

**FILED**  
NOV 09 2007

No. 80204-1

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
NOV 09 11 08:09 AM  
BY RONALD R. BRENNER

ARTHUR T. LANE, KENNETH GORHOFF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated,  
*Respondents/Cross-Appellants,*

v.

THE CITY OF SEATTLE,  
*Respondent/Cross-Respondent,*

v.

THE CITY OF SHORELINE, KING COUNTY, KING COUNTY FIRE DISTRICT NO. 2, KING COUNTY FIRE DISTRICT NO. 4 (a.k.a. Shoreline Fire Department), NORTH HIGHLINE FIRE DISTRICT NO. 11, KING COUNTY FIRE DISTRICT NO. 16 (a.k.a. Northshore Fire Department), and KING COUNTY FIRE DISTRICT NO. 20,  
*Respondents, and*

THE CITY OF BURIEN and THE CITY OF LAKE FOREST PARK,  
*Appellants.*

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 NOV -7 PM 2:00

---

**BRIEF OF RESPONDENTS/CROSS-APPELLANTS LANE, et al.  
("RATEPAYERS")**

---

**ORIGINAL**

David F. Jurca, WSBA #2015  
Jennifer S. Divine, WSBA #22770  
Connie K. Haslam, WSBA #18053  
HELSELL FETTERMAN LLP  
1001 Fourth Avenue, Suite 4200  
Seattle, Washington 98154  
(206) 292-1144  
Attorneys for Lane, et al. (Ratepayers)

TABLE OF CONTENTS

I. INTRODUCTION .....1

II. ASSIGNMENTS OF ERROR AND ISSUES  
PERTAINING THERETO .....2

    A. Counterstatement of Issues Pertaining to  
    Assignments of Error on Appeals of Burien and  
    Lake Forest Park .....2

    B. Assignments of Error and Issues on Cross-Appeal.....3

III. STATEMENT OF THE CASE.....4

    A. The *Okeson* Decision .....4

    B. Seattle’s Response to the *Okeson* Decision .....5

    C. The Proceedings Below .....10

        1. The ratepayers’ claims and Seattle’s third-  
        party claims .....10

        2. Motions for summary judgment on fire  
        hydrant costs .....12

        3. Rulings on prejudgment and postjudgment  
        interest.....14

        4. Motions for summary judgment on tax rate  
        increase .....15

        5. Appeals by Burien and Lake Forest Park .....16

        6. The ratepayers’ cross-appeal.....17

IV. ARGUMENT IN RESPONSE TO APPEALS OF BURIEN  
AND LAKE FOREST PARK.....17

    A. Seattle’s Obligations Under the Trial Court  
    Judgment Are Not at Issue on this Appeal.....17

|    |  |    |
|----|--|----|
| B. | Providing Fire Hydrants Is a General Governmental Function .....   | 19 |
| C. | The <i>Okeson</i> Reasoning Applies to this Case .....   | 21 |
| D. | Water System Regulations Requiring Fire Hydrants Do Not Change the Character of Fire Protection Service from Governmental to Proprietary, and Do Not Dictate Who Should Pay for the Hydrants.....                | 24 |
| E. | This Court Has Already Rejected the Argument that the 2002 Amendments to RCW 35.92.010 and .050 Require that Costs of an “Integral” Utility Service Be Charged to Ratepayers.....                                | 28 |
| F. | Charging Fire Hydrant Costs to the Ratepayers Imposes an Unconstitutional Hidden Tax on Their Domestic Water Usage, Not a Fee to Regulate Their Fire Hydrant Usage .....   | 30 |
| G. | The Trial Court’s Conclusion that Fire Hydrant Costs Cannot Lawfully Be Charged to Ratepayers Was Sound .....  | 33 |
| V. | ARGUMENT IN SUPPORT OF RATEPAYERS’ CROSS-APPEAL .....  | 34 |
| A. | Prejudgment and Postjudgment Interest at the Normal 12% Statutory Rate Is Owed on the Refunds to SPU and Its Ratepayers.....   | 34 |
| 1. | The Court should abandon the judicially created “general rule” that as a matter of sovereign immunity state and local governments cannot, without their consent, be held liable for interest on their debts..... | 36 |
| 2. | Sovereign immunity does not apply to a municipality’s proprietary acts .....   | 38 |

|     |  |    |
|-----|--|----|
| 3.  | RCW 80.04.440 constitutes an explicit statutory waiver of sovereign immunity for claims against water utilities and an implied statutory consent to be held liable for interest..... | 39 |
| 4.  | Any sovereign immunity of Seattle or SPU was impliedly waived by the contract between SPU and its customers (including the City itself) .....  | 40 |
| B.  | Seattle’s January 1, 2005 Water Utility Tax Rate Increase Was for an Unlawful Purpose and Therefore Is Invalid.....  | 42 |
| 1.  | The ratepayers have standing to challenge the tax rate increase.....   | 43 |
| 2.  | The tax rate increase is invalid because it was enacted for an unlawful purpose and has an unlawful effect .....   | 45 |
| VI. | CONCLUSION.....  | 49 |

TABLE OF AUTHORITIES

Cases

*Architectural Woods, Inc. v. State*, 92 Wn.2d 521,  
598 P.2d 1372 (1979).....37, 39, 40, 41

*Capitol Hill Methodist Church v. City of Seattle*,  
52 Wn.2d 359, 324 P.2d 1113 (1958).....19

*Carrillo v. City of Ocean Shores*, 122 Wn. App.  
592, 94 P.3d 961 (2004).....38, 39

*City of Spokane v. Taxpayers of City of Spokane*,  
111 Wn.2d 91, 758 P.2d 480 (1988).....44

*Culbertson v. H. Witbeck Co.*, 127 U.S. 326,  
8 S. Ct. 1136, 32 L. Ed. 134 (1888).....46

*Cunningham v. City of Seattle*, 42 Wash. 134, 84 P. 641 (1906) .....38, 39

*Freeland v. Hastings*, 92 Mass. (10 Allen) 570 (1865) .....46

*Genie Indus., Inc. v. Market Transp. Ltd.*,  
138 Wn. App. 694, 158 P.3d 1217 (2007).....18

*Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*,  
150 Wn.2d 791, 83 P.3d 419 (2004).....45

*Grosjean v. American Press Co.*, 297 U.S. 233,  
56 S. Ct. 444, 80 L. Ed. 660 (1936).....47

*Hansen v. Rothaus*, 107 Wn.2d 468, 730 P.2d 662 (1986).....34

*Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558,  
404 P.2d 453 (1965).....44

*Jones v. City of Centralia*, 157 Wash. 194, 289 P. 3 (1930).....45

*Kelso v. City of Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964) .....37

|  |        |
|--|--------|
| <i>King County v. Puget Sound Power &amp; Light Co.</i> , 70 Wn. App. 58,<br>852 P.2d 313 (1993).....                                    | 34     |
| <i>Lakoduk v. Cruger</i> , 47 Wn.2d 286, 287 P.2d 338 (1955).....  | 19     |
| <i>Madison v. State</i> , 161 Wn.2d 85, 163 P.3d 757 (2007).....   | 18     |
| <i>Mathews v. Massell</i> , 356 F. Supp. 291 (N.D. Ga. 1973).....  | 47, 48 |
| <i>Minneapolis Star &amp; Tribune Co. v. Minnesota Comm’r of Revenue</i> ,<br>460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed.2d 295 (1983)..... | 47     |
| <i>Nealon v. District of Columbia</i> , 669 A.2d 685 (D.C. App. 1995).....   | 20     |
| <i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003) .....  | passim |
| <i>Our Lady of Lourdes Hosp. v. Franklin County</i> ,<br>120 Wn.2d 439, 842 P.2d 956 (1993).....   | 37     |
| <i>People ex rel. Schlaeger v. Buena Vista Bldg. Corp.</i> ,<br>71 N.E.2d 10 (Ill. 1947).....  | 47     |
| <i>Perry v. City of Independence</i> ,<br>69 P.2d 706 (Kan. 1937).....   | 20     |
| <i>Prier v. Refrigeration Eng’g Co.</i> ,<br>74 Wn.2d 25, 442 P.2d 621 (1968).....   | 34     |
| <i>Riddoch v. State</i> ,<br>68 Wash. 329, 123 P. 450 (1912).....  | 39     |
| <i>Riggs v. Township of Long Beach</i> ,<br>538 A.2d 808 (N.J. 1988).....  | 46     |
| <i>Rouse v. Peoples Leasing Co.</i> ,<br>96 Wn.2d 722, 638 P.2d 1245 (1982).....   | 48     |
| <i>Russell v. City of Grandview</i> ,<br>39 Wn.2d 551, 236 P.2d 1061 (1951).....   | 39     |

|   |            |
|---|------------|
| <i>Russell v. City of Tacoma</i> ,<br>8 Wash. 156, 158-160, 35 P. 605 (1894) .....                                  | 38         |
| <i>Seattle Sch. Dist. No. 1 v. State</i> ,<br>90 Wn.2d 476, 585 P.2d 71 (1978) .....                                | 43         |
| <i>Shea v. City of Portsmouth</i> ,<br>94 A.2d 902 (N.H. 1953) .....  | 20         |
| <i>Spier v. Dep't of Labor &amp; Indus.</i> ,<br>176 Wash. 374, 29 P.2d 679 (1934) .....                            | 36         |
| <i>State ex rel. Campbell County v. Delinquent Taxpayers of 1939</i> ,<br>191 S.W.2d 153 (Tenn. 1945) .....         | 47         |
| <i>State v. PUD No. 1 of Klickitat County</i> ,<br>79 Wn.2d 237, 484 P.2d 393 (1971) .....                          | 48         |
| <i>Stiefel v. City of Kent</i> ,<br>132 Wn. App. 523, 132 P.3d 1111 (2006) .....                                    | 12, 19, 20 |
| <i>Sullivan v. White</i> ,<br>13 Wn. App. 668, 536 P.2d 1211 (1975) .....   | 48         |
| <i>Sutton v. City of Snohomish</i> ,<br>11 Wash. 24, 39 P. 273 (1895) .....   | 38         |
| <i>Twitchell v. City of Spokane</i> ,<br>55 Wash. 86, 104 P. 150 (1909) .....                                       | 23         |
| <i>Union Pac. R. Co. v. Troupe</i> ,<br>155 N.W. 230 (Neb. 1915) .....  | 47         |
| <i>Wash. Fed'n of State Employees v. Joint Ctr. for Higher Educ.</i> ,<br>86 Wn. App. 1, 933 P.2d 1080 (1997) ..... | 43         |
| <u>Washington Constitution</u>  |            |
| Wash. Const. art. VII, § 5 .....  | 33, 45     |

Statutes & Rules

|                      |                    |
|----------------------|--------------------|
| RAP 3.1 .....        | 18                 |
| RCW 19.52.010 .....  | 34                 |
| RCW 19.52.020 .....  | 34                 |
| RCW 35.92.010 .....  | 28                 |
| RCW 35.92.050 .....  | 28                 |
| RCW 39.76.010 .....  | 42                 |
| RCW 39.76.011 .....  | 42                 |
| RCW 4.56.110(4)..... | 34                 |
| RCW 4.92.090 .....   | 37                 |
| RCW 4.96.010 .....   | 37                 |
| RCW 43.09.210 .....  | 45                 |
| RCW 7.24.020 .....   | 44                 |
| RCW 80.04.010 .....  | 40                 |
| RCW 80.04.440 .....  | 14, 35, 39, 40, 44 |

Ordinances

|                                       |         |
|---------------------------------------|---------|
| Seattle Municipal Code 21.04.020..... | 41      |
| Seattle Municipal Code 21.04.030..... | 41      |
| Seattle Municipal Code 21.04.040..... | 41      |
| Seattle Ordinance 121671 .....        | 6, 7, 9 |
| Seattle Ordinance 121672.....         | 6, 8    |

Seattle Ordinance 121676.....6, 9

Other Authorities

15 Karl B. Tegland, Wash. Prac., *Civil Procedure* § 42.2 (2003).....44

18A McQuillin, *Municipal Corporations* § 53.106  
(3d ed., rev. vol. 2002).....20

84 C.J.S. *Taxation* § 427 (2006) .....46

85 C.J.S. *Taxation* §§ 1093, 1477 (2006) .....46

## I. INTRODUCTION

This case is a natural follow-up to *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), applying the reasoning of that case concerning streetlights to the analogous situation of fire hydrants. In addition, this case raises two important new issues: (1) whether the doctrine of sovereign immunity protects a proprietary municipal utility from liability for prejudgment and postjudgment interest, and (2) whether a municipal tax increase expressly enacted for the purpose of making an improper end-run around this Court's decision in *Okeson* by continuing to impose general government expenses on utility ratepayers is valid.

At the outset, it should be noted that Seattle has not appealed from any aspect of the judgment below. Among other things, that judgment (i) requires Seattle's proprietary water utility ("SPU")<sup>1</sup> to reimburse ratepayers for fire hydrant expenses improperly included in water rates prior to January 1, 2005, and (ii) requires Seattle's general fund to reimburse SPU for expenses of fire hydrants located within Seattle.<sup>2</sup> Because Seattle has not appealed from the judgment, those obligations are final and are not at issue on this appeal.

---

<sup>1</sup> Seattle's proprietary electric utility is called Seattle City Light. The City's other proprietary utilities (water, garbage, and drainage and wastewater) are collectively called Seattle Public Utilities, or "SPU." References to SPU in this brief are to the water utility.

<sup>2</sup> SPU provides 16,931 fire hydrants within Seattle and an additional 1,397 hydrants outside Seattle, including 107 in Burien and 57 in Lake Forest Park. CP 1347.

The only parties seeking appellate review are (i) appellants Burien and Lake Forest Park (two of the third-party defendants below), who are challenging the judgment insofar as it requires them to reimburse SPU for the relatively small number of hydrants located in those two cities,<sup>3</sup> and (ii) the class of SPU's water ratepayers (plaintiffs below), who are challenging the judgment insofar as it failed to award interest on the refunds at the normal 12% statutory rate and failed to invalidate a utility tax increase that was adopted in express defiance of this Court's decision in *Okeson*. The ratepayers have not asserted any claims against the third-party defendants and take no position on the issue of whether Burien and Lake Forest Park or the fire districts operating within those jurisdictions should reimburse SPU for the fire hydrants located there. The ratepayers do, however, oppose Burien's and Lake Forest Park's contentions that fire hydrant expenses should be paid by utility ratepayers.

## II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

### A. Counterstatement of Issues Pertaining to Assignments of Error on Appeals of Burien and Lake Forest Park

In a municipality where fire protection service is provided by a fire

---

<sup>3</sup> The 107 hydrants in Burien and 57 in Lake Forest Park together account for less than 1% of the 18,328 fire hydrants provided by SPU in Seattle and surrounding communities. CP 1347. Although the briefs of the two appellant cities are written as if they were also challenging the judgment insofar as it imposes refund obligations on SPU and on Seattle's general fund, those cities lack standing to appeal from portions of the judgment as to which they are not aggrieved parties. See discussion *infra* at 17-18.

district rather than by the municipality itself, should the expenses of providing fire hydrants be paid by the fire district, by the municipality's general government, or by a proprietary water utility's ratepayers?

B. Assignments of Error and Issues on Cross-Appeal

1. The trial court erred in refusing to award prejudgment and postjudgment interest, at the normal 12% statutory rate, on the amounts to be refunded by SPU to ratepayers and by the City's general fund to SPU for fire hydrant expenses from March 1, 2002 through December 31, 2004.

Issue 1(a). Does the doctrine of sovereign immunity shield SPU, as a proprietary municipal utility, from liability to ratepayers for prejudgment and postjudgment interest, at the normal 12% statutory rate, on refunds owed by SPU to ratepayers?

Issue 1(b). Does the doctrine of sovereign immunity shield Seattle's general government from liability for prejudgment and postjudgment interest, at the normal 12% statutory rate, on the amounts owed by the City's general fund to SPU for fire hydrant expenses?

2. The trial court erred in upholding the validity of Seattle's water utility tax rate increase that was adopted for the express purpose of continuing to impose fire hydrant expenses on water ratepayers.

Issue 2(a). Do water ratepayers have standing to challenge the validity of an ordinance increasing municipal water utility taxes that are

passed on to ratepayers through rates?

Issue 2(b). Was Seattle's ordinance increasing the water utility tax rate from 10% to 14.04% on January 1, 2005 an improper attempt to circumvent applicable law and continue the City's practice of unlawfully imposing fire hydrant costs on SPU and its ratepayers?

### III. STATEMENT OF THE CASE

#### A. The Okeson Decision

In its unanimous decision in *Okeson*, this Court held that a Seattle ordinance imposing streetlight costs on electric utility ratepayers was invalid because streetlights serve a general governmental purpose (public safety) rather than a proprietary utility purpose:

Providing streetlights . . . is a governmental function because they operate for the benefit of the general public, and not for the "comfort and use" of individual customers. City Light customers have no control over the provision or use of streetlights. Hence, while the electric utility itself is a proprietary function of government, the maintenance of streetlights is a governmental function.

150 Wn.2d at 550-51. Accordingly, the Court held that streetlight costs should be paid by the City's general fund rather than by the utility or its ratepayers. The Court also held that including streetlight costs in electric rates constituted an illegal, hidden tax on ratepayers. *Id.* at 558.

In defending against the ratepayers' claims in *Okeson*, Seattle had argued that imposing streetlight costs on electric ratepayers should be

treated in the same way as imposing fire hydrant costs on water ratepayers, which the City had been doing for many years. CP 1143-47. It emphasized in its brief to this Court (in a bold-font heading) that “**No reasoned analysis can ignore the parallels between providing streetlights and fire hydrants.**” CP 1143. Without addressing the aptness of the analogy, the Court simply pointed out that the dispute in that case concerned payment for streetlights, not fire hydrants:

The fire hydrant issue is not before us, and the mere fact that fire hydrant costs have been included in the water rate (and never been challenged) does not determine the issue of payment for streetlights, presented here.

150 Wn.2d at 551.

B. Seattle’s Response to the *Okeson* Decision

Seattle recognized that *Okeson*’s reasoning was equally applicable to fire hydrants, and realized that it could no longer impose fire hydrant costs on ratepayers through water rates. As Seattle itself has explained:

Seattle concluded that fire hydrants, like streetlights, operate for the public health and safety of the general public and, like streetlights, must under *Okeson I* be categorized as a governmental rather than a proprietary function.

Sea. Brf. at 1<sup>4</sup>; *see also* Sea. Brf. at 3-4; CP 1673-74.

Seattle decided to begin reimbursing SPU as of January 1, 2005 for

---

<sup>4</sup> “Sea. Brf.” refers to Respondent City of Seattle’s Brief in Response to Burien and Lake Forest Park, filed in this Court on 10/17/07.

expenses of public fire hydrants located within the City. It did this by simultaneously enacting three ordinances, one dealing with payment for fire hydrants and two raising the water utility tax rate. Ordinance 121676 adopted rates to be paid for public fire hydrants by the City's general fund (for hydrants within Seattle) and other governmental entities (for hydrants outside Seattle). Sea. Br. at 4-5; CP 2483-90. The rates were based on a carefully reasoned allocation of costs attributable to fire hydrants. No party has challenged the reasonableness of the cost allocation or the amount of the rates. The only issue before the Court concerning the fire hydrant rates is who should pay them, not whether the rate amounts were properly determined.

On the same day as it enacted Ordinance 121676 adopting fire hydrant rates to be charged to the City's general fund, Seattle also enacted two ordinances that increased the tax rate for water utility taxes to be paid by SPU and passed on to ratepayers through rates. The first ordinance, No. 121671, raised the water utility tax rate from 10% to 14.04% effective as of January 1, 2005. CP 2449-51. The second ordinance, No. 121672, raised the tax rate from 14.04% to 15.54% effective as of May 15, 2005. CP 2453-55.

The specific purpose of the January 1, 2005 tax rate increase, as declared in the preamble to Ordinance 121671, was to pay for the fire

hydrant costs that ratepayers had previously been paying but that Seattle's general fund would supposedly begin covering as of January 1, 2005:

WHEREAS increasing the fee or tax on retail water businesses from ten percent to approximately fourteen percent will increase the amount of revenue from this fee or tax in the amount needed to pay the projected hydrant service costs of the City;

CP 2449-50 (emphasis added).

The City's "Fiscal Note" for Council Bill 115094 (which became Ordinance 121671)<sup>5</sup> described the "Background" of the water utility tax rate increase as follows:

The City imposes revenue taxes on utility services, including water service. The current tax rate on water services is 10%. As allowed by state law, the water system provides hydrant services in its distribution service area, and now recovers the costs of this service from ratepayers. Starting in 2005, SPU proposes to charge cities and fire districts for the hydrant services provided within their boundaries. The City of Seattle's cost for the hydrant services provided within the city limits is about \$3.8 million. One way in which Seattle can generate the revenue to pay for these hydrant services is to increase the revenue tax on water utilities. This change would be rate-neutral to most customers, because the increased tax costs will be offset by reduced costs for hydrant services (i.e. hydrant services will now be recovered from cities and fire districts, and not retail rates).

CP 2457 (emphasis added). Saying that the tax rate increase would be

---

<sup>5</sup> Proposed legislation is assigned a "Council Bill" number, and when a bill is passed by the City Council and approved by the Mayor it becomes an ordinance and is assigned a separate Ordinance number. The City prepares a "Fiscal Note" for proposed legislation describing the anticipated financial implications of the bill.

“rate-neutral” to customers meant that the ratepayers would keep paying the same amount for water after January 1, 2005 as before, since the rates would continue to include a charge for fire hydrant expenses via the increased utility tax.

The Fiscal Note for Council Bill 115095 (which became Ordinance 121672, increasing the water utility tax rate by another 1.5% as of May 15, 2005) described the “Background” of the additional increase as follows:

There is no statutory constraint on the tax rates charged on the utility services provided by SPU. In order to provide a dedicated source of funding for fire hydrants, the tax rate on water services will be increased to 14.04% as of January 1, 2005. The additional 1.5% provided in this legislation is designed to fund other General Fund priorities in 2005 and 2006.

CP 2461 (emphasis added). In other words, the purpose of increasing the tax rate by more than 40% (from 10% to 14.04%) as of January 1, 2005 was solely to pay for fire hydrants, whereas the additional 1.5% increase as of May 15, 2005 was to raise general revenues. The ratepayers seek to invalidate only the 4.04% tax rate increase for fire hydrants; they do not seek to invalidate the subsequent 1.5% increase for general revenues.

Seattle has reiterated in this litigation that the purpose of the January 1, 2005 water utility tax rate increase was to continue imposing fire hydrant expenses on SPU and its ratepayers while paying mere lip service to the *Okeson* requirement that those expenses must be borne by

the general fund. In its answer to the ratepayers' amended complaint, the City stated that "the amount of the revenue from the increase in the water utility tax rate was anticipated to be approximately the amount needed to pay the projected hydrant service costs of the City." CP 2466 at ¶ 18.

Even more tellingly, the City stated in response to the ratepayers' motion for summary judgment that the purpose of the utility tax increase was to "hold the general fund harmless" from the *Okeson* decision:

Ordinance No. 121671 increased the utility tax applied to SPU ratepayers from 10 percent to 14.04 percent. This collects an amount of money equal to the cost imposed on the general fund from transferring the fire hydrant costs from the SPU water fund to the city's general fund; thus, holding Seattle's general fund harmless from the court's decision in *Okeson*.

CP 2470 (emphasis added). The City then argued that any refund for pre-2005 hydrant costs would be pointless:

As demonstrated by Ordinances 121671 and 121676 Seattle has lawfully made its general fund "whole" for the cost of fire hydrant service by taxing water ratepayers. . . . As a result, no remedy this court can offer Plaintiffs can be effective in achieving their goal of obtaining a refund from the general fund to water ratepayers. Were the court to order such refund, Seattle could simply raise the tax rate on SPU to achieve general fund revenue neutrality once more.

CP 2477-78 (emphasis added).

By increasing the water utility tax by the precise amount needed to pay for fire hydrants, Seattle has continued to impose those general governmental costs solely on SPU and its ratepayers, instead of spreading

those costs among the broader revenue base supporting the general fund. It is the ratepayers' position that in raising the water utility tax rate for the express purpose of "holding the general fund harmless" from the *Okeson* decision by continuing to place the financial burden of fire hydrant costs entirely on the utility and its ratepayers, Seattle was doing nothing less than openly defying the legal principles reiterated by this Court in *Okeson*.

The City has set up a sham arrangement, under which the general fund pays the utility for fire hydrants with one hand while simultaneously taking that same amount of money back from the utility and its ratepayers with the other hand, in the form of the increased utility tax. In economic substance, the situation after the tax rate increase is just as unlawful as it was before — the utility and its ratepayers still bear all of the fire hydrant costs. Since the tax rate increase was enacted for an unlawful purpose and has had an unlawful effect, it is invalid.

C. The Proceedings Below

1. The ratepayers' claims and Seattle's third-party claims

Seattle's general fund began paying for streetlights immediately upon issuance of the *Okeson* decision in November 2003. However, the general fund did not begin paying for fire hydrants until January 1, 2005. As noted above, on that date the general fund began paying for those costs with one hand while simultaneously taking that same amount of money

back from the ratepayers with the other hand, through increased water utility taxes. Although the City purported to pay for post-January 1, 2005 fire hydrant costs through this sham arrangement, it did nothing at all about reimbursing SPU ratepayers for fire hydrant costs that had been included in water rates prior to January 1, 2005. Accordingly, on March 1, 2005 three ratepayers (including two who were class representatives in *Okeson*) brought this class action on behalf of SPU ratepayers, to obtain refunds for the fire hydrant costs that had been included in water rates prior to January 1, 2005.<sup>6</sup> On July 19, 2005 the case was certified as a class action on behalf of SPU ratepayers other than Seattle itself and the third-party defendant cities and county.<sup>7</sup> CP 658-60.

Seattle answered the complaint by denying that it was obligated to reimburse the utility or its ratepayers for fire hydrant costs. CP 25, ¶ 44. Seattle then amended its answer to assert third-party claims against a handful of suburban cities and King County for recovery of costs for fire hydrants provided by SPU within those cities and in unincorporated parts

---

<sup>6</sup> Because refund claims are subject to a three-year statute of limitations, the time period for which refunds were sought was from March 1, 2002 through December 31, 2004. As originally filed, the complaint also included claims relating to expenditures by SPU for public art and for support of Sound Transit's light rail project. Those claims have been resolved separately and are not involved in the present appeal or cross-appeal.

<sup>7</sup> Technically those parties are also ratepayers, in the sense that they are billed for water used in municipal buildings and for other municipal purposes, but we use the term "ratepayers" here to refer to class members, *i.e.*, SPU utility customers other than the defendant and third-party defendant cities and county.

of the County. CP 685-88. The ratepayers later amended their complaint to add the claim that the tax rate increase was invalid. CP 1849-59.

2. Motions for summary judgment on fire hydrant costs

In June 2006 the ratepayers moved for summary judgment on the pre-2005 fire hydrant costs, seeking refunds from Seattle's general fund to SPU and from SPU to the ratepayers. CP 763-86. At the same time, the suburban cities and King County moved for summary judgment dismissing Seattle's third-party claims against them, arguing that (i) fire hydrant costs should be charged to ratepayers through water rates, (ii) there is no contractual or other legal basis for Seattle to charge the suburban cities or King County for such costs, and (iii) if fire hydrant costs are properly chargeable to the entities responsible for fire protection, then the special-purpose fire districts operating there are the entities that should be charged, not the general governments of the suburban cities or the county. CP 997-1021, 1448-62, 1516-31.

The trial court held, in keeping with the reasoning of this Court in *Okeson* and the reasoning of the court of appeals in *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006), that providing water for fire protection for the general public was a governmental function that should be paid for by a city's general government, not by a proprietary utility or its ratepayers. CP 2154-59. Accordingly, the trial court ordered Seattle's

general fund to reimburse SPU for costs incurred from March 1, 2002 through December 31, 2004 for fire hydrants located within Seattle, and it ordered SPU to make refunds to water ratepayers for fire hydrant costs included in water bills for the same period. CP 2140-41.

As to Seattle's claims regarding fire hydrants provided by SPU outside of Seattle, the trial court initially declined to rule on the third-party defendants' argument that parties not before the court (the fire districts) were responsible for those costs. Instead, the trial court directed Seattle to join the fire districts as additional third-party defendants, so that the court would have the benefit of the fire districts' views on the issue. CP 2160-62. After the fire districts were brought into the case, and after further briefing and oral argument, the trial court ruled that the suburban cities and the county, rather than the fire districts, were responsible for reimbursing SPU for fire hydrants. With respect to Shoreline and King County, however, the court held that in the franchise agreements with those entities SPU had waived its right to obtain such reimbursement. CP 3965-67. Accordingly, the trial court dismissed SPU's third-party claims against the fire districts and against Shoreline and King County, but ruled in Seattle's favor on its claims against Burien and Lake Forest Park. CP 3839-40.

3. Rulings on prejudgment and postjudgment interest

The ratepayers sought awards of prejudgment and postjudgment interest at the normal 12% statutory rate on the refunds to be made by SPU to ratepayers, and on the refunds to be made by Seattle's general fund to SPU. CP 1976-91. Seattle objected, on the ground that it was protected by sovereign immunity from liability for such interest. CP 2009-17. The ratepayers argued in response that (i) the doctrine of sovereign immunity does not apply to a proprietary utility like SPU, and (ii) any sovereign immunity from liability for interest on refunds was impliedly waived by contract and by the utility liability statute, RCW 80.04.440. CP 2039-50.

The trial court agreed with the ratepayers that the doctrine of sovereign immunity does not apply to a utility's proprietary activities. However, the court reasoned that that principle did not help the ratepayers here, since the right to obtain refunds in this case was based on the fact that providing fire hydrants was a general government function rather than a proprietary utility function. CP 2277-78.

The trial court also ruled that RCW 80.04.440 did not constitute a waiver of sovereign immunity from liability for interest. CP 2278-79. The court did, however, conclude that under that statute SPU and its ratepayers were entitled to compensation for "all loss" resulting from the improper handling of fire hydrant costs, including compensation for loss

of use of money, based on a “reasonable rate of return that would have been earned by a reasonably prudent investor.” *Id.* On that basis, the trial court awarded prejudgment and postjudgment interest at the rate of 3.18% per annum on the amounts to be paid by Seattle’s general fund to SPU, but at the rate of only 1% per annum on the refunds to be paid by SPU to the ratepayers. CP 2368-69; CP 2371-72, ¶¶ 3-4.

4. Motions for summary judgment on tax rate increase

Following the trial court’s ruling that Seattle’s general fund was liable for pre-2005 fire hydrant costs and that SPU must reimburse the ratepayers for those costs, Seattle and the ratepayers filed cross-motions for summary judgment concerning the validity or invalidity of the January 1, 2005 water utility tax rate increase. Seattle’s initial argument was that the ratepayers lacked standing to challenge the validity of the tax rate increase, since the tax is imposed on the utility rather than on the ratepayers directly. CP 2558-60. Seattle also argued that since it was authorized to impose a water utility tax and there was no statutory limit on the tax rate (unlike the statutory 6% limit on an electric utility tax), there was no reason why Seattle could not impose whatever tax rate it wished on SPU for whatever purpose. CP 2561-64, 2566-68.

The ratepayers, on the other hand, argued that since the increased water utility taxes were necessarily passed along to and paid by utility

ratepayers, they had both statutory and common law standing to challenge the validity of the tax increase. CP 2610-23. They also argued that since the express purpose and effect of the January 1, 2005 water utility tax rate increase was unlawful (*i.e.*, to continue imposing fire hydrant costs on the utility and its ratepayers), the tax increase was invalid. CP 2578-89.

The trial court agreed that the ratepayers had standing to challenge the validity of the tax rate increase. RP 5 (2-13-07). However, the court reasoned that since Seattle was authorized to impose a utility tax to raise revenues for general city purposes, and since at least some portion of the original 10% utility tax could admittedly be used to help pay for fire hydrants, there was nothing unlawful about increasing the utility tax to pay for all of the fire hydrant costs. RP 7-10 (2-13-07). Hence, the trial court granted summary judgment dismissing the ratepayers' claim. CP 3670; CP 4188, ¶ 3.

5. Appeals by Burien and Lake Forest Park

Burien and Lake Forest Park have appealed from the trial court judgment against them in favor of Seattle on its third-party claims. That judgment (i) requires Burien to pay \$131,533 and Lake Forest Park to pay \$74,171 to SPU for fire hydrant costs through April 30, 2007, plus 3.18% interest until paid, and (ii) declares that Burien and Lake Forest Park must continue reimbursing SPU for fire hydrant services after April 30, 2007.

CP 4188, ¶ 4(b), (c) & (d). Both cities' appeals raise purely legal issues. There are no disputed facts.

6. The ratepayers' cross-appeal

The ratepayers cross-appeal from the trial court judgment insofar as it (i) denied prejudgment and postjudgment interest at the 12% statutory rate on the refunds to SPU and the ratepayers and (ii) upheld the validity of Seattle's January 1, 2005 water utility tax rate increase. CP 4179-4251. Like the appeals of Burien and Lake Forest Park, the ratepayers' cross-appeal raises purely legal issues. There are no disputed facts.

---

IV. ARGUMENT IN RESPONSE TO APPEALS OF BURIEN AND LAKE FOREST PARK

As noted at the outset, the ratepayers asserted no claims against Burien or Lake Forest Park and take no position as to whether those cities' general governments or the fire districts serving those areas should reimburse SPU for the costs of the fire hydrants in those cities. The ratepayers do, however, oppose those cities' arguments that the fire hydrant costs should be borne by SPU's water ratepayers.

A. Seattle's Obligations Under the Trial Court Judgment Are Not at Issue on this Appeal.

Lake Forest Park has filed a "Supplemental" conclusion to its appeal brief, in which it requests reversal of the trial court judgment "in its entirety" or, in the alternative, reversal of the judgment against it in favor

of Seattle. Neither Lake Forest Park nor Burien has standing to seek reversal of the judgment “in its entirety.” They have every right to appeal from the parts of the judgment as to which they are aggrieved parties, but they have no right to appeal from the parts of the judgment that do not affect them. RAP 3.1 (“Only an aggrieved party may seek review by the appellate court”); *see also Madison v. State*, 161 Wn.2d 85, ¶ 43, 163 P.3d 757 (2007). Burien and Lake Forest Park have no standing to seek reversal of any part of paragraphs 1, 2 or 3 of the trial court judgment (CP 4186-88), which affect only Seattle and the ratepayers.

Seattle has not appealed from any part of the judgment, and is therefore bound by it regardless of the outcome of Burien’s and Lake Forest Park’s appeals. *See Genie Indus., Inc. v. Market Transp. Ltd.*, 138 Wn. App. 694, ¶¶ 32, 49-52, 158 P.3d 1217 (2007) (successful appeal by one party does not benefit non-appealing party, even if theory on appeal would have been identical for non-appealing party). Thus, although (as in every case) the legal principles involved may potentially apply more generally, the appeals of Burien and Lake Forest Park in this case are limited in scope to reimbursement of costs for the relatively small number of fire hydrants provided by SPU in those two cities.

B. Providing Fire Hydrants Is a General Governmental Function.

Burien and Lake Forest Park argue that providing fire hydrants is a proprietary utility function because (i) hydrants are an “integral” part of the utility’s proprietary water system, (ii) SPU occasionally sells or uses water from hydrants for other purposes such as street cleaning and flushing the water system, and (iii) water is provided for the “comfort and use” of ratepayers. *See* Bur. Brf. at 6, 15, 20-24; LFP Brf. at 5, 7-8, 10. These arguments miss the real issue (who should pay for public fire protection) and ignore the long-settled law in the area.

It is well established in Washington, and so far as we know in all other jurisdictions, that public fire protection is a governmental function. *See, e.g., Capitol Hill Methodist Church v. City of Seattle*, 52 Wn.2d 359, 366, 324 P.2d 1113 (1958) (“furnishing of fire protection by the City of Seattle is a governmental function”); *Lakoduk v. Cruger*, 47 Wn.2d 286, 289, 287 P.2d 338 (1955); *Stiefel v. City of Kent*, 132 Wn. App. 523, ¶¶ 15-17, 132 P.3d 1111 (2006). It is also widely held that providing fire hydrants is part of the governmental function of public fire protection, despite the fact that the hydrants are provided by a proprietary water utility and despite the occasional use of hydrants for other purposes such as flushing lines or testing the entire water system, since the principal purpose of the hydrants is for fire protection:

It is a generally accepted fact that public hydrants are established and maintained principally for use in extinguishing fires . . . Nor does the fact that a hydrant is capable of being used for the benefit of the whole system in flushing and testing change its primary purpose. Such uses are merely incidental to the principally designed use of the hydrant as a means of fire extinguishment.

*Shea v. City of Portsmouth*, 94 A.2d 902, 904-05 (N.H. 1953); 18A McQuillin, *Municipal Corporations* § 53.106 at 197 (3d ed., rev. vol. 2002) (“as the principal purpose of a hydrant is for fire protection, an occasional use for other purposes, such as flushing or testing the entire water system, does not change the primary character of such installations from governmental to proprietary”).<sup>8</sup>

That is clearly the rule in Washington. For example, in *Stiefel v. City of Kent*, *supra*, the court recognized that the governmental function of fire protection encompasses all aspects of the water system necessary for fighting fires, including the “delivery of water through fire hydrants,” and rejected the argument that maintaining hydrants should be considered a proprietary function merely because they are provided by a proprietary water utility. 132 Wn. App. at ¶ 16 (“fact that the same water supply line serves both fire hydrants and the domestic water system does not convert a

---

<sup>8</sup> See also *Nealon v. District of Columbia*, 669 A.2d 685, 690-91 (D.C. App. 1995) (providing water to fire hydrants is part of city’s governmental fire protection function); *Perry v. City of Independence*, 69 P.2d 706, 707 (Kan. 1937) (“the maintenance and operation of a fire department and fire hydrants by the city is a governmental function”).

fundamentally governmental function into a proprietary one”).<sup>9</sup>

C. The *Okeson* Reasoning Applies to this Case.

The issue here, as described by the trial court, is whether a distinction can be drawn between providing water for fire protection (a governmental function to be paid for by the general government), and providing water for use by homeowners and other ratepayers (a proprietary function to be paid for by the ratepayers). CP 2146-47.

The *Okeson* action on behalf of electric ratepayers involved the identical issue with respect to streetlights. This Court unanimously held that the costs of the electric utility service provided to the city for the governmental function of lighting city streets for public safety must be paid by the general city government, and could not be passed on to utility ratepayers as a hidden tax on their electricity usage. As Seattle has acknowledged, the reasoning in *Okeson* controls the outcome in this case.

The various attempts by Burien and Lake Forest Park to distinguish *Okeson* and argue for a different result with respect to fire hydrants are

---

<sup>9</sup> Nor could the occasional use of hydrants for incidental purposes such as street cleaning or testing or flushing the water lines convert the hydrants from a governmental function into a proprietary one. First, street cleaning is itself a governmental function, so if a city occasionally uses fire hydrants for that purpose that could not transform the hydrants from governmental to proprietary. Second, occasionally testing and flushing the lines is necessary to maintain proper water flows for fire fighting. Third, if hydrants were not needed for fire fighting, then completely different (below-grade) flushing devices would be used. CP 1645. Lastly, these incidental uses of fire hydrants are *de minimis* compared to their fundamental purpose of providing water for fire fighting.

without merit. Indeed, in arguing that the costs of fire hydrant service should be included in the water rate base and passed on to utility ratepayers other than the local government, the two appellant cities make the same mistake that Seattle did in *Okeson*: they confuse the issue of who provides the utility service with the issue of who should pay for that service.

The appellants here try to get around the Court's reasoning in *Okeson* by pointing to immaterial differences between streetlights and fire hydrants. Bur. Brf. at 19-22; LFP Brf. at 7-8, 11, 14. The two cities are missing the point. The relevant analogy is not between the streetlights and fire hydrants themselves, but rather between (i) providing streetlights and electricity for the public safety purpose of lighting city streets, and (ii) providing fire hydrants and water for the public safety purpose of fire protection. The question here, as it was in *Okeson*, is not who is providing the service, but what is its purpose, *i.e.*, is it being provided for the benefit of the general government or for the benefit of individual ratepayers who can decide whether to consume more or less of the service.<sup>10</sup>

---

<sup>10</sup> Individual ratepayers can decide whether to use more or less electricity in their homes or businesses; but, as this Court stressed in *Okeson*, individual ratepayers have no control over the provision or use of streetlights (150 Wn.2d at 550), and there is no relationship between the amount of electricity used by individual ratepayers in their own homes or businesses, for which they pay through rates, and the amount of "streetlight service" they use (*id.* at 554). Similarly, there is no relationship between individual ratepayers' water consumption in their own homes or businesses and the amount of "fire hydrant service" they use.

When water (or electricity) is provided to individual ratepayers for household or business use, it is the ratepayer who is the ultimate customer and must pay for “a commodity which is furnished for his comfort and use.” *Okeson*, 150 Wn.2d at 550 (citing *Twitchell v. City of Spokane*, 55 Wash. 86, 89, 104 P. 150 (1909)). When the service is not provided to individual customers, but rather for the benefit of the general public, then the service is a governmental function, and it is the general government who is the ultimate “customer” and must pay for the service. *Id.*

In *Okeson*, the ultimate customer of the electric utility service used for public streetlights was Seattle’s general government. Thus, the City’s general fund was responsible for payment of the streetlight costs through a “streetlight rate,” and the costs of the streetlight service could not be collected through a hidden tax on other ratepayers.

Likewise, the ultimate customer of the water utility service provided for public fire protection, including fire hydrants, is the general governmental body responsible for local fire protection, not individual ratepayers. Fire protection service is provided “for the benefit of the general public,” and individual ratepayers have no more “control over the provision or use” of fire hydrants than do City Light customers over “the provision or use of streetlights.” *Okeson*, 150 Wn.2d at 550.

It is immaterial that streetlights use electricity continuously during

the nighttime hours while fire hydrants provide only stand-by water service, or that structures adjacent to hydrants may receive additional benefits by virtue of their proximity to a hydrant.<sup>11</sup> None of those points can alter the fact that the primary purpose of fire hydrants is to provide fire protection for the benefit of the general public. Thus, the costs of that service must be paid by the local governmental body responsible for fire protection, not by individual water ratepayers.

D. Water System Regulations Requiring Fire Hydrants Do Not Change the Character of Fire Protection Service from Governmental to Proprietary, and Do Not Dictate Who Should Pay for the Hydrants.

Burien and Lake Forest Park rely heavily on the regulation of water utilities by state authorities. *See* Bur. Brf. at 8-14, 21; LFP Brf. at 3, 6-7. They contend that the state-imposed requirements distinguish the fire hydrant situation from that of streetlights, as streetlights can be viewed as discretionary. Bur. Brf. at 10-13, 21; LFP Brf. at 6-8.<sup>12</sup> The two cities

---

<sup>11</sup> The same arguments could be made regarding streetlights, in that adjacent homeowners or businesses may receive additional safety and convenience benefits by their proximity to streetlights over the benefits received by those located further away from the lights.

<sup>12</sup> In making this argument, the two appellants rely in part on the following sentence from *Okeson*: “Streetlights are still provided for the welfare of the general public at the discretion of the city and not individual ratepayers.” 150 Wn.2d at 557. In rejecting the cities’ argument, the trial court correctly reasoned: “It is evident from this statement that the focus of the inquiry is not whether the service is mandated by state law, but whether the purpose of the particular service is for the general welfare, or whether the individual ratepayer has the discretion to accept or decline the particular service at issue. Thus, nothing in *Okeson* compels the conclusion that mandatory state regulations cause the maintenance and operation of fire hydrants to be a [proprietary] function, as opposed to a governmental function.” CP 2152.

argue that the existence of the state regulations means that fire hydrants are an integral part of SPU's infrastructure, and consequently hydrant costs may be incorporated into the rate base and passed on to ratepayers even if streetlight costs may not. Bur. Brf. at 6, 13-15, 21, 23-24; LFP Brf. at 11-14.

Once again, Burien and Lake Forest Park are focusing on the wrong question. The relevant issue is not how the fire hydrant service is provided or who provides it, but who should pay for the service in view of its purpose, *i.e.*, whether it serves the general governmental purpose of fire protection or the proprietary utility purpose of furnishing water to ratepayers. The clear purpose of the regulations relied upon by the two cities is to provide water for fire fighting, not to improve the delivery of water to individual homes or businesses.

The streetlight charge at issue in *Okeson* included an allocated portion of the electrical system's transmission costs, as well as maintenance costs and the cost of the electricity actually supplying the streetlights. Similarly, the fire hydrant charge in this case includes an allocated portion of the water system delivery costs (reservoirs and mains), as well as maintenance costs of the hydrants themselves. CP 1035-38. Arguing that fire hydrant costs should be allocated to ratepayers and not to the government responsible for fire protection, because the hydrants and

mains are an integral part of the water delivery system, is as unreasonable as arguing that streetlight costs should be allocated to ratepayers and not to the government responsible for public safety, because the electrical wires and utility poles for streetlights are an integral part of the electrical transmission system.

The fact that hydrants are legally and operationally required does not answer the question of who should pay for their costs. The entire process of setting utility rates involves taking into account all costs of operating the water system (regulatory and non-regulatory), dividing up those costs appropriately, and allocating costs to the correct customer class based on the degree to which each customer class drives water costs. CP 1035, 1283-88, 1327-33, 1349-54. The fire protection customer class pays a tiny percentage of reservoir costs, a portion of the costs of water mains, and all of the fire hydrant specific costs. CP 1035-38. These allocations are based on the utility experts' experience and judgment as to the uses and burdens placed on the system by each customer class. CP 1035-38, 1283. No party has challenged the reasonableness of the way water system costs have been allocated to fire hydrants.<sup>13</sup>

---

<sup>13</sup> Burien's suggestion (Bur. Brf. at 4) that in 2005 all SPU infrastructure costs were shifted to Seattle's general fund and the suburban governments (presumably through fire hydrant rates) is blatantly inaccurate and is unsupported by any evidence, and must be simply a careless misstatement. Only a small fraction of the water system's infrastructure costs have been allocated to fire hydrant rates. *See* CP 1035-38, 1283-88, 1327-33.

The rate-setting principles discussed in Burien's brief at 16-17, to the effect that Seattle has broad discretion in setting rates, actually support the ratepayers' position rather than the appellants' contentions. While the issue of whether a particular category of utility costs is properly chargeable to the city's general government or to the utility's ratepayers is a legal question (*see Okeson*, 150 Wn.2d at 548-49), Seattle has discretion (subject to any applicable statutory requirements) in setting rates that will be sufficient to recover those costs from the appropriate customer class. In other words, whether the general government or the utility's ratepayers should pay the costs of fire protection (including hydrants) is a legal question, but the city has discretion in setting the rates necessary to recover those costs from the parties that are legally required to pay them.

What that means here is that SPU's allocation of costs to public fire protection and Seattle's setting of rates to recover those costs from the responsible governmental entities should be upheld in the absence of a showing that the rates are arbitrary, unreasonable or less than sufficient to recover the true and full value of the fire hydrant service received by the local government. Since January 1, 2005 Seattle has employed a reasonable method for determining "public fire hydrant" rates to be charged to the governmental entities responsible for fire protection. The two appellants have shown no basis for disputing the reasonableness of

those rates. With respect to Seattle's pre-2005 water rates, however, the ratepayers have shown that those rates illegally included a component for fire hydrant costs that should have been charged to the appropriate governmental entities rather than to the ratepayers.

E. This Court Has Already Rejected the Argument that the 2002 Amendments to RCW 35.92.010 and .050 Require that Costs of an "Integral" Utility Service Be Charged to Ratepayers.

The two appellants point out that RCW 35.92.010 provides that a city may maintain and operate a water system, including fire hydrants, as an integral utility service incorporated within general rates. Bur. Brf. at 17-19; LFP Brf. at 6. The language in RCW 35.92.010 about fire hydrants was added by the Washington legislature in 2002. That legislation (Laws of 2002, ch. 102) made the same change to RCW 35.92.050 about streetlights as it made to RCW 35.92.010 about fire hydrants.

The appellants argue that the 2002 legislation requires water utilities to "include the cost of water and service to fire hydrants in their rates." Bur. Brf. at 19; LFP Brf. at 7. They contend further that the 2002 amendments bolster their other arguments to the effect that fire hydrants are an integral part of the water system, the costs of which are properly chargeable to individual ratepayers.

These arguments are no more persuasive here than they were in *Okeson*. Seattle made identical arguments in that case regarding

streetlights as Burien and Lake Forest Park make here regarding fire hydrants. The Court explicitly rejected the arguments as to streetlights when it held that the 2002 legislation could not convert an unconstitutional tax into a constitutional one. *Okeson*, 150 Wn.2d at 557-58. As the trial court noted in this case, “nothing in *Okeson* implies that what would otherwise be a governmental function is transformed into a proprietary function by simple statutory enactment.” CP 2151.

The Court in *Okeson* and the trial court in this case both recognized the essential fallacy of appellants’ argument: the fact that fire hydrants (or streetlights) may be an “integral” part of the water (or electrical) system does not answer the question of which ratepayer class should be charged for hydrant (or streetlight) costs.<sup>14</sup> Indeed, the entire process of ratemaking involves looking at all aspects of an integrated utility system and determining how those costs should be allocated based on how each customer class influences utility costs. *See, e.g.*, CP 1283-88, 1327-33. Nothing in the 2002 amendments to the municipal utility statutes prevents a water utility from allocating the costs of providing public fire hydrant

---

<sup>14</sup> As noted by the trial court, if, as a result of the integration of SPU’s water system, “it was impossible or overly burdensome to require SPU to separately calculate the costs associated with fire hydrant maintenance, then the point might be well taken. But where, as here, the cost is easily determined and can be fairly apportioned, the mere integral nature of the fire hydrants with the rest of the water system does not by itself justify a determination that the service is proprietary if it would otherwise be properly deemed governmental.” CP 2153.

service to the class of governmental customers responsible for public fire protection, as SPU has done here, or from charging reasonable rates for the fire hydrant service provided to those governmental customers.

F. Charging Fire Hydrant Costs to the Ratepayers Imposes an Unconstitutional Hidden Tax on Their Domestic Water Usage, Not a Fee to Regulate Their Fire Hydrant Usage.

Burien and Lake Forest Park also argue that, even if providing fire hydrant service were a governmental function, the cost of the service is still properly passed on to the individual ratepayers because it is a regulatory fee rather than a tax imposed to raise money for the general treasury. Bur. Brf. at 21-24; LFP Brf. at 10-15. As the Court explained in *Okeson*, however, including the costs of a general governmental service in the rates charged to individual utility customers imposes an unconstitutional hidden tax on those ratepayers. 150 Wn.2d at 551-56.

Appellants argue that the analysis for hydrants should be different than for streetlights, as streetlights provide general public benefits to passers-by, while fire hydrants supposedly respond to individual customer demand and provide individual benefits to abutting water customers. *See* Bur. Brf. at 22-23; LFP Brf. at 8, 10, 14-15. That argument is erroneous. First, to say that fire hydrants benefit only the individual homeowner served by an adjacent hydrant requires the use of extreme tunnel vision. The whole point of having fire hydrants is to provide sufficient water flow

capacity to put out each fire as quickly as possible and to prevent the fire from sweeping from building to building and causing the kind of devastation wrought by the Great Seattle Fire of 1889. *See* CP 1212. The fire protection provided by public hydrant service clearly benefits the entire city, not just the individual homeowners or businesses located nearest to a particular hydrant.

Second, appellants' argument about homeowners receiving individual benefits misses the point of the *Covell/Samis/Okeson* tax/fee analysis. There is no "direct relationship" between any individual benefit received by ratepayers and the amount they were charged for fire hydrant costs prior to January 1, 2005. *Okeson*, 150 Wn.2d at 553-54 ("third *Covell* factor requires that there be a 'direct relationship' between the fee charged and either a service received by the fee payers or a burden to which they contribute"). If fire hydrant costs are buried in the rates charged to individual ratepayers, then water customers will pay a portion of fire hydrant costs based on their individual domestic water usage, not on their "usage" of fire hydrants. While the "direct relationship" factor may not require "mathematical precision," as Lake Forest Park notes (LFP Brf. at 13), it does require that the fee charged be rationally related to the fee payer's use of the service charged (in this case fire hydrants or, more broadly, fire protection), and not to the use of some other service (in this

case the customer's water usage). Whether an individual homeowner uses more or less water by taking more or fewer showers, having a swimming pool or not, or watering his or her lawn regularly or not, has no relation to the homeowner's proximity to a fire hydrant or the homeowner's burden on the fire protection system.<sup>15</sup>

The appellants' argument that fire hydrant costs are distinguishable from streetlight costs because hydrants are "regulatory in nature" is similarly misplaced. *See* Bur. Brf. at 20-21, LFP Brf. at 11-12. The fact that fire hydrants may be required by regulation, while streetlights are "discretionary," does not mean that hydrant charges on ratepayers are a proper regulatory fee while streetlight charges on ratepayers are an improper tax. As explained above, the problem with imposing hydrant costs on water ratepayers is the same as with imposing streetlight costs on electricity ratepayers: they are each imposed on ratepayers in proportion to their individual utility service usage, not in proportion to their "usage" of the hydrants or streetlights. The hydrant charges here do not regulate the individual ratepayers' usage of hydrants any more than the streetlight charges in *Okeson* regulated the individual ratepayers' usage of

---

<sup>15</sup> Indeed, it could be argued that homeowners who use more water on their lawns and shrubbery than do their neighbors present less of a fire risk and place less of a burden on the fire protection system, yet if fire hydrant costs were included in rates the well watered homes would pay more than homes that present a greater fire danger.

streetlights. Individual utility customers have no control over the provision of public benefits such as fire hydrants or streetlights.

Charging ratepayers for the costs of those public benefits as part of their rates imposes a hidden, unconstitutional tax on the ratepayers' utility usage, not a regulatory fee for their usage of (or burden on) the public benefits in question.<sup>16</sup> Imposing such a hidden tax (as Seattle did prior to January 1, 2005) violates the following provision of the Washington State Constitution: "No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied." Wash. Const. art. VII, § 5. *See* CP 2158-59 (trial court's oral ruling); *see also* CP 779-82 (ratepayers' motion for summary judgment).

G. The Trial Court's Conclusion that Fire Hydrant Costs Cannot Lawfully Be Charged to Ratepayers Was Sound.

For all of the foregoing reasons, and for the additional reasons that were articulated so well by the trial court in its oral ruling of July 31, 2006 (CP 2144-63), the judgment below should be affirmed insofar as it held

---

<sup>16</sup> The trial court ruled that the hydrant assessment was a tax. In reaching its decision, the court found that by imposing the cost of hydrants on individual ratepayers, Seattle was able to free up revenue for general government purposes and that "there has been no showing of a relationship between the water used by an individual rate payer and the amount of water necessary to operate and maintain the fire hydrants." It also found that there was no direct relationship between any benefit received by individual ratepayers and the cost assessed against them, and the charge was not based on hydrant usage or any burden associated with an individual's need for fire protection. CP 2154-58.

that public fire hydrant costs cannot lawfully be imposed on ratepayers.

V. ARGUMENT IN SUPPORT OF RATEPAYERS’  
CROSS-APPEAL

A. Prejudgment and Postjudgment Interest at the Normal 12%  
Statutory Rate Is Owed on the Refunds to SPU and Its Ratepayers.

The trial court ruled that SPU must reimburse the ratepayers, and that Seattle’s general fund must reimburse SPU, for fire hydrant costs incurred from March 1, 2002 through December 31, 2004. If Seattle were a private party rather than a municipality, prejudgment interest would unquestionably be payable on the amounts to be refunded because those amounts are liquidated. *See Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986); *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968); *King County v. Puget Sound Power & Light Co.*, 70 Wn. App. 58, 60-61, 852 P.2d 313 (1993). Because the refund claims are contractual or quasi-contractual in nature, the applicable interest rate for both prejudgment and postjudgment interest would be 12% per annum. *See* RCW 19.52.010 as to prejudgment interest and RCW 4.56.110(4) and 19.52.020 as to postjudgment interest.

The only basis raised by Seattle or cited by the trial court for not awarding interest at the normal 12% rate in this case was the so-called “general rule” that as a matter of sovereign immunity the state and its political subdivisions cannot, without their consent, be required to pay

interest on their debts. The trial court declined, on that basis, to award prejudgment or postjudgment interest at the 12% rate.<sup>17</sup> While the court agreed that the doctrine of sovereign immunity does not apply to proprietary utilities (CP 2277), the court nevertheless concluded that since providing hydrants for public fire protection is a governmental function, sovereign immunity should protect Seattle from liability for interest at the statutory rate. CP 2277-78.

The fundamental mistake made by the trial court was in failing to distinguish between the two kinds of refunds required. The doctrine of sovereign immunity may potentially be implicated when considering the refund to be made by Seattle's general government to SPU, but it does not come into play at all with respect to the refund to be made by SPU to the ratepayers. The relationship between SPU and the ratepayers is entirely proprietary in nature, and the activity of SPU giving rise to its refund obligation was the proprietary act of overcharging the ratepayers by improperly including fire hydrant costs in the amounts billed to them.

Admittedly, the issue is less clear with respect to the amount owed by the City's general fund to SPU, since arguably the activity giving rise

---

<sup>17</sup> As noted above, however, the trial court did award interest, at the rate of 1% on the refunds to ratepayers and 3.18% on the refund to SPU, as part of the "damages" available under the general utility liability statute, RCW 80.04.440. CP 2368-69; CP 2371-72, ¶¶ 3-4.

to the refund obligation was the City's failure to pay SPU for the costs of providing hydrants for the City's general (public) benefit. But on closer analysis we submit that here, too, the refund obligation arises from the proprietary "billing" relationship between the utility and its customer (Seattle's general city government), in that the purpose of the refund is to make up for the utility's having underbilled the City until January 1, 2005. Moreover, as shown below, any sovereign immunity the City might have had was impliedly waived by statute and by the contractual relationship between the utility and its "customer," the City's general government.

1. The Court should abandon the judicially created "general rule" that as a matter of sovereign immunity state and local governments cannot, without their consent, be held liable for interest on their debts.

While interest is payable on the refunds ordered in this case under well-established exceptions to the so-called "general rule," we urge the Court to take this opportunity to discard the judicially created "general rule" as an irrational anachronism that serves no valid purpose. The rule originated in Washington in *Spier v. Dep't of Labor & Indus.*, 176 Wash. 374, 376-77, 29 P.2d 679 (1934), involving a workman's compensation claim, but the statutory law and case law have subsequently progressed to the point where the *Spier* rule is no longer justified.

The development of sovereign immunity law in Washington was

reviewed by this Court in *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979). There the Court held that the “consent” required under the *Spier* “general rule” need not be express but could be implied statutorily or contractually, and that such implied consent was given when a public entity enters into a contract with a private party, even if the contract is silent on the subject of interest. 92 Wn.2d at 526-27.

Since sovereign immunity has been waived by statute for tort claims (see RCW 4.92.090 as to the state and RCW 4.96.010 as to local government entities), and under *Architectural Woods* such immunity is deemed waived for contractual claims, there is not much room or reason left to hang on to this last vestige of sovereign immunity under *Spier*. There is no good reason why liability for interest should be treated any differently than liability for substantive torts or for breach of contractual or quasi-contractual duties. This is especially so because, as this Court stated in *Kelso v. City of Tacoma*, 63 Wn.2d 913, 918-919, 390 P.2d 2 (1964), by enacting the statutory waiver of sovereign immunity “[t]he legislature has clearly indicated its intention to change the public policy of the state.”<sup>18</sup>

In any event, regardless of whether the Court sees fit to hang on to

---

<sup>18</sup> *But see Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 455-56, 842 P.2d 956 (1993), involving a county’s liability for a governmental function (providing medical care for jail inmates), in which the Court cited the *Spier* “general rule” without any analysis or explanation of whether the rule still made sense in the modern world.

this vestige of sovereign immunity under *Spier*, under well-established exceptions the general rule has no application to the refunds in this case.

2. Sovereign immunity does not apply to a municipality's proprietary acts.

In a recent decision that is squarely on point, the court of appeals addressed the effect of the sovereign immunity doctrine on an award of interest on claims similar to those here. In *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004), the plaintiffs sought refunds for hidden taxes masquerading as water and sewer “availability charges” assessed by a city’s water and sewer utility against owners of vacant lots. The city in that case argued, as Seattle did in this case, that the doctrine of sovereign immunity barred prejudgment and postjudgment interest on refunds to property owners for the illegal charges.

The court began its analysis by citing the “general rule” that the “state cannot, without its consent, be held to interest on its debts.” *Carrillo*, 122 Wn. App. at 615. The court then described Washington’s long-standing rule that a municipal corporation has the same sovereign immunity as the state for its governmental functions but does not have sovereign immunity for its proprietary functions. *Id.* at 615-16.<sup>19</sup> Next,

---

<sup>19</sup> The rule that sovereign immunity applies only to governmental acts, not proprietary acts, has been recognized in Washington for nearly as long as the doctrine of sovereign immunity itself. *See, e.g., Russell v. City of Tacoma*, 8 Wash. 156, 158-160, 35 P. 605 (1894); *Sutton v. City of Snohomish*, 11 Wash. 24, 27, 39 P. 273 (1895); *Cunningham v.*

the court noted that under *Architectural Woods, supra*, a governmental entity impliedly consents to be held liable for interest by entering into a contract with a private party. *Id.* at 616-17. Citing a number of prior cases in Washington allowing interest on claims for refunds from cities and counties, the court concluded that “sovereign immunity does not excuse the City from pre- and post-judgment interest for its collection of an illegal tax.” *Id.* The same result should be reached here.

3. RCW 80.04.440 constitutes an explicit statutory waiver of sovereign immunity for claims against water utilities and an implied statutory consent to be held liable for interest.

RCW 80.04.440 constitutes a clear statutory waiver of sovereign immunity for claims against municipal water utilities. Prior to *Architectural Woods*, the statutory waiver of sovereign immunity might have left open the issue of whether the consent to be sued also constituted consent to be held liable for interest, since the statute makes no express reference to interest. But that issue is no longer open after *Architectural Woods*, because in that decision the Court held that consent to be held liable for interest could be statutorily or contractually implied, *i.e.*, such consent need not be given expressly. 92 Wn.2d at 526. Since the statute

---

*City of Seattle*, 42 Wash. 134, 137, 84 P. 641 (1906); *Riddoch v. State*, 68 Wash. 329, 334, 123 P. 450 (1912) (municipal corporations acting in their proprietary capacity “are neither sovereign nor immune”); *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) (city was liable for negligent operation of municipal water system, because sovereign immunity was not applicable to proprietary municipal utility).

declares that a water utility (including a municipally owned utility and the municipality itself) “shall be liable” for “all loss, damage or injury” (emphasis added) caused by or resulting from any unlawful acts done, caused or permitted by the utility,<sup>20</sup> and since the statute makes no distinction between municipally owned utilities and privately owned utilities, by implication the statute constitutes consent by a municipally owned utility to be held liable for interest to the same extent as a privately owned utility.

4. Any sovereign immunity of Seattle or SPU was impliedly waived by the contract between SPU and its customers (including the City itself).

Under *Architectural Woods*, “by the act of entering into an authorized contract with a private party, [a municipality] . . . thereby waives its sovereign immunity in regard to the transaction and impliedly consents to the same responsibilities and liabilities as the private party, including liability for interest.” 92 Wn.2d at 526-27 (emphasis added).

Here, each utility customer enters into a contract with SPU for water

---

<sup>20</sup> RCW 80.04.440 provides, in part: “In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, . . .” SPU constitutes a “water company” and therefore a “public service company” under the definitions set forth in RCW 80.04.010. As the municipal owner of the utility, the City of Seattle also falls within these definitions, because the definition of “water company” expressly provides that it includes any city or town owning such a utility.

service.<sup>21</sup> Accordingly, the City and SPU have waived any sovereign immunity in regard to the contract between the utility and each customer, and they have impliedly consented “to the same responsibilities and liabilities as the private party, including liability for interest.”

The contract between the utility and each customer is a bilateral contract in which (i) the utility promises to furnish the customer with service at the customer's premises at specified rates, and (ii) the customer promises to accept and pay for such service. Under *Architectural Woods* the waiver of sovereign immunity extends to claims of whatever nature “in regard to the transaction,” and the waiver occurs not by breaching the contract but simply “by the act of entering into” it. 92 Wn.2d at 526-27.

There is no reason why the contract between SPU and the City itself (including the promise to pay for SPU’s utility service, whether for water delivered to municipal buildings or for public fire hydrants) should be treated any differently than the contract between SPU and any other customer. Having contractually waived any sovereign immunity, including as to liability for interest, Seattle and SPU are to be treated like any private party and are subject to the normal, statutory 12% rate for prejudgment interest on liquidated claims and for postjudgment interest.

---

<sup>21</sup> See Seattle Municipal Code §§21.04.020, .030 & .040 (CP 2006-08), describing the terms of the “contract” between SPU and each water ratepayer.

Thus, there is no principled basis for invoking sovereign immunity here, since it has been waived both contractually and by statute and is not applicable at all to the City's or SPU's proprietary activities. Nor is there any valid public policy reason why the 12% rate should be considered excessive or unusual. Although they are not directly applicable to this case, the Court may take note of RCW 39.76.010 and .011, which provide that, with certain exceptions, every city must pay interest at the rate of 1% per month "on amounts due on written contracts for public works, personal services, goods and services, equipment, and travel" whenever the city fails to make timely payment. These statutes demonstrate that 12% per annum is not considered an unusual or excessive rate for interest on a city's payment obligations. There is no good reason why 12% per annum should be considered an appropriate interest rate for amounts owed by a city to contractors but not for amounts owed by a city to its proprietary utility or to innocent utility ratepayers.

B. Seattle's January 1, 2005 Water Utility Tax Rate Increase Was for an Unlawful Purpose and Therefore Is Invalid.

As explained above, Seattle has explicitly admitted that the purpose of the January 1, 2005 water utility tax rate increase was to "hold the general fund harmless from" *Okeson* by continuing to impose fire hydrant costs entirely on SPU and its ratepayers, in the form of the

increased utility tax. In other words, Seattle realizes that under *Okeson* fire hydrant costs are supposed to be paid for by the general government, but it has decided to keep making the utility and its ratepayers bear all of those costs anyway. To put it bluntly, by this arrangement Seattle is thumbing its nose at this Court's unanimous decision in *Okeson*.

1. The ratepayers have standing to challenge the tax rate increase.

Seattle argued in the trial court that the ratepayers lacked standing to challenge the validity of the tax rate increase, since the tax is imposed on the utility rather than on the ratepayers directly. The question of standing was thoroughly briefed below (see CP 2610-23), and the trial court correctly rejected Seattle's argument. RP 5 (2-13-07).

This Court has "criticized 'unrealistically strict' considerations of standing, and it has noted that Washington is increasingly taking a broader, less restrictive view." *Wash. Fed'n of State Employees v. Joint Ctr. for Higher Educ.*, 86 Wn. App. 1, 4, 933 P.2d 1080 (1997) (quoting *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 493, 585 P.2d 71 (1978)). Here, the ratepayers clearly have standing to assert their claims both under the applicable statutes and under common law principles, since the utility tax is necessarily passed along to and paid by the ratepayers.

The ratepayers have express statutory standing under RCW 80.04.440 to bring an action challenging a utility's unlawful acts (in this case, payment of the illegal tax):

In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, . . . An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

The increased tax charged by the City and paid by SPU injures the utility's ratepayers because the tax payments are made out of the SPU water fund, and thus are passed on to ratepayers through rates. Under this statute, SPU ratepayers have express statutory authority to challenge unlawful conduct involving the utility, including payment of the increased taxes.

For the same reason, the ratepayers also have statutory standing to sue under RCW 7.24.020. "Economic interests are sufficient to give standing to sue [under the Declaratory Judgment Act]." 15 Karl B. Tegland, Wash. Prac., *Civil Procedure* § 42.2 (2003) (citing *Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558, 404 P.2d 453 (1965) (taxpayer affected by assessment for local improvements)). *See also City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 96, 758 P.2d 480 (1988) (utility ratepayers were appropriate parties in litigation over solid waste facility, because "it is the ratepayers who would

ultimately pay the bills”).<sup>22</sup>

Finally, the ratepayers also have both “personal” and “representational” standing to sue on this claim under well-established common law principles. *See, e.g., Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802-03, 83 P.3d 419 (2004); *Jones v. City of Centralia*, 157 Wash. 194, 203-04, 289 P. 3 (1930); *see* additional authorities cited in the trial court briefing at CP 2615-23.

2. The tax rate increase is invalid because it was enacted for an unlawful purpose and has an unlawful effect.

Article VII, Section 5 of the Washington State Constitution provides that “No tax shall be levied except in pursuance of law.” While there is a paucity of law on the meaning of the phrase “in pursuance of law” as used in this provision, surely it means, at a minimum, that a tax must be levied for a lawful purpose and not for a purpose that is contrary to law. A tax that is levied for an unlawful purpose cannot be deemed “in pursuance of law” as required by the State Constitution.

We have not found any Washington decisions squarely addressing the issue of whether a municipal tax enacted for an unlawful purpose is

---

<sup>22</sup> The ratepayers also contend they have standing to sue under RCW 43.09.210. *See* CP 2613-15. Other parties have argued on this appeal that there is no private right of action under that statute. *See* Fire Dists. Brf. at 16-17. We submit that whether there is a private right of action under that statute is an important issue, but it need not be decided in this case. The issue has been given scant attention in the briefing on this appeal, and we urge the Court not to rule on this issue until it is presented in a proper case with full briefing.

valid. However, the answer to that question should be obvious. Our system of government under law would not long endure if local governments were allowed to impose taxes or take other municipal actions for unlawful purposes. Consistent with that observation, so far as we know every jurisdiction that actually has addressed the question has concluded that a tax enacted for an unlawful purpose is invalid.<sup>23</sup>

The general rule is set forth succinctly at 84 C.J.S. *Taxation* § 427 (2006): “A tax cannot be levied for a prohibited or illegal purpose . . . .” (footnotes omitted); *see also* 85 C.J.S. *Taxation* §§ 1093, 1477 (2006).

There are numerous cases applying that principle, going back at least as far as the Civil War. *See, e.g., Freeland v. Hastings*, 92 Mass. (10 Allen) 570 (1865) (municipal tax to raise funds to reimburse persons who had paid money to procure substitutes to avoid being drafted themselves was for personal benefit of those individuals rather than for a valid governmental purpose, and was therefore unlawful and could not be collected); *Culbertson v. H. Witbeck Co.*, 127 U.S. 326, 335-37, 8 S. Ct. 1136, 32 L. Ed. 134 (1888) (affirming invalidation of tax deed where

---

<sup>23</sup> Some courts have drawn a distinction between an unlawful “purpose” of the legislation in question and improper “motives” of the legislators who voted for the legislation. Courts are reluctant to inquire into the subjective “motives” of legislators; but where the “purpose” (or goal) of the legislation itself is apparent, courts will not hesitate to strike down legislation having an unlawful purpose. This distinction was explained in *Riggs v. Township of Long Beach*, 538 A.2d 808, 813-14 (N.J. 1988) (ordinance rezoning tract from higher to lower residential density, for purpose of reducing fair market value of property prior to condemnation, was invalid).

county taxes had been increased for unlawful purpose of raising funds to pay illegal extra compensation to two county judges); *Union Pac. R. Co. v. Troupe*, 155 N.W. 230, 232-33 (Neb. 1915) (school taxes “levied for an illegal and unauthorized purpose ... were properly enjoined”); *State ex rel. Campbell County v. Delinquent Taxpayers of 1939*, 191 S.W.2d 153, 154-55 (Tenn. 1945) (jail tax that was legal on its face but was levied for an unlawful purpose was “fraudulent in law and cannot be condoned”); *People ex rel. Schlaeger v. Buena Vista Bldg. Corp.*, 71 N.E.2d 10, 12-16 (Ill. 1947) (tax levied to pay for illegal bonds was illegal); *see also Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936), and *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed.2d 295 (1983) (otherwise valid “use” and “gross receipts” taxes on newspapers held invalid because of unlawful legislative purpose or unlawful effect).

In assessing the validity or invalidity of a tax, courts should be guided by the fundamental principle that substance prevails over form. This principle was well illustrated in *Mathews v. Massell*, 356 F. Supp. 291 (N.D. Ga. 1973), where the court invalidated a plan by the City of Atlanta to utilize \$4.5 million in federal revenue sharing funds to reduce water and sewer billings for Atlanta residents. Because federal law did not allow revenue sharing funds to be used directly for that purpose, Atlanta

decided to accomplish the same result indirectly. The city adopted ordinances pursuant to which the funds would be used to pay firemen's salaries (an allowed use of the funds), and then the money thereby "freed up" from Atlanta's general fund would be used to give rate relief to utility customers. The court was not fooled and squarely rejected the city's plan:

... the courts have consistently refused to exalt artifice over reality or to ignore the actual substance of a particular set of transactions. Thus the court must recognize that the defendants have merely transferred funds from one account to another in an effort to disguise the fact that they plan to distribute \$4.5 million of Revenue Sharing funds to the holders of water/sewer accounts.

356 F. Supp. at 300.<sup>24</sup>

The *Mathews* court also rejected Atlanta's argument that violations of the federal restrictions "will be extremely difficult to discover and prove, for Revenue Sharing funds will be commingled in fact with other local funds." *Id.* at 302. The court acknowledged that proof of such violations might be difficult in other cases, but not in the case at hand:

Such problems of proof will undoubtedly arise; however, in the present case the use of Revenue Sharing funds in violation of § 103(a) has been clearly proved by plaintiffs, in large part by the statements of defendants themselves.

*Id.* The same is true here. While in many cases it might be difficult to

---

<sup>24</sup> Washington law fully embraces the principle that substance prevails over form. *See, e.g., Rouse v. Peoples Leasing Co.*, 96 Wn.2d 722, 726, 638 P.2d 1245 (1982); *State v. PUD No. 1 of Klickitat County*, 79 Wn.2d 237, 241, 484 P.2d 393 (1971); *Sullivan v. White*, 13 Wn. App. 668, 670-71, 536 P.2d 1211 (1975) ("test of substance over form has been uniformly applied in this State").

“look into the minds” of local government officials to prove that the municipal acts in question had an unlawful purpose, that problem does not exist in this case. Here, Seattle has proudly proclaimed that the purpose of the water utility tax rate increase was to continue imposing fire hydrant costs on SPU and its ratepayers, as a means of “holding Seattle’s general fund harmless from the court’s decision in *Okeson*.” CP 2470.

The admitted purpose and effect of the January 1, 2005 water utility tax rate increase was to continue the City’s prior unlawful practice of imposing the costs of public fire hydrant service on SPU and its ratepayers, instead of doing what Seattle knew was required under *Okeson* and spreading those general governmental costs across the broader revenue base supporting the City’s general fund. The tax increase was expressly enacted for an unlawful purpose – to subvert the effect and rationale of this Court’s decision in *Okeson* – and should be declared invalid.

## VI. CONCLUSION

Seattle had it right when it previously told this Court that there is no legally significant distinction between streetlights and fire hydrants in deciding whether ratepayers or the local governmental entity should pay for them, and when it recognized that under *Okeson* the costs of public fire hydrants could not lawfully be imposed on SPU or its ratepayers. Seattle

got it wrong when it decided to disregard the teaching of *Okeson* by continuing to impose fire hydrant costs on SPU and its ratepayers instead of honestly shifting those costs to the City's general fund.

The Court should (1) affirm the trial court's determination that fire hydrant costs are not to be borne by SPU or its ratepayers, (2) reverse the trial court's refusal to award prejudgment and postjudgment interest on the refunds at the normal 12% statutory rate, (3) reverse the trial court's ruling upholding the validity of Seattle's January 1, 2005 water utility tax rate increase, and (4) remand this case to the trial court for determination of appropriate remedies for the unlawful tax rate increase.

Respectfully submitted this 7th day of November, 2007.

HELSELL FETTERMAN LLP

By   
David F. Jurca, WSBA # 2015  
Jennifer S. Divire, WSBA #22770  
Connie K. Haslam, WSBA #18053  
Attorneys for Respondents/Cross-  
Appellants Lane, *et al.* (Ratepayers)