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SUPREME COURT
STATE OF WASHINGTON

2021 FEB -5 P 4: 03 h NO. 76954-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

vs.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE PUBLIC UTILITIES, and CHUCK CLARKE, in his official capacity as Director of Seattle Public Utilities, WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a Waste Management of Seattle, a Delaware Corporation, RABANCO, LTD., a Washington corporation,

Respondents.

ON APPEAL FROM DIVISION ONE OF THE COURT OF APPEALS

**SUPPLEMENTAL BRIEF OF RESPONDENTS
CITY OF SEATTLE, SEATTLE PUBLIC UTILITIES,
AND CHUCK CLARKE**

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I. INTRODUCTION

Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke (collectively, “Seattle”) submit this Supplemental Brief pursuant to RAP 13.7(d). This brief addresses significant case law decided since briefing was completed, responds to additional authorities cited by appellants after briefing was completed, and clarifies Seattle’s position on a statutory construction issue decided by the Court of Appeals on grounds not addressed in the parties’ briefs before that court.

Of particular significance to this appeal is this Court’s September 2006 decision in *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), which held that the right to pursue a specific trade or profession “is not a fundamental right, requiring heightened judicial scrutiny.” 158 Wn.2d at 222. As discussed below, this holding once and for all disposes of the principal argument advanced by appellants in seeking review in this Court – namely, that because Seattle’s actions implicated a supposed “fundamental right” to hold specific private employment, the Court of Appeals applied an improperly deferential “rational basis” standard of review. *Amunrud* confirmed that the Court of Appeals correctly applied rational basis review, and afforded appropriate deference to the reasonable restrictions Seattle has placed on who can be in the business of collecting commercial solid waste within the City of Seattle.

II. ARGUMENT AND AUTHORTIES

A. Recent decisions by this Court confirm that the Court of Appeals correctly applied rational basis review in this case

In accordance with RCW 81.77.020, Seattle has enacted ordinances that prohibit anyone from being in the business of hauling construction, demolition and land clearing waste (“CDL”), absent a city contract. Seattle has further chosen to contract exclusively for CDL collection with respondents Rabanco and Waste Management. As discussed in prior briefing, these measures were taken in furtherance of important governmental objectives. Appellants, however, assert that in contracting solely with Rabanco and Waste Management, Seattle granted these companies special privileges in violation of the “privileges and immunities” clause of the Washington State Constitution.¹

1. Where no fundamental right is implicated, rational basis review is appropriate

Appellants’ principal argument in seeking review in this Court was that, because the Court of Appeals had analyzed appellants’ claims under a rational basis standard instead of applying an independent, more stringent review under the privileges and immunities clause, the

¹ Article I, section 12 of the Washington State Constitution states: “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.”

decision of the Court of Appeals was inconsistent with this Court's decision in *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) ("*Grant County I*"). See Petition for Review (filed March 16, 2005) at 8-14.² Specifically, in *Grant County II*, this Court held that article I, section 12 may require an independent analysis where a challenged law grants a privilege or immunity to a particular class. However, this Court emphasized that "not every statute authorizing a particular class to do or obtain something involves a 'privilege' subject to article I, section 12." 150 Wn.2d at 812. Instead, the "privileges and immunities" clause applies only "to those fundamental rights which belong to the citizens of the state by reason of such citizenship." *Id.* at 812-13 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

The threshold inquiry under *Grant County II*, then, is whether any such "fundamental right" is implicated. If the answer is no, then no independent privileges and immunities analysis is required, and the appropriate constitutional scrutiny is rational basis review under the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Grant County Fire Protection Dist. No. 5 v. City of Moses*

² See also Petitioners' Reply to Seattle Respondents' Answer to Petition for Review (filed May 3, 2005) at 2-6. Appellants' arguments concerning article I, section 12 were similarly prominent in their briefing in the Court of Appeals. See, e.g., Opening Brief of Appellants (filed in the Court of Appeals on June 28, 2004) at 15-35.

Lake, 145 Wn.2d 702, 724, 42 P.3d 394 (2002) (“*Grant County I*”) (rational basis review under equal protection clause mandated where no fundamental right is implicated).³

Appellants asserted that the “fundamental right” implicated in this case was the right to hold specific private employment and follow a chosen profession free of unreasonable government interference. Petition for Review at 10 (citing *Plumbers & Steamfitters Union Local 598 v. Washington Pub. Power Supply Sys.*, 44 Wn. App. 906, 915, 724 P.2d 1030 (1986)). As a result, appellants argued, this case was subject to a heightened level of review under article I, section 12.⁴

Even before *Amunrud*, appellants’ arguments based on a supposed “fundamental right” to specific private employment were badly misplaced, as Seattle has discussed in prior briefing.⁵ After *Amunrud*, it is beyond

³ See also *Andersen v. King County*, 158 Wn.2d 1, 18, 138 P.3d 963 (2006) (where no fundamental right is implicated, or no suspect or semisuspect classification has been drawn, rational basis review is appropriate). Appellants have not maintained – nor could they – that they are members of a “suspect” class.

⁴ Appellants proposed adoption of a “reasonable ground” level of scrutiny to apply to regulatory classifications challenged under the privileges and immunities clause. See Appellants’ Reply to Rabanco (filed in the Court of Appeals on September 2, 2004) at 11-12. Because no fundamental right is implicated here, this Court need not decide the issue of the appropriate level of review under article I, section 12.

⁵ Solid waste collection is a governmental function that is critical to public health and safety; it is not “private employment.” See Amended Brief of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke (“Brief of Seattle Respondents,” filed in the Court of Appeals on August 5, 2004) at 23-28. Moreover, the Washington case upon which appellants primarily rely as establishing a fundamental right to pursue private employment observes that the principle has been narrowly applied in circumstances that

dispute that appellants' argument based on the privileges and immunities clause fails.

2. *Amunrud* disposes of appellants' arguments concerning interference with a purported "fundamental right"

In *Amunrud*, the Washington Department of Social and Health Services ("DSHS") suspended the commercial driver's license of a parent who had failed to pay child support for his son. On appeal, the parent asserted that the right to obtain a driver's license and earn a living is a "fundamental right." 158 Wn.2d at 219-220. He argued that the statute authorizing DSHS to suspend his license should therefore be subject to strict scrutiny, rather than the rational basis test that had been applied by the lower courts. *Id.* This Court disagreed. Citing a long line of federal and state decisions from Washington and elsewhere, the Court stated:

[N]either this court nor the United States Supreme Court has characterized the right to pursue a particular profession as a fundamental right. Instead, courts have repeatedly held that the right to employment is a protected interest subject to rational basis review.

Id. at 220. The Court stressed that in Washington, governmental action that allegedly interferes with the right to pursue an occupation is subject only to

have no applicability here. See *Plumbers & Steamfitters*, 44 Wn. App. at 915 (fundamental rights are implicated in an employment discharge situation where the government imposes a stigma, thereby foreclosing the employee's freedom to obtain other employment, or dismisses an employee on grounds calling into question his integrity, honor or good name) (discussing *Greene v. McElroy*, 360 U.S. 474 (1959)).

rational basis review:

[W]hile it is clear that pursuing a lawful private profession or occupation is a protected right under the state and federal constitutions, it is equally clear that such right is not a fundamental right, requiring heightened judicial scrutiny.

. . . Because the right to pursue a trade or profession is a protected right but not a fundamental right, we apply a rational basis test.

Id. at 222.⁶ Thus, while *Amunrud* arose in the context of a due process challenge, it nevertheless squarely addresses the threshold question of whether a fundamental right is implicated in this case. The Court’s holding is clear: the right to pursue a particular professional is a protected interest subject to rational basis review, but is not a fundamental right subject to heightened scrutiny.⁷

⁶ The dissent in *Amunrud* expressed concern regarding what it viewed as an attenuated connection between child support and the revocation of a commercial driver’s license. 158 Wn.2d at 238-45. The majority nevertheless found that the connection was sufficient to satisfy rational basis review. Here, there is an obvious and direct connection between public health concerns and the restrictions that Seattle has implemented regarding the collection of commercial solid waste.

⁷ In their Second Statement of Additional Authorities, appellants cited the Fifth Circuit’s decision in *Stidham v. Tex. Com’n on Private Sec.*, 418 F.3d 486 (5th Cir. 2005), claiming that it supported their contention that the right to pursue a chosen profession was a fundamental right. In fact, *Stidham* says nothing of the kind. (The word “fundamental” appears nowhere in the opinion.) *Stidham* held only that the plaintiff had “a protectable liberty interest in pursuing an occupation of his choice” (*id.* at 491-92), and that he had been deprived of that interest without procedural due process. There is no question that the right to pursue an occupation is “protected,” and subject to rational basis review. *Amunrud* confirms this. 158 Wn.2d at 222. But neither case holds that such a right is “fundamental” – which is required before heightened scrutiny under the privileges and immunities clause is triggered.

3. Rational basis review is consistent with Washington precedent concerning government regulation of solid waste

The rational basis test that applies here “is the most relaxed form of judicial scrutiny.” *Amunrud*, 158 Wn.2d at 223 (citing *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993)). “In determining whether a rational relationship exists, a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” *Amunrud*, 158 Wn.2d at 222 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Under rational basis review, laws are presumed to be constitutional, and “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” *Heller*, 509 U.S. at 320 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The governmental entity has no obligation to produce evidence to sustain the rationality of the challenged classification. *Heller*, 509 U.S. at 320. Thus, even though a statutory classification may deprive a citizen of a right he may otherwise have enjoyed to maintain a business, under rational basis review that classification must be upheld as long as it is reasonably related to a legitimate governmental objective.

Applying rational basis review to the ordinances at issue here is consistent with well-established Washington precedent affording considerable deference to municipalities in regulating waste. In *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994), this Court quoted with approval the following summary of a city's police power function to regulate and contract for solid waste collection:

The accumulation of garbage and trash within a city is deleterious to public health and safety. The collection and disposal of garbage and trash by the City constitutes a valid exercise of police power and a governmental function which the City may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public agencies are authorized to pursue by the best means in their possession to protect the public health . . .

Id., 124 Wn.2d at 40 (quoting *Shaw Disposal v. Auburn*, 15 Wn. App. 65, 68, 546 P.2d 123 (1976), in turn quoting *Davis v. Santa Ana*, 108 Cal. App. 2d 669, 676, 239 P.2d 656 (1952)) (emphasis added).⁸ Reversing the decision of the Court of Appeals would constitute a astonishing departure from nearly 100 years of Washington precedent establishing that the

⁸ In prior briefing, appellants sought to distinguish *Shaw Disposal* and other decisions involving waste collection by arguing that Seattle's regulation of solid waste collection is constrained by the privileges and immunities clause (which was not at issue in *Shaw Disposal*). See Appellant's Reply to Seattle Respondents (filed in the Court of Appeals

regulation of solid waste is a valid exercise of local police power, and that local governments have the authority to determine who should provide solid waste collection services.

Although Seattle has no obligation to produce evidence showing that its regulatory actions were reasonably related to a legitimate governmental objective, in fact there is considerable evidence in the record to establish this relationship.⁹ Examples include:

Safe waste disposal. Under Washington law, a local governmental entity that contracts with a private company remains ultimately responsible for solid waste collection and disposal. *Weyerhaeuser*, 124 Wn.2d at 40-41. Seattle had legitimate concerns about public health issues relating to CDL disposal, based on its prior experiences with landfills. CP 1592 (Ray Hoffman Dep. at 159:15-25). Seattle was provided assurance by Waste Management and Rabanco that residual CDL waste would go to appropriate landfills. CP at 415, ¶ 9; CP at 416, ¶ 20; CP at 447, ¶¶ 3-4; CP at 989, ¶¶ 3-4.

Operating within the law. Waste Management and Rabanco were the only companies legally hauling CDL waste at the time of the contracts.

on September 2, 2004) at 14-15. After *Amunrud*, any attempt to distinguish these cases on that basis must fail.

⁹ The evidence supporting this point is discussed in more detail in the Brief of Seattle Respondents at 28-33.

CP 1556 (Dep. at 123:14-21). Appellants Ventenbergs and Kendall Trucking, in contrast, were hauling CDL waste illegally. CP 95-96, 100-01. Given that Seattle is ultimately responsible for ensuring that solid waste is collected and disposed of in a safe and legal manner, Seattle had legitimate grounds to contract with companies that were operating within the law.

Limit on number of contractors. Seattle had legitimate reasons to restrict the market to two rather than multiple contractors. In examining the experience of Portland, Oregon (which used multiple service providers), Seattle found there had been “high levels of confusion among customers, no uniform standards for collection equipment or containers, no uniform standard for the services being provided.” CP 1616-17 (Dep. at 183:25-184:3). Seattle settled on two contractors as a number “great enough to promote competition, small enough to establish uniform service delivery standards, and large enough for the companies to achieve economies of scale.” CP 1617 (Dep. at 184:4-7).

Performance guaranties. There were legitimate reasons for Seattle to contract with large companies with established performance records. The contracts contain mechanisms to ensure performance that are more meaningful when the contractor is a large company. The contracts require a performance bond and insurance naming the City of Seattle as an

additional insured. CP 244, 246-49, 341, 343-46. They also provide for an indemnity and hold harmless provision, and for the payment of liquidated damages for performance problems. CP 249-50, 346-47.¹⁰

The Court of Appeals applied the correct level of review in holding that Seattle's ordinances were reasonably related to legitimate government interests, and therefore not unconstitutional:

The City's ordinances forbid anyone from being in the business of collecting solid waste, absent a city contract. The City has articulated important public health objectives: to maintain the environmental standards established in its long-haul disposal contract with Waste Management, to ensure that waste is sent to proper landfills, and to promote recycling in the commercial sector. The City's contracting requirement allows it to draft the contracts to more easily accomplish these objectives. Further, by contracting with only two companies, the City can more easily regulate the collection and disposal of CDL. The City acted reasonably, so we defer to its decision to contract exclusively with Rabanco and Waste Management.

Court of Appeals Opinion at 6-7 (Appendix A hereto at A6-A7).¹¹

¹⁰ Appellants have asserted that these concerns, and the others discussed in prior briefing, are not the "real" reason that Seattle chose to contract solely with Waste Management and Rabanco. In fact, the record shows that these concerns were raised during the negotiation of the solid waste contracts. However, even if appellants were correct that Seattle is engaging in *post hoc* reasoning, it is irrelevant under rational basis review. It is sufficient that the Court can conceive of legitimate governmental interests that are rationally related to Seattle's actions.

¹¹ Appellants have devoted considerable energy to attempting to demonstrate that the decision to contract exclusively with Waste Management and Rabanco was not the only means available to Seattle of achieving its health and safety goals. *See, e.g.*, Opening Brief of Appellants at 24-25. Even if appellants' contention is true, it is irrelevant under rational basis review. It is sufficient that there is some conceivable rational relationship between the classification and some legitimate governmental purpose.

4. Deferential review by the courts is appropriate, because appellants' grievances are properly addressed by the legislature

Appellants have attempted to distinguish the waste collection cases cited by Seattle and relied upon by the Court of Appeals by arguing that CDL is a different type of waste – subject to different constitutional standards. While municipalities unquestionably have the right, in the exercise of reasonable discretion, to choose to contract independently for CDL hauling, there is no legal authority requiring that they do so.

To the contrary, the legislature has specifically included CDL in the general statutory definition of “solid waste”: “[A]ll putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials.” RCW 70.95.030(23) (emphasis added). The legislature then incorporated this definition of solid waste into RCW ch. 81.77 (governing solid waste collection companies), while specifically choosing to exclude commercial recyclable materials. *See* RCW 81.77.010(9).¹²

¹² This delineation is reflected in the legislature’s decision to statutorily exclude commercial recyclable materials from both city and Washington Utilities and Transportation Commission control. *See* RCW 81.77.140; RCW 35.21.158.

In other words, to the extent that there is merit to appellants' argument that different legal standards should apply to CDL collection, there is an obvious and appropriate solution. The legislature has the power to exempt CDL from WUTC and city control, as it has with commercial recyclable materials. To date, however, it has not done so. In light of the deferential level of review that applies to judicial scrutiny of municipalities' regulation of solid waste, this is a particularly inappropriate case for the courts to intervene and substitute their judgment for that of the legislature.

B. The Court of appeals rejected appellants' arguments based on RCW 35.21.156 on one of many available grounds

1. The Court of Appeals correctly determined that granting relief to appellants would adversely affect the public interest

Appellants argued that in contracting exclusively with Waste Management and Rabanco, Seattle violated procedural requirements in RCW 35.21.156. In fact, as discussed in prior briefing (and noted below), this statute does not apply to the circumstances of this case.

The Court of Appeals, however, chose to decide this issue on grounds not addressed in the parties' briefs. Noting that the only possible relief available to appellants would be to enjoin Seattle's contracts with

Rabanco and Waste Management, the Court of Appeals determined that granting such relief would be contrary to the public interest:

[I]njunctive relief from public contracts will only be granted if doing so does not compete with the public interest. The public interest in performance of the contracts is great. Collection of commercial solid waste must continue. The current contracts were negotiated over many years, and reopening the negotiation process will cost valuable time and money. Furthermore, the City's public interest objectives to control collection rates, increase recycling, and ensure materials are properly disposed of are preserved in the contracts.

Appendix A9-A10 (citing *Peerless Food Prods., Inc. v. State*, 119 Wn.2d 584, 597, 835 P.2d 1012 (1992); and *Dick Enterprises, Inc. v. King County*, 83 Wn. App. 566, 569, 922 P.2d 184 (1996)) (footnote omitted).

In seeking review in this Court, appellants sought to distinguish the cases upon which the Court of Appeals relied on the grounds that they involved allegedly flawed bidding processes. *See* Petition for Review at 17-19. That distinction misses the point. The principal concern of the Court of Appeals was the effect on the public interest, both in terms of public health and finances.¹³ The public interest is particularly strong when the contracts in question involve the collection and disposal of solid

¹³ In addition to the Washington cases cited by the Court of Appeals, other jurisdictions have recognized that efforts to enjoin the performance of public contracts are subject to a public interest test. *See, e.g., Georgia Gazette Pub. Co. v. U.S. Dept. of Defense*, 562 F. Supp. 1004, 1011 (S.D. Ga. 1983) (court would not grant injunctive relief from public contract unless relief "would be beneficial to the public interest").

waste. In light of the deferential standard of review applicable here, appellants bear a heavy burden of demonstrating that the public interest would not be adversely affected if relief were to be granted. The Court of Appeals reasonably concluded that it would not serve the public interest to enjoin these contracts.

2. RCW 35.21.156 does not restrict Seattle’s ability to negotiate contracts for the hauling of municipal solid waste

Appellants’ claim – that the hauling contracts at issue are void because of Seattle’s purported failure to follow the procedural “mandates” of RCW 35.21.156 – ignores the plain language of the governing statutes, the legislative history, and well-established case law.

The plain language of RCW 35.21.156 (as well as RCW 35.21.120 and .152) has been addressed in detail in Seattle’s prior briefing. In summary, RCW 35.21.156 on its face does not apply to waste collection contracts. As the trial court correctly found, it sets forth requirements for bidding relating only to construction of capital facilities for waste transfer and disposal, not hauling.” Appendix B-3 (CP 1332) (emphasis added). Moreover, the language of RCW 35.21.156 is permissive. The procedural requirements of the statute apply only if the city elects to use a Request for Proposal (“RFP”) process to select a contractor to construct a waste facility. There is no requirement in the statute that the RFP process be

used. Presumably, if the legislature wanted the procedures set forth in RCW 35.21.156 to apply to all municipal hauling contracts, the statute would explicitly say so. Appellants' tortured reading of the statutes (based in large part on the fact that RCW 35.21.120, .152 and .156, while different in many respects, all use the common phrase "solid waste handling systems") should not impose requirements that the legislature has seen fit to omit. *See Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999) (where statute is unambiguous, court should assume that the legislature meant what it said; "we do not construe unambiguous statutes").

Appellants' reading of the statutory scheme is further undermined by the legislative history. In enacting RCW 35.21.156 in 1986, the legislature stated that the purpose was to "provide an alternative method for the performance of those subjects authorized by these sections and shall be regarded as supplemental and additional to the powers conferred by [other laws]." Laws of Wash. 1986, ch. 282, § 16, *reprinted in* RCWA 35.21.156 (historical and statutory notes). The legislature thus recognized that local governments have available to them various means of entering into contracts for solid waste facilities. RCW 35.21.156 supplements, rather than replaces, other contracting options.

Finally, in *Weyerhaeuser*, a case decided after RCW 35.21.156 was enacted, this Court cited with approval the holding in *Shaw Disposal* that rejected a challenge to a unilaterally negotiated and exclusive collection contract, and rejected the argument that garbage contracts must be awarded to the lowest responsible bidder. *Weyerhaeuser*, 124 Wn.2d at 40 (citing *Shaw Disposal*, 15 Wn. App. at 68). *Weyerhaeuser* confirms that local governments are legally responsible for waste collection, and are not restricted to any particular contracting process in meeting that responsibility. Significantly, the *Shaw Disposal* court, in rejecting an argument in favor of greater judicial scrutiny of bidding for garbage collection contracts, stated: “The legislature resolves questions of this kind, not the courts.” 15 Wn. App. at 69.

C. Appellants’ reliance on *Okeson* is misplaced

In their Third Statement of Additional Authorities, appellants submitted the decision of the Court of Appeals in *Okeson v. City of Seattle*, 130 Wn. App. 814, 125 P.3d 172 (2005). Appellants claim that *Okeson* supports their contention that if the hauling of CDL “is characterized as the provision of a proprietary function, Respondent City of Seattle is not shielded from constitutional and statutory limitations.”

This assertion is specious. First, the hauling of CDL is plainly not a “proprietary function.” As the Court of Appeals correctly observed:

Although CDL is collected on request, rather than on a set schedule, the benefits of CDL disposal do not lie exclusively with CDL generators. CDL is waste. The regulation of solid waste hauling benefits public health because it ensures that waste is sent to designated landfills and environmental standards are maintained. Thus, CDL collection is a government function.

Appendix A-5. This holding – that CDL collection, like other waste collection, is a governmental function – is consistent with the legislature’s inclusion of CDL in the statutory definition of “solid waste.” RCW 70.95.030(23). The holding is further consistent with nearly a hundred years of Washington case law identifying the collection of garbage as a uniquely municipal function, regardless of whether the municipality collects the garbage itself or contracts with someone else to do so. *Weyerhaeuser*, 124 Wn.2d at 40 (ultimate responsibility for waste collection rests with local government); *City of Spokane v. Carlson*, 73 Wn.2d 76, 79, 436 P.2d 454 (1968); *Smith v. City of Spokane*, 55 Wash. 219, 221, 104 P. 249 (1909).

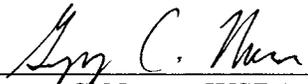
Second, Seattle does not claim that it is “shielded from constitutional and statutory limitations.” Seattle objects only to appellants’ attempts to impose constitutional tests and statutory obligations that do not govern here. Seattle’s regulation of the collection of solid waste, including CDL, is fully consistent with constitutional standards and statutory requirements.

III. CONCLUSION

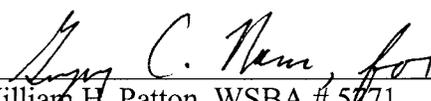
For the reasons set forth herein and in Seattle's prior briefs to the Court of Appeals and this Court, the ruling of the Court of Appeals should be affirmed.

DATED this 5th day of February, 2007.

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Seattle Public Utilities, and Chuck Clarke

Appendix A

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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

Appellants,

vs.

THE CITY OF SEATTLE, a municipal
corporation, SEATTLE PUBLIC UTILITIES,
and CHUCK CLARKE, in his official capacity
as Director of Seattle Public Utilities,

and

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

and

RABANCO, LTD., a Washington corporation,

Respondents.

DIVISION ONE

No. 53920-5-1

UNPUBLISHED OPINION

FILED: February 14, 2005

BAKER, J. — This appeal challenges the City of Seattle's approach to
regulating commercial solid waste collection. Under City ordinances, it is illegal

for anyone to be in the business of hauling construction, demolition and land clearing waste (CDL) in Seattle, absent a City contract. The City has contracted for CDL collection with only two companies. Plaintiffs argue that their exclusion from the business of hauling CDL violates the Privilege and Immunities, Contract, and Takings Clauses of our state constitution. They also claim that the City violated the procedural mandates for contracting under RCW 35.21.156. Because the City's ordinances are consistent with Washington's statutory scheme for regulating solid waste and do not contravene the state constitution, we affirm.

I.

Josef Ventenbergs, owner of Kendell Trucking, Inc., has been in the business of hauling CDL since 1993. Ronald Haider founded Haider Construction in 2001. Haider Construction specializes in remodeling residential homes and roofing. Haider has consistently hired Kendell Trucking to remove CDL from his worksites.

Under state law, if a person or entity wants to be in the business of hauling CDL, it must do one of two things: obtain a certificate of convenience and necessity (G-certificate) from the Washington Utility and Transportation Commission (WUTC), or contract with the city or town in which it wants to operate. Kendell Trucking did neither. Nevertheless, it hauled CDL in Seattle for almost 10 years without interruption.

From 1962 to 2001, the City of Seattle did not regulate commercial solid waste. During this time, the WUTC regulated the transportation of Seattle's

commercial solid waste by issuing G-certificates to private companies. Following a series of acquisitions and consolidations, only two companies, Rabanco, Ltd. and Waste Management of Washington, Inc., were holders of G-certificates.

The City decided to begin regulating commercial solid waste in order to reduce collection rates, promote recycling in the commercial waste sector, and ensure proper disposal. In April of 2001, after years of negotiation, the City contracted with Waste Management and Rabanco for the collection of commercial solid waste. The contracts provided that each company would be the primary collector of municipal solid waste in its respective zone, and collect CDL without respect to zones. At that time, the definition of solid waste under the City's code did not include CDL.

In October of 2002, the City amended its code to include CDL in the definition of solid waste.¹ Another ordinance prohibits anyone from hauling solid waste without a city contract or G-certificate.² The two ordinances effectively prohibit Ventenbergs from hauling CDL in the City.

In early 2003, the City informed Ventenbergs that he was not permitted to haul CDL in Seattle. A few months later, Ventenbergs, Kendell Trucking, Haider, and Haider Construction (plaintiffs) filed suit against the City, Waste Management, and Rabanco (defendants), alleging constitutional and statutory violations. The City filed a counterclaim for injunctive relief from Ventenbergs and Kendell Trucking hauling CDL. The parties filed cross motions for summary

¹ Seattle Municipal Code § 21.36.016(12).

² Seattle Municipal Code § 21.36.030. The ordinance provides exceptions for the University of Washington, the military, and the Seattle Housing Authority.

judgment. The superior court granted the defendants' motion for summary judgment, and denied the plaintiffs' motion. It denied the City's motion for injunctive relief. The court ruled that Ventenbergs was violating the law by hauling CDL without a permit or contract, but denied the City's request for an injunction.³

II.

Plaintiffs appeal, and argue that the City's ordinances violate the Privileges and Immunities, Contract, and Takings Clauses of our state constitution because they make it illegal for anyone other than Waste Management and Rabanco to be in the business of hauling CDL. Plaintiffs also claim that defendants violated RCW 35.21.156 by not following its procedural mandates for issuing city contracts.

We review a grant of summary judgment de novo.⁴ Summary judgment is appropriate when there is no genuine issue as to any material fact and, when viewing the evidence in the nonmoving party's favor, the moving party is entitled to judgment as a matter of law.⁵ In deciding whether an ordinance is constitutional, the presumption is in favor of its validity.⁶

³ Seattle does not appeal the denial of an injunction.

⁴ Okeson v. City of Seattle, 150 Wn.2d 540, 548, 78 P.3d 1279 (2003).

⁵ Stenger v. Stanwood Sch. Dist., 95 Wn. App. 802, 812, 977 P.2d 660 (1999).

⁶ Shea v. Olson, 185 Wash. 143, 152, 53 P.2d 615 (1936); Snohomish County Builders Ass'n v. Snohomish Health Dist., 8 Wn. App. 589, 598, 508 P.2d 617 (1973).

A. Privileges and Immunities Clause

Plaintiffs argue that the City granted Rabanco and Waste Management special privileges, in violation of our state constitution. But the regulation of solid waste collection is a police power function, so the City may restrict people from hauling CDL.

Washington courts have repeatedly held that the regulation of solid waste is a valid exercise of local police power.⁷ Nevertheless, plaintiffs argue that CDL hauling is a proprietary, not a government, function because it is only collected upon request. Our Supreme Court has noted that services that are provided on request, for the comfort and use of individual customers, are proprietary in nature.⁸ But "[t]he principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity."⁹ Although CDL is collected on request, rather than on a set schedule, the benefits of CDL disposal do not lie exclusively with CDL generators. CDL is waste. The regulation of solid waste hauling benefits public health because it ensures that waste is sent to designated landfills and environmental standards are maintained. Thus, CDL collection is a government function.

⁷ E.g., Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 40, 873 P.2d 498 (1994) (citing Shaw Disposal, Inc. v. City of Auburn, 15 Wn. App. 65, 68, 546 P.2d 1236 (1976)); City of Spokane v. Carlson, 73 Wn.2d 76, 80-81, 436 P.2d 454 (1968); Metro. Servs., Inc. v. City of Spokane, 32 Wn. App. 714, 717, 649 P.2d 642 (1982).

⁸ Okeson, 150 Wn.2d at 550.

⁹ Okeson, 150 Wn.2d at 550.

Courts are very deferential to laws enacted under police powers.¹⁰ Several courts have held that a city may collect and dispose of waste itself, or grant exclusive contracts to one or more companies.¹¹

But an ordinance that results in inequality must not be arbitrary.¹² The ordinance must have "a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power."¹³ If it does, it will be held constitutional, "even though the law operates to deprive a citizen of the right which he might otherwise enjoy to maintain a business, or pursue a profession, or endeavor to gain a livelihood."¹⁴

The City's ordinances forbid anyone from being in the business of collecting solid waste, absent a city contract. The City has articulated important public health objectives: to maintain the environmental standards established in its long-haul disposal contract with Waste Management, to ensure that waste is sent to proper landfills, and to promote recycling in the commercial sector. The City's contracting requirement allows it to draft the contracts to more easily accomplish these objectives. Further, by contracting with only two companies, the City can more easily regulate the collection and disposal of CDL. The City

¹⁰ Shea, 185 Wash. at 153; Shaw Disposal, 15 Wn. App. at 69 (explaining that whether a city must contract for waste collection through competitive bidding is a question for the Legislature).

¹¹ Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 40, 873 P.2d 498 (1994) (citing Shaw Disposal, 15 Wn.App. at 68).

¹² Elkins v. Schaaf, 4 Wn.2d 12, 20, 102 P.2d 230 (1940).

¹³ Washington Kelpers Ass'n v. State, 81 Wn.2d 410, 417, 502 P.2d 1170 (1972).

¹⁴ Campbell v. State, 12 Wn.2d 459, 465, 122 P.2d 458 (1942).

acted reasonably, so we defer to its decision to contract exclusively with Rabanco and Waste Management.

B. Contract Clause

Plaintiffs claim that the City's ordinances interfered with their contract for CDL hauling, in violation of article I, section 23 of our state constitution. But Ventenbergs cannot perform the contract without violating state law; therefore the contract is void.

The State regulates waste collection and disposal where local governments do not.¹⁵ No person or company may be in the business of collecting solid waste "without first having obtained from the [WUTC] a certificate declaring that public convenience and necessity require such operation."¹⁶ The only exceptions to the permit requirement are when: (1) a company is engaged in solid waste disposal by contract with any city or town, or (2) a city pays its own employees to collect solid waste.¹⁷

Plaintiffs argue that when the City exercised its right to control the collection of commercial solid waste in April of 2001, the State lost all authority to regulate solid waste collection. In other words, they argue that the requirement to obtain a G-certificate under chapter 81.77 RCW no longer applied in Seattle. Under this premise, they claim that because the City did not redefine solid waste

¹⁵ RCW 81.77.020. See Metro. Servs., 32 Wn. App. at 717 (explaining that RCW 35.13.280 "provides that annexation of an area by a city cancels any permit granted by the state for garbage collection").

¹⁶ RCW 81.77.040; RCW 81.77.020.

¹⁷ RCW 81.77.020. A person may haul his own CDL without a permit, however.

to include CDL until November 2002, Ventenbergs and Haider entered a genuine, oral contract in the interim.

But the relevant statute indicates otherwise:

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.^[18]

The language is unambiguous. The only exceptions to the State certificate requirement are if a company has contracted with a city or if a city itself, through its own employees, collects solid waste. It does not state, as plaintiffs argue, that once a city contracts with one vender, other vendors who wish to collect solid waste no longer need a permit to do so.¹⁹

Ventenbergs did not have a G-certificate. Contracts that violate state law are void.²⁰ Thus, there was never a valid contract between Haider and Ventenbergs.

C. Takings Clause

Plaintiffs argue that requiring Haider to hire Rabanco or Waste Management unconstitutionally deprives Haider of a fundamental attribute of

¹⁸ RCW 81.77.020.

¹⁹ WUTC regulations indicate that it will cease regulation of an area on the date a city commences services as specified in its notice to the commission, or if it commences service before notifying the commission, on the date of receipt of the city's notice. WAC 480-70-141(2). But, even if the WUTC received notice and cancelled its regulation of commercial solid waste in Seattle, the Ventenbergs would still be bound by the statute. Ventenbergs' only means of hauling CDL, however, would be to obtain a city contract.

²⁰ Parker v. Tumwater Family Practice Clinic, 118 Wn. App. 425, 433, 76 P.3d 764 (2003), rev. denied, 151 Wn.2d 1022 (2004).

ownership, the right to dispose of his property. We do not need to address this claim because it was not properly pled below.²¹ Regardless, the claim is completely without merit. CDL is waste that has no value or use to Haider. In fact, Haider pays someone to haul CDL away for disposal. Plaintiffs' takings claim is frivolous.

D. RCW 35.21.156

Plaintiffs next contend that the City violated the procedural mandates of RCW 35.21.156.²² The parties dispute whether this provision applies to contracts for CDL hauling. Because this issue is moot, we do not decide it.

We cannot grant meaningful relief to plaintiffs. The only possible relief is to enjoin the City's contracts with Waste Management and Rabanco. But injunctive relief from public contracts will only be granted if doing so does not compete with the public interest.²³ The public interest in performance of the contracts is great. Collection of commercial solid waste must continue. The

²¹ Plaintiffs first asserted a takings claim in a reply to the City's counterclaim for injunctive relief, and briefed the issue in their motion for summary judgment. But the claim was contingent on the court granting the City's injunction. The court did not grant the City an injunction. The claim was never pled as a direct challenge to the City's ordinances.

²² Plaintiffs also filed a motion to strike portions of the City's amended brief and for sanctions. They argue that the City violated RAP 10 by citing to new evidence and appending it to their brief. The City responds that it only attached legislative history, which is permitted under RAP 10.4(c). There is no rule against submitting additional legal authority on appeal. We must strike any portion of the City's brief that cites appended materials which cannot be verified independently. But, doing so does not affect the outcome of plaintiffs' appeal. We will not issue sanctions.

²³ Peerless Food Prods., Inc. v. State, 119 Wn.2d 584, 597, 835 P.2d 1012 (1992); Dick Enterprises, Inc. v. King County, 83 Wn. App. 566, 569, 922 P.2d 184 (1996) ("Bidder injunctions against performance of public contracts would adversely affect the public interest by increasing expense to the taxpayers.").

current contracts were negotiated over many years, and reopening the negotiation process will cost valuable time and money. Furthermore, the City's public interest objectives—to control collection rates, increase recycling, and ensure materials are properly disposed of—are preserved in the contracts. In contrast, there is little, if any, perceivable benefit to plaintiffs in reopening negotiations. Plaintiffs have not shown that they were wrongfully excluded from bidding on a City contract.

AFFIRMED.

WE CONCUR:

Appelquist, J.

Baker, J.

COX, CJ

Appendix B

Douglas B. McGroom

JUDGE OF THE SUPERIOR COURT
SEATTLE, WASHINGTON 98104-2381

DEPARTMENT TWENTY-TWO

February 23, 2004

VIA FACSIMILE

William Maurer 341-9311

Polly McNeill 281-9882

David W. Wiley 628-6611

Will Patton 684-8284

Dear Counsel:

Re: *Ventenbergs v. City of Seattle, et al*; 03-2-25260-3S

The explanation of my rulings on the motions of the parties and the request for injunctive relief is as follows:

1. Constitutional Issues

The plaintiffs' claim that the modification of the definition of "City's Waste" to include CDL Waste [SMC 21.36.012(5)] by the Seattle City Council in October, 2002 was state action which operated to discriminate against them without reasonable basis, interfered with their rights to contract with one another (and others similarly situated) and constituted governmental interference with their fundamental right to follow their chosen professions.

Mr. Ventenbergs ability to follow his chosen profession was particularly interfered because the ordinances [SMC 21.36.030 and SMC 21.36.012(5)] had the effect of restricting CDL Waste hauling to Rabanco and Waste Management put him out of the business of hauling CDL waste in the City.

The effect on Mr. Haider is no so dramatic, as he can, presumably, continue in the contracting profession utilizing haulers other than Mr. Ventenbergs.

As I have previously indicated, I find that the ordinances did not interfere with a valid contract between Mr. Ventenbergs and Mr. Haider. RCW 81.77.040 requires that a

hauler of solid waste (including CDL waste) have a certificate of convenience and necessity issued by the WUTC before he can "operate for the hauling of solid waste". Mr. Ventenbergs did not have and does not have this certificate.

When the City signed the April 2001 contracts with Rabanco and Waste Management, which did not specifically include hauling CDL waste in the contract or enabling ordinance, no "window" was created for non-certified haulers to collect this type of waste. RCW 81.77 still pertained and it remained a gross misdemeanor (RCW 81.77.090) for a non-certified hauler who did not have a contract with the City, to operate (RCW 81.77.020).

The fact that enforcement action pertaining to the WUTC certificate requirement was suspended after the City signed contracts with Rabanco and Waste Management in April 2001, did not, obviously, operate to repeal RCW 81.77 in the city. Thus, performance on the contract between Mr. Ventenbergs (who had neither certificate nor a contract with the city) and Mr. Haider during the April 2001 to October 2002 period, and thereafter, was in violation of state law and their contract for this performance was void as against public policy.

The plaintiffs' argument that the Seattle ordinances are in conflict with state law if the plaintiffs are held to the requirements of RCW 81.77.020 fails because when viewing RCW 81.77 as a whole, it is apparent that the WUTC would not issue a certificate to a hauler to do business in a city which had contracted with other haulers to transport solid waste. Although this may appear to be a "catch 22", it is not because the statute fulfills its' legitimate health and safety purpose of insuring regulation of all solid waste haulers by either the WUTC or the city.

It is conceded that the right to pursue some specific professions (i.e. solid waste hauling) may be infringed upon by the City if the purpose of the infringement is to achieve goals consistent with the public welfare. The assertion that waste collection is a city service involving the public welfare is not contested. The city may "municipalize" or contract for such service pursuant to its' police power.

The plaintiffs' principal argument is that no legitimate public goal is served when a city contracting for the service, restricts the market by choosing, without competitive bidding, one hauler over another-when the excluded hauler is subject to, and will comply with the same health and safety regulations as the contracted hauler.

This argument, while clearly applicable in cases involving attempted regulation of businesses which are not deemed city services, cannot hold up in the face of the overwhelming authority that solid waste haulage is a city function, directly impacting the public health and welfare, the contracting for which need not be the subject of competitive bidding.

Because in this state, solid waste collection is viewed by the courts as a government function which the government can control either by performing the function

itself or by contracting to have it done without a competitive bidding process (as opposed to Idaho), I have held that hauling solid waste within the City of Seattle is not a fundamental right to which the privileges and immunity clause would pertain.

Thus, while by contracting with two hauling companies and excluding another, the City did "play favorites" (legitimately or otherwise), the plaintiffs are not entitled to relief under the privileges and immunities clause.

The plaintiffs also allege that the City, by not entertaining a bidding process for hauling CDL waste violated RCW35.21.156. This statute sets forth requirements for bidding relating only to construction of capital facilities for waste transfer and disposal, not hauling. RCW 35.21.120 applies to "any service related to solid waste handling (including hauling)" and requires no such competitive process.

Because I have held that the plaintiffs' have not been deprived of fundamental rights under the privileges and immunities clause of the Washington State Constitution, and that they have had no legitimate contract right interfered with, it is not necessary to address the issue of whether the city had a reasonable basis for excluding Kendall Trucking from consideration when it awarded the contracts to Waste Management and Rabanco and enacted the ordinance which put CDL waste within the purview of that contract.

2. Injunctive Relief

The defendant City requests a permanent injunction against the plaintiffs but has filed no briefing on that issue. The court lacks knowledge on whether or not it has authority to enjoin parties from violating state law or city ordinances. It would seem that such an injunction would improperly shift enforcement responsibilities from the appropriate city or state law enforcement agency to the court.

For those reasons, the City's request for a permanent injunction was denied.

Very Truly Yours,



JUDGE DOUGLAS MCBROOM

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STATE OF WASHINGTON

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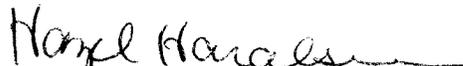
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I further certify that I caused a true and correct copy of the
foregoing document to be delivered, pursuant to an agreement between
counsel, by electronic mail and by U.S. mail, postage prepaid, to:

Counsel for WRRRA:

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

DATED this 5th day of February, 2007, at Seattle, Washington.



Hazel Haralson