solid waste management act establishes a comprehensive statewide program for solid waste handling

[and] assigns primary responsibility for solid waste handling to local government. . .").[3]

Even if Seattle opted not to formally and actively regulate the collection, transport, and disposal of the "CDL" form of solid waste generated within its city limits until 2001, that did not mean it lacked the power to do so, nor did it create in Kendall Trucking any protectable property right or expectation.

---

[3] The legal environment in which the City of Seattle must strive to meet these responsibilities is one in which a "generator" of waste materials can be held strictly liable, jointly and severally, for pollution – including groundwater contamination – resulting from how it such materials are disposed of.

> [T]he Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675, . . . imposes strict, joint and several liability for environmental damage on past and present owners of contaminated property as well as the polluters and the transporters of pollution. CERCLA has been vigorously litigated in state and federal courts, and has been consistently upheld as constitutional.
>
> In 1988, the voters in the state of Washington passed Initiative 97, the Model Toxics Control Act (MTCA) (chapter 70.105D RCW). MTCA was modeled on CERCLA, and we have found CERCLA case law persuasive in interpreting MTCA. See Bird-Johnson Corp. v. Dana Corp., 119 Wn.2d 423, 427, 833 P.2d 375 (1992). Like CERCLA, MTCA establishes a mechanism to clean up hazardous waste sites. . . Potentially liable persons include the current and former property owners, polluters, and transporters of waste. Potentially liable persons are jointly and severally liable, and liability is strict. . .

Asarco Inc. v. Department of Ecology, 145 Wn.2d 750, 754, 43 P.3d 471 (2002). Whether or not "CDL" waste typically includes "hazardous" substances, the mere potential for very substantial liability for how commercial materials are disposed of provides Seattle with an incentive to carry out its planning and regulatory responsibilities carefully with respect to disposal of all solid wastes generated within its boundaries.

D. The City's Enactment and Enforcement of SMC § 21.36.012(5) and .030, Implements the City's Power to Make Exclusive Solid Waste Collection Contracts, And It Neither Denies Kendall Trucking Equal Protection of the Law Nor Impairs Any Constitutionally Protected Contract Right of Any of the Appellants.

1. Appellants' arguments based on Wash. Const. Art. I, §§ 12 and 23 give short shrift to the City's police power under the same Constitution.

Wash. Const. Art. XI § 11 provides that "Any . . . city . . . township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Appellants' brief fails to acknowledge that SMC 21.36.030 constitutes an exercise of police powers delegated by the Legislature to the City of Seattle, which powers are of constitutional dimension and of co-equal importance with the sections under which appellants seek to challenge the ordinances.

The Legislature, pursuant to Art. I, § 1 of our State Constitution, may enact laws to promote the health, peace, safety, and general welfare. State v. Brayman, 110 Wn.2d 183, 192-93, 751 P.2d 294 (1988). "The police power of the state extends not only to the preservation of the public health, safety, and morals, but also to the preservation and promotion of the public welfare." Clark v. Dwyer, 56 Wn.2d 425, 432, 353 P.2d 941 (1960). "Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It

exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution." Shea v. Olson, 185 Wash. 143, 153, 53 P.2d 615 (1936); CLEAN v. State, 130 Wn.2d 782, 805, 928 P.2d 1054 (1996); Alderwood Assocs. v. Washington Env. Council, 96 Wn.2d 230, 252, 635 P.2d 108 (1981) (Concurring opinion of Justice Dolliver).

> While, formerly, the power was viewed as one of strict and direct application, it has now come to be more favored on account of changed and changing economic and social conditions, and at present is frequently relied on to sustain laws which affect the common good in only an indirect way. A large discretion is therefore vested in the Legislature to determine what the public interest demands and what measures are necessary to secure and protect the same.

Shea v. Olson, 185 Wash. at 154. (citations omitted). The prohibition of Art. I § 12 "[does not] apply to laws enacted by a state Legislature in the exercise of its police power. We have repeatedly so held." Shea, 185 Wash. at 153.

Powers delegated to cities under Art. XI § 11 are part of the inherent police power reserved to the states under U.S. Const. Amend. 10. Whitaker v. Spiegel Inc., 95 Wn.2d 661, 675, 623 P.2d 1147 (1981). As the court explained in State v. McConahy, 86 Wn. App. 557, 937 P.2d 1133, rev. denied, 133 Wn.2d 1018 (1997), the grant of police power

under Art. XI, § 11 is just as important as the constitutional provisions upon which appellants seek to rely.

In McConahy, the court considered a challenge to a Seattle ordinance that prohibited lying or sitting on sidewalks downtown or in neighborhood commercial zones between the hours of 7 a.m. and 9 p.m.. The court upheld the ordinance, rejecting an argument that Wash. Const. Art. I, § 1, which provides that "that "[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights," meant that individual rights take precedence over the city's right to exercise its police powers pursuant to Art. XI, § 11. McConahy, 86 Wn. App. at 563. The court accorded the two sections "co-equal" importance, and held that "art. XI, § 11 grants local governments the police power to enact legislation to protect the health, safety, and welfare of the citizens, while art. I, § 1 acts as a check on that power by requiring that the legislation be reasonable and not infringe unduly on individual rights." The court went on to hold that the ordinance had been enacted "in response to a legitimate legislative health and safety concern," in light of findings by the city council that "people sitting on the sidewalk presented a health and safety concern because many citizens had trouble maneuvering around them and shoppers were deterred from coming into

core areas because petty crime and blight were increasing," and did not unreasonably or arbitrarily intrude upon the right of individuals to be left alone to move about or stand still as they see fit. McConahy, 86 Wn. App. at 564. Thus, the prohibition of Art. I, § 12 does not apply to nonarbitrary laws enacted by municipalities in the exercise of police powers delegated to them by the State. Shea v. Olson, 185 Wash. at 153.

Because cities like Seattle are authorized by statute, as well as under the constitutional grant of police powers, to regulate solid waste collection, transport and disposal, and to do so by entering into exclusive contracts, it would make no sense to hold that cities act arbitrarily by doing exactly that. In addition, as explained in the City of Seattle's brief, as well as for the reasons discussed below, SMC 21.36.012(5) and .030 neither implicate nor infringe unduly on any constitutionally protected rights of any of the appellants.

2. Because it is rational for Seattle to discriminate between companies with which it has lawful exclusive contracts and those with which it does not have such contracts, SMC 21.36.012(5) and .030 do not operate to deny equal protection of the law to Kendall Trucking.

Section 12 of Art. I is the so-called "special privileges and immunities" clause. It provides as follows:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or

> immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Section 12 is similar to the Equal Protection Clause in U.S. Const. Amend. XIV § 1, and is construed and applied the same way. Tunstall v. Bergeson, 141 Wn.2d 201, 224-25, 5 P.3d 691 (2000); State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 482 (1996).

The Seattle Ordinance creates two classifications: those who are contractually authorized to collect solid waste, including CDL, and those who are not. Those who are contractually authorized to collect solid waste may do so; those who are not may not.

Whether a classification scheme under a statute or municipal ordinance runs afoul of Art. I § 12 is determined according to different tests depending on the nature of right that is affected. "Strict" scrutiny is the test used when a fundamental right is being infringed or a suspect class is involved. Tunstall, 141 Wn.2d at 225. Plaintiffs argue that strict scrutiny must be applied because the Seattle Ordinance infringes upon Josef Ventenbergs' (and perhaps Kendall Trucking's) right to pursue his livelihood, to hold specific private employment, and/or to follow a chosen profession. App. Br. at 19-20. They are wrong. There may be a fundamental right to pursue work as a photographer that a city may not impair in order to discriminate against non-residents, see Ralph v.

Wenatchee, 34 Wn.2d 638, 209 P.2d 270 (1949), but there is no fundamental right to collect or transport municipal solid waste, or to compete for or be issued a city contract. See Quinn Const. Co. v. King County Fire Prot. Dist. No 26, 111 Wn. App. 19, 32, 44 P.3d 865 (2002) ("a bidder on a public works contract has no constitutionally protected property interest in being awarded a government contract").[4]

In the absence of infringement of a fundamental right or involvement of a suspect class, courts apply "rational basis" review to privileges-and-immunities challenges to statutes and ordinances.

> Under rational basis review, there is a presumption of constitutionality and a statute is upheld "unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives." Shawn P., 122 Wn.2d at 561, 859 P.2d 1220. In other words, the rational basis test provides that "a statutory classification will be upheld if any conceivable state of facts reasonably justifies the classification." Shawn P., 122 Wn.2d at 563-64, 859 P.2d 1220. The party challenging the legislation has the burden of proving that the classification is "purely arbitrary." State v. Coria, 120 Wn.2d 156, 172, 839 P.2d 890 (1992).

Id. at 224-25.

The rational basis test requires only that the means employed by the statute or ordinance be rationally related to a legitimate state or

[4] Appellants cite no legal authority for the curious argument that "[w]hen the City passed an ordinance making *Kendall Trucking's* operations illegal, it deprived *Ventenbergs* not only of his livelihood, but also of a fundamental attribute of his state and national citizenship." App. Br. at 30. Ventenbergs remains free to seek employment, as an individual, in the solid-waste hauling industry.

municipal goal, not that they be the best way of achieving that goal. Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997). To the extent that plaintiffs' argument is that having three CDL contractors would effectuate the city's legitimate objectives just as well as, or better than, having two commercial solid waste contractors, see App. Br. at 24-30, the argument is spurious for purposes of "rational basis" analysis. The City does not need to have the most impressive argument possible for contracting with two rather than more companies. For appellants to prevail, the City needs must have *no* rational reason. Merely by virtue of the fact that statutes and case law say a city can enter into an exclusive solid waste collection contract, RCW 35.21.120 and 81.77.020; Shaw Disposal, Inc. v. Auburn, 15 Wn. App. 65, 546 P.2d 1236 (1976), it is not irrational for Seattle to discriminate against those who do not have exclusive solid waste collection contracts with it and in favor of those that do; in fact it would be irrational for the City *not* to so discriminate, because that would eliminate the exclusivity provisions of such contracts.

Similarly, because the classification made by the City Ordinance is a classification that the City is authorized to make under Washington state statutory and case law by virtue of the authority granted to cities by RCW 35.21.120 to enter into exclusive contracts for the collection and transport of solid waste, the classification made by the ordinance *ipso facto* cannot

be irrational unless the one made by the statute is irrational. Implicit in the statutory authorization is a legislative determination that, in the area of municipal solid waste collection at least, "exclusivity" is acceptable. Because plaintiffs do not argue that RCW 35.21.120, as construed by Smith v. Spokane[5], City Sanitary Services v. Rausch[6], and Shaw Disposal irrationally permit cities to enter into exclusive contracts for solid waste collection, or that RCW 70.95.030(22) irrationally classifies "CDL" as solid waste instead of as something else that a city would not be authorized to contract for the collection of, whatever insistence they express to the contrary, appellants have ceded the right to argue that the Seattle ordinance's classification, which is consistent with one permitted by statute, is irrational.[7]

---

[5] See 55 Wash. 219, 221, 104 P. 249 (1909) ("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 [as valid exercises of the police power]").

[6] 10 Wn.2d 446, 450, 117 P.2d 225 (1941).

[7] Had appellants argued that the statute irrationally discriminates by treating companies that have contracts to collect municipal solid waste differently from companies that do not have such contracts, the implications of their argument would be absurd: either cities could not contract with anyone to collect solid waste, or they would have to contract with everyone who wants to collect solid waste; not even a classification between contractors and noncontractors under a competitive bidding system would be rational. Mere exclusion from a class of contractors would be irrational and unconstitutional; classification would be constitutionally invalid *per se*.

3. SMC 21.36.012(5) and .030 do not violate Wash. Const. Art. I § 23, because they advance a legitimate municipal interest and because the contract they "impair" was illegal.

Article I, § 23 of the Washington Constitution provides that:

> No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

This provision is substantially similar to, and is given the same effect as, U.S. Const., Art. I § 10. Washington Fed'n of State Employees v. State, 101 Wn.2d 536, 539, 682 P.2d 869 (1984). "The threshold question is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" Margola Assocs. v. City of Seattle, 121 Wn.2d 625, 653, 854 P.2d 23 (1993) (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978)). Even conceding that the municipal code provisions at issue here have substantially impaired Kendall Trucking's contractual relationship with Haider Construction, however, those provisions are not unconstitutional for at least two reasons.

First, contractual obligations may constitutionally be impaired by legislation that advances a legitimate public purpose. Birkenwald Distrib. Co. v. Heublein, Inc., 55 Wn. App. 1, 9, 776 P.2d 721 (1989). The municipal code provisions at issue give effect to the City's police power, under which it may enter into exclusive, unbid contracts for the collection of solid waste. Shaw Disposal, 15 Wn. App. at 68. An exercise of the

police power is, by definition, a legitimate public purpose. Johanson v. Department of Social and Health Servs., 91 Wn. App. 737, 746, 959 P.2d 1166 (1998), rev. denied, 137 Wn.2d 1010 (1999).

Second, assuming for the sake of argument that Kendall Trucking and Haider Construction had a standing contract, or an agreement to contract in the future, Kendall Trucking never had a WUTC certificate or a Seattle contract that authorized it to perform such a service for Haider Construction, and the contract therefore was not one that the constitution protects from impairment. See Griffith v. Connecticut, 218 U.S. 563, 571, 31 S. Ct. 132, 54 L. Ed. 1151 (1910) (the contract clause of the U.S. Constitution does not give validity to contracts which are properly prohibited by statute).

4. It does not matter that "CDL" is not collected on regular scheduled routes, but rather is collected as needed.

Appellants invoke a statement made by the court in Okeson v. City of Seattle, 150 Wn.2d 540, 549, 78 P.3d 1279 (2003), out of context, to support a contention, App. Br. at 32-33, that Seattle acts in a proprietary capacity, and therefore not in a governmental one, when it regulates "CDL" collection, because CDL collection is provided on request (rather than on a periodic pick-up basis). Okeson addressed whether a tax on Seattle City Light customers to pay for street lighting was an

unconstitutional tax or a permissible form of charge or fee. The court had to consider, first, whether the provision of street lighting is a governmental function or a proprietary one, not because the answer was itself dispositive, but because it affected the test by which the validity of the charge would be determined. Okeson, 150 Wn.2d at 1284-85. The court held that, although the provision of street lighting *is* a governmental function, 150 Wn.2d at 550, the operation of Seattle City Light was proprietary, and the charges were an unconstitutional tax because their principal purpose was to raise revenue rather than regulate, id. at 553, and because the charges were not based on how much street light a customer used, id. at 553-54.

Because this case does not involve a taxation issue, or the imposition of charges by a municipal entity, Okeson is not pertinent.[8] It should be noted that the Okeson court relied upon, 150 Wn.2d at 552-54, and did not even suggest that it was overruling or disapproving, Samis Land Co. v. City of Soap Lake, 143 Wn.2d 798, 23 P.3d 477 (2001), a previous case involving a taxation issue, where it had made clear that:

> ***Local governments have authority under their general article XI, section 11 police powers to require payment of fees*** that are " 'akin to charges for services rendered' " in

[8] And see Teter v. Clark Cy., 104 Wn.2d 227, 704 P.2d 1171 (1985) (despite use of the term "utility" to refer to a sewerage system, municipality held to operate the system under its governmental function).

> that they are deposited into a segregated fund directly related either to the provision of a service received by the entities paying the fees or to the alleviation of a burden to which they contribute. Such charges, ***which*** this court has collectively referred to as "regulatory fees," ***include*** a wide assortment of utility customer fees, utility connection fees, ***garbage collection fees***, local storm water facility fees, user fees, permit fees, parking fees, registration fees, filing fees, and license fees.
>
> Because such fees are not considered taxes, they are exempt from fundamental constitutional constraints on governmental taxation authority.

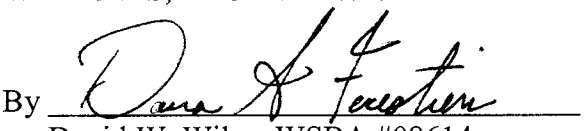
Samis Land Co., 143 Wn.2d at 804-05 (emphases added). Thus, Okeson does not support an argument that regulation of solid waste collection is not a governmental function authorized by Wash. Const. Art. XI, § 11.

III. CONCLUSION

For the reasons stated above and in the City of Seattle's brief, the superior court's orders dismissing appellants' challenges to SMC 21.36.012(5) and .030 should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of July, 2004.

WILLIAMS, KASTNER & GIBBS PLLC

By 

David W. Wiley, WSBA #08614
Dana A. Ferestien, WSBA #26460

Attorneys for Respondent Rabanco, Ltd.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 28th day of July, 2004, I caused a true and correct copy of the foregoing document, "BRIEF OF RESPONDENT RABANCO, LTD.," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

Counsel for Appellants:
William R. Maurer, WSBA #25451
Jeanette M. Petersen, WSBA #28299
INSTITUTE FOR JUSTICE
811 First Ave., Suite 625
Seattle, WA 98104

Counsel for City of Seattle, Seattle Public Utilities and Chuck Clarke:
William H. Patton, WSBA #5771
Rebecca Earnest, WSBA #13478
SEATTLE CITY ATTORNEY
600 Fourth Ave., 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769

Counsel for Waste Management of Washington d/b/a Waste Management of Seattle:
Polly L. McNeill, WSBA #17437
Jessica L. Goldman, WSBA #21856
SUMMIT LAW GROUP, PLLC
315 Fifth Ave., Suite 1000
Seattle, WA 98104-2682

Andrew M. Kenefick, WSBA #18374
WASTE MANAGEMENT OF WASHINGTON, INC.
801 Second Ave., Suite 614
Seattle, WA 98104-1599

Counsel for WRRA:
James K. Sells, WSBA #06040
RYAN SELLS UPTEGRAFT, INC., P.S.
9657 Levin Rd. NW, Suite 240
Silverdale, WA 98383

DATED this 28th day of July, 2004, at Seattle, Washington.

Carrie A. Cardiali

Carrie A. Cardiali