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SUPREME COURT 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,

Petitioners,

v.

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.

ON APPEAL FROM DIVISION ONE OF THE COURT OF APPEALS

SUPPLEMENTAL BRIEF OF RESPONDENT
WASTE MANAGEMENT OF WASHINGTON, INC.

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I. INTRODUCTION

In its *de novo* review here,¹ this Court, like the Court of Appeals, should affirm the trial court's grant of summary judgment in favor of the City of Seattle ("the City"), Waste Management of Washington, Inc. ("Waste Management") and Rabanco, Ltd. ("Rabanco"). In this Supplemental Brief submitted pursuant to RAP 13.7(d), Waste Management demonstrates why the argument of Petitioners Josef Ventenbergs, Kendall Trucking, Inc., Ronald Haider, and Haider Construction (collectively, "Petitioners") must fail. The rights asserted by Ventenbergs and Haider are not supported by law and cannot overcome the City's constitutional and legislative police power to regulate solid waste handling.

Municipal police power over solid waste derives from the Washington Constitution, the Legislature's regulatory system and over 100 years of Washington case law. Petitioners do not challenge the constitutionality of this legislative scheme but instead complain about the City's actions to implement those statutes and to exercise its inherent constitutional authority. The City's compliance with these statutes is a rational exercise of its police power and not subject to attack. Moreover, no constitutionally-protected property right of Petitioners' has been taken by the City's compliance with the legislative mandate; indeed, the City's actions protected the undisputedly vested property rights of Waste Management and Rabanco, as the Legislature demands. Finally, under its

¹ *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006).

broad statutory and constitutional authority to regulate solid waste collection, the City was not required to use any particular vendor selection procedure.

II. ARGUMENT

A. **The City's Compliance With a Statute Is a Rational Exercise of Its Police Power and the Possibility That the City Might Have Been Sued Had It Not Complied With the Statute Does Not Make Its Conduct Any Less Rational.**

In Washington, except where an individual hauls his own garbage, solid waste collection is performed under the regulatory auspices of either the State (through the Washington Utilities and Transportation Commission ("WUTC")) or a city that exercises its constitutionally-based police powers to assert jurisdiction. RCW 81.77.020. Under this state statutory scheme, solid waste is not a free market activity; it is always regulated. A solid waste company has its rates established and scrutinized by a governmental entity (either the WUTC or a city) and is obligated to provide collection to all customers, whether the service is cost-effective or not – but in exchange an authorized company receives a protected right to provide services within a specified territory. Ch. 81.77 RCW. The regulatory scheme attempts to ensure universal service at reasonable rates and guards against "cream-skimming" in urban areas. *See Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 400 (9th Cir. 1995).

Waste Management and Rabanco each owned a WUTC certificate of public convenience and necessity to perform commercial solid waste

collection in Seattle prior to the City's decision to assert jurisdiction and contract for the services. (CP 414 ¶¶ 7-8.) Under the WUTC's laws, solid waste certificates of convenience include the collection of "demolition and construction wastes." RCW 81.77.010(9) (adopting by reference the definition in RCW 70.95.030(22)).

A WUTC certificate is a property right. RCW 81.77.0201; *Dahl-Smyth, Inc. v. Walla Walla*, 110 Wn. App. 26, 34, 38 P.3d 366 (2002), *rev'd on other grounds*, 148 Wn.2d 835, 64 P.3d 15 (2003). Recognizing the need to protect that property right, the Legislature adopted a remedial statute that addresses what must occur when an incorporated city takes over regulation in a territory previously serviced by a WUTC-authorized company. RCW 35.02.160 establishes certain safeguards for the potential impact to the affected certificate holder's property right as a result of this transfer of jurisdiction.

The statute sets forth a procedure to protect the certificate holder. First, it makes clear that the WUTC continues to regulate solid waste collection within a city's limits until the city decides to contract for the services. RCW 35.02.160. Second, when a city does in fact take over regulation, it must notify the WUTC and at that point the state-authorized certificate rights are cancelled. *Id.* Third, the statute then requires the city to grant an exclusive "franchise" to the certificate holder for a term of not less than seven years. *Id.* Alternatively, the city can acquire the certificate holder's service rights through purchase or condemnation. *Id.* Finally,

In the event that any ... corporation whose
franchise or permit has been canceled ...

suffers any measurable damages as a result of any incorporation pursuant to this chapter, such ... corporation has a right of action against any city ... causing such damages.

RCW 35.02.160 (emphasis added). Damages for canceling a WUTC certificate can be significant. *Dahl-Smyth*, 148 Wn.2d 835.

Prior to the City's decision to assert jurisdiction over solid waste collection in 2001, only Waste Management and Rabanco held WUTC certificate rights for commercial solid waste collection in Seattle. (CP 414-17.) Pursuant to the mandate of RCW 35.02.160, the City was required either to: (a) grant the two companies a franchise **and** not grant franchises to any other haulers, or (b) compensate Waste Management and Rabanco for the loss of their exclusive WUTC certificate property rights. Thus, one obvious result of the statutory scheme is that the City reasonably was constrained in its choice of the parties with whom it would contract. Had it contracted with anyone else, it also would have had to compensate Waste Management and Rabanco.

The City's 2001 decision to treat the two companies differently from any other business was legitimate. Indeed, negotiating a contract for a seven-year term was exactly what the statute required. The City was merely abiding by the statute's mandates. It could have acquired the companies' service rights, but that would have been contrary to the public's interest and fiscally irrational. The City's taxpayers would have to pay twice: once to buy the certificate rights and then again when they received collection services from another hauler. Instead, the City

negotiated exclusive contracts with the two companies, who, in exchange, voluntarily relinquished their RCW 35.02.160 claims. (CP 318 § 80.) Like the WUTC certificates, Waste Management's and Rabanco's solid waste collection contracts with the City of Seattle call for the two companies to provide CDL collection in the City. (CP 223-24 § 120 ¶ c; CP 320-21 § 120 ¶ c.)

Petitioners' oft-repeated contention that the City's reason for contracting with Waste Management and Rabanco was "out of fear" of being sued, (Pet'n for Review at 3, 18), and that this fear causes the City's exercise of its police power to fail the rational basis test, is absurd. Almost any time a government entity complies with and takes into consideration the mandates of a statutory regime, it could be argued that the government entity is trying to avoid being sued. Particularly with a remedial statutory scheme like the one here, if a city ignores the exhortation of the Legislature, it risks litigation. Accepting Petitioners' argument would lead to the preposterous result that any government actions which conform to statutory mandates inherently fail to satisfy the rational basis test. To the contrary, the City's consideration of – and compliance with – a state statute requiring it to either contract exclusively with Rabanco and Waste Management or compensate the companies for the damage to their vested rights manifestly is reasonable.

B. No Property Right of Haider's Has Been Taken.

Ironically, Petitioners discount the statutory mandates protecting the certificate rights of the two companies, which unequivocally are vested

property rights, and instead argue that their garbage is constitutionally protected.

In one of the briefs that Ventenbergs and Haider filed in support of their petition for review, they contend that “Haider’s right to freely alienate” the CDL generated on his construction projects for third parties has been improperly “taken” by the City of Seattle. (Pets.’ Reply to Seattle Resps.’ Answer to Pet. for Rev. at 14.) As evidenced by the lack of any authority to support this proposition and the Court of Appeal’s holding that this claim is “frivolous,” no such property right exists and no constitutional taking has occurred. (Pet. for Review, App. A at 9.)

To start with, to the degree the CDL which Haider wishes to “freely alienate” has any value, it does not belong to him. As alleged in the Complaint, the CDL comes from residential customers who have hired Haider to remodel or re-roof their homes. (CP 6 ¶ 5.) It is the customer’s worksite that produces the CDL. (CP 559 ¶ 7.) If the CDL has value, Haider offers to return it to his customers. (CP 560 ¶ 11.) CDL that is worth anything belongs to Haider’s customers. Cf. RCW 36.58.060 (“original owner” returning ownership of solid waste until it arrives at disposal site).

Furthermore, as Haider readily acknowledges, the CDL is waste. (CP 559 ¶ 7.) It is not “property.” Cf. *AGG Enters. v. Washington County*, 281 F.3d 1324 (9th Cir. 2002) (mixed solid waste from construction sites is not “property” under the Federal Aviation Administration Act and regulation of solid waste collection by local

governments in Oregon therefore was not preempted). As the Court of Appeals held, the CDL waste “has no value or use to Haider.” (Pet’n for Review, App. A at 9.) He does not sell or use the CDL. To the contrary, he discards the CDL in a dumpster and **pays someone** to haul it away to the dump. (CP 559-60 ¶ 7, CP 552 ¶ 11.) Ventenbergs is not **buying** the CDL from Haider. Instead Ventenbergs is **selling** his services to Haider.

Perhaps recognizing the difficulty of prevailing on the position that his garbage is constitutionally protected property, Haider instead argues that his property consists of the “the right to freely alienate his property.” (Pet’n for Review at 16). Even ignoring the tautological nature of that argument – because the CDL he wants to alienate is neither his nor is it “property” – the notion that a “right to alienate” is to be protected as if it were an interest in “property” is nonsense. Haider can find no support for the proposition. Haider’s reliance on a 1911 case to support his property rights argument is misplaced. *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 671, 117 P. 497 (1911), involves whether an easement for water conveyance may be moved despite the burdened estate property owner’s objection, even though the owner “does not need” the water and “cannot use it.” The court rejected the concept of forcing the property owner to grant an easement on a different portion of his property on that basis. To equate an interest in real estate with a desire to freely alienate personal property that has no value and belongs to somebody else requires a large leap of logic. Haider’s preference to hire Ventenbergs instead of the City’s contractors to remove the CDL simply is not a property right.

Because no private “property” has been “taken or damaged for public or private use,” Haider fails to state a takings claim under article I, section 16 of the Washington Constitution). The City of Seattle’s regulation of solid waste collection is a valid exercise of its police power.

C. The City of Seattle Is Not Required to Use Any Particular Vendor Selection Procedure – Including That Set Forth in RCW 35.21.156 – To Secure CDL Hauling Contracts.

The City’s powers are founded in the Washington Constitution, which grants cities police power authority to regulate solid waste so long as city regulations are not in conflict with the Legislature’s enactments. Wash. Const., art. XI, § 11 (1889). The Legislature has enacted statutes to implement this constitutionally-based municipal authority over solid waste. The statute that establishes remedies for impacts to WUTC certificates discussed above recognizes the underlying police powers granted to municipalities by the Constitution. Another recognition by the Legislature of this constitutionally-based authority can be found in the procurement statutes applicable to solid waste handling.

Granting cities maximum flexibility in exercising police powers over solid waste, the Legislature delegated to cities broad authority to procure solid waste collection services within each city’s boundaries. RCW 35.21.120 provides in relevant part:

A city or town may provide for solid waste handling by or under the direction of officials and employees of the city or town or **may award contracts for any service related to solid waste handling** including contracts entered into under RCW 35.21.152....

As used in this chapter, the terms “solid waste” and “solid waste handling” shall be as defined in RCW 70.95.030.

RCW 35.21.120 (emphasis added). “Solid waste” includes construction, demolition, and landclearing waste (“CDL”).

“Solid waste” or “wastes” means all putrescible and nonputrescible solid and semisolid waste 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). “Solid waste handling,” in turn, means:

the management, storage, **collection, transportation**, treatment, utilization, processing, and final disposal of solid wastes

RCW 70.95.030(24) (emphasis added).

The Legislature has not limited the means by which a city may contract for solid waste services. The contracting authority established in RCW 35.21.120 is wide-ranging. Under RCW 35.21.120’s legislative mandate, the City of Seattle has broad authority to choose how to structure solid waste – including CDL – collection services. It may collect solid waste itself through its own employees or it may, without restriction, “award contracts” to private parties, as it has elected to do here. No statute required Seattle to obtain competitive bids to implement the authority granted by RCW 35.21.120.

Conversely, had the Legislature intended to impose a specific procurement process on cities for solid waste handling, it could have done so. The Legislature previously imposed competitive bidding requirements for solid waste collection on second-, third-, and fourth-class municipalities. It specifically did not enact the same requirement for first class cities, like the City of Seattle. And even this statute was repealed in 1989. RCW 35.23.353 (*repealed by* ch. 399, Laws of 1989 §13) (“Any purchase by a municipality of the second, third or fourth class of ... services for garbage collection and disposal ... shall be made upon call for bids....”) Moreover, prior to 1989, RCW 35.21.152 expressly imposed a bidding requirement, but that too was removed. RCW 35.21.152 (1977) (“agreements relating to the sale of solid materials recovered during the processing of solid waste shall take place only after the receipt of competitive written bids by such city”) (*amended by* ch. 399, Laws of 1989 §10).

For public works projects, as a general rule, the Legislature has imposed a requirement for competitive bidding. *See* RCW Ch. 39.04 (setting forth the general bidding requirements for public works for both the State and municipalities). However, these laws do not require the City to bid for the collection services at issue, either. The term “public works” is defined by statute:

The term public work shall include all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.

RCW 39.04.010. Notably, the statutory definition does not include **services**, such as the solid waste collection services at issue here. *Shaw Disposal, Inc. v. City of Auburn*, 15 Wn. App. 65, 67, 546 P.2d 1236 (1978) (term “public work” does not include solid waste collection or disposal services). So, public works bidding requirements did not govern the City’s negotiations with Waste Management and Rabanco of contracts for solid waste collection services.

In contrast, solid waste **plants and facilities** – such as transfer stations or incinerators – could arguably be considered “public works.” For that reason, explicit statutory exemptions are needed for a public works procurement process other than bidding. RCW 35.21.152 is one such exemption. It allows cities to enter into agreements with public or private parties for solid waste facilities. Like RCW 35.21.120, it similarly does not restrict the means for procurement.

Another exemption is found in RCW 35.21.156. This statute creates an alternative vendor selection process for a “design/build/operate” arrangement. Instead of restricting municipal procurement procedures for these “DBO” contracts, the Legislature enacted a statute that provides a negotiated bid selection process which cities “may” – but are not required to – employ to contract for “the systems, plants, sites, or other facilities for solid waste handling.” The statute provides:

(1) Notwithstanding the provisions of any city charter, or any law to the contrary, **and in addition to any other authority provided by law**, the legislative authority of a city or town **may** contract with one or

more vendors for one or more of the **design, construction, or operation** of, or other service related to, the systems, plants, sites, or other facilities for solid waste handling in accordance with the procedures set forth in this section....

....

(9) **The vendor selection process permitted by this section shall be supplemental to and shall not be construed as a repeal of or limitation on any other authority granted by law.**

RCW 35.21.156 (emphasis added). In enacting this statute, the Legislature emphasized that it

shall be deemed 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 the Washington state Constitution, other state laws, and the charter of any city or county.

Laws of Wash. 1986, ch. 282, § 16, *reprinted in* RCWA 35.21.156 (historical and statutory notes) (emphasis added).²

It is plain that the Legislature intended the streamlined vendor selection process of RCW 35.21.156 to **supplement**, rather than replace, other city options for entering into contracts for plants and facilities. It authorizes, but does not require, negotiated DBO contracts for public-works-type solid waste facilities.

Thus, RCW 35.21.156 is not applicable to contracts that involve only collection services. The Legislature has treated differently municipal

² The Legislature rewrote this statute in 1989 as part of the same legislation that rewrote and readopted RCW 35.21.120 and RCW 35.21.152.

contracts for services and contracts for facilities. The only statute governing procurement of services is RCW 35.21.120, which leaves cities free to award collection services contracts as they deem appropriate for their citizens.³ In any event, even if RCW 35.21.156 did apply to solid waste collection contracts, the process is optional, not mandatory. A city “may” – but is not required to – follow the process set forth in the statute.

In short, pursuant to RCW 35.21.120, Seattle had broad authority to enter into contracts with Rabanco and Waste Management without considering other possible contractors. The City is, after all, contracting with private vendors to perform services for its citizens that entail considerable public health risks and environmental concerns. No statutory provision restricts the breadth of this authority, nor should it.

III. CONCLUSION

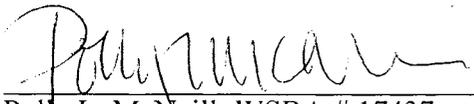
For each of the foregoing reasons and those addressed in the briefs filed by the City of Seattle and by Rabanco, Waste Management respectfully requests that this Court affirm the Court of Appeals.

³ Indeed, it would be impossible for a city to comply with the mandates of RCW 35.02.160, discussed in Section A, if it were required to solicit bids or employ a negotiated bid process.

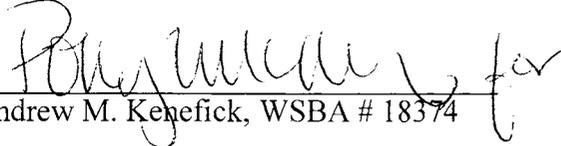
DATED this 5th day of February, 2007.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, under penalty of perjury under the laws of the
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On February 5, 2007, I caused to be served via the method noted
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Executed at Seattle, Washington this 5th day of February, 2007.



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