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SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SNOQUALMIE,

Respondent,

v.

THE STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellant,

and,

KING COUNTY EXECUTIVE DOW CONSTANTINE; KING
COUNTY ASSESSOR LLOYD HARA; KING COUNTY,

Defendants.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In 2014, the Legislature created a property tax exemption for tribal property used for economic development. To receive the exemption, Indian tribes owning certain economic development property must make “payments in lieu of leasehold excise tax” (PILT) to the county where the property is located.

Nearly all of the City’s arguments rest on the fallacy that enacting a property tax exemption and PILT at the same time must mean that the Act is an unconstitutional alternative property tax scheme. The City, however, does not have standing to bring its claims, and even if it did, its claims fail. There is no dispute that the Legislature has wide discretion to create property tax exemptions and to impose a fee or an excise tax. The Act is nothing more than the Legislature using its discretion to enact both an exemption and a fee, or an excise tax. This Court should reverse the trial court’s decision and conclude that the Act is constitutional.

II. ARGUMENT

A. **The City Lacks Personal Or Representational Standing To Raise Its Constitutional Claims.**

To bring this action under the Uniform Declaratory Judgment Act (UDJA), the City must have standing to raise its claims. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). The City’s

standing arguments fail to identify any interest or harm sufficient to provide it with standing in any capacity. Resp. at 6-17. Accordingly, this Court should reject the City's arguments and reverse the trial court's decision without reaching the merits of this case.¹

1. The City itself lacks standing.

To have standing, the City must fall within the zone of interests that the challenged statute or constitutional provision protects or regulates. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (*Grant County II*). The City asserts that it meets this test because it is a "central participant" in the process for taxing property, and thus has a direct interest in the "fairness and constitutionality of that process." Resp. at 7. This assertion is merely a generalized interest that is insufficient to give the City standing.

The City primarily claims that the Act, and more specifically the PILT, violates the Washington Constitution's uniformity clauses. CP 12 (referencing Wash. Const. art. VII, §§ 1, 9). These clauses protect individual taxpayers by ensuring that they share uniformly in the tax burden. *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 761, 733 P.2d

¹ The City falsely asserts that the Department has abandoned its justiciability argument on appeal. Resp. at 6 n.1. But the UDJA requirements for a justiciable controversy encompass traditional standing requirements. *To-Ro Trade Shows*, 144 Wn.2d at 411 n.5. Thus, the Department has thoroughly briefed whether the City's constitutional claims are justiciable under the UDJA.

539 (1987). As such, only a taxpayer who suffers from an alleged lack of uniformity in property taxation may bring a claim under the uniformity clauses. *Vance Lumber Co. v. King County*, 184 Wash. 402, 405, 409-10, 51 P.2d 623 (1935). Thus, long-established precedent demonstrates that the City is not within the zone of interests of the uniformity clause.

The City ignores this principle, claiming that the uniformity clauses are specifically intended to protect cities from “improper exercises of taxing authority.” Resp. at 14. But the City fails to point to a single case that has ever stated this, and in fact, *Vance Lumber* concludes just the opposite. See 184 Wash. at 405, 409-10. The City simply discounts *Vance Lumber*, claiming that more recent decisions supersede its analysis in favor of a “more liberalized view” of standing. Resp. at 15. This Court, however, has never overruled *Vance Lumber*. And under the City’s novel approach, a “more liberalized view” of standing would mean a municipal corporation like the City could raise almost any claim by asserting a general interest in the “fairness and constitutionality” of the subject matter at issue. Such an approach renders the zone of interests test meaningless for municipalities like the City.

To support its expansive approach to standing, the City relies upon this Court’s decision in *City of Seattle v. State*, 103 Wn.2d 663, 669, 694 P.2d 641 (1985). Resp. at 7. *City of Seattle*, however, did not address

uniformity interests at all. Instead, it examined whether a city had standing to assert an equal protection challenge against a statute relating to voting procedures for the annexation of property. 103 Wn.2d at 665-69.

Recognizing that previous cases had held that the equal protection clause ensures the integrity of the voting process, the Court concluded that the city had a direct interest in the “fairness and constitutionality” of the annexation process. *Id.* at 668-69. In contrast, no case has ever broadened the protections of the uniformity clauses to include a municipality’s general interest in the “fairness and constitutionality” of the property tax system. Uniformity only protects *individuals* specifically affected by a tax shift. *See Vance Lumber*, 184 Wash. at 405, 409-10. The City does not fall within the zone of interests for property tax uniformity.

Even if the City met the zone of interests test, it still lacks standing because the Act has not caused the City a personal and substantial injury. *See Grant County II*, 150 Wn.2d at 802. The City first argues that the Act harms it by imposing financial constraints that require it to increase tax rates and move closer to its statutory maximum tax rate. Resp. at 8. But such “political and practical problems” are only abstract harms that do not warrant standing. *See* Resp. at 8.

The very cases the City relies upon in making its argument demonstrate this. Resp. at 8-9 (citing *Seattle Sch. Dist. No. 1 of King*

County v. State, 90 Wn.2d 476, 585 P.2d 71 (1978) and *City of Seattle*, 103 Wn.2d at 669). In both cases, the challenged actions or law had caused the municipality an actual and substantial injury, not merely a generalized grievance. *See Seattle Sch. Dist. No. 1 of King County*, 90 Wn.2d at 492 (state's lack of funding caused school districts to cut supplies, reduce teaching staff, and delay repairs to deteriorating school buildings); *City of Seattle*, 103 Wn.2d at 665-67 (annexation procedures blocked City's attempts to annex specific property into its boundaries). In contrast, the PILT has not harmed the City at all, but benefits it with additional revenue on top of the property taxes it already collected.

The City's second alleged harm is that it may lose future revenue if the Muckleshoot Indian Tribe improves additional property it owns and seeks the economic development exemption for such property. Resp. at 9. Such allegations, however, are pure speculation. While the City references a development agreement for this property between the City and the Tribe, this agreement merely shows that the Tribe is in the process of developing the property. CP 222-80. The Tribe did not apply for the economic development exemption in relation to this property and nothing in the agreement requires the Tribe to seek an exemption for this property.²

² If anything, the agreement demonstrates the speculative nature of the City's alleged injuries. *See, e.g.*, CP 263 (demonstrating change in ownership when the Tribe

Recognizing the hypothetical nature of its alleged injuries, the City suggests that even “speculative and undocumented” allegations can qualify as a sufficient injury for standing purposes. Resp. at 9 (citing *Kucera v. Dep’t of Transp.*, 140 Wn.2d 200, 213, 995 P.2d 63 (2000)). This suggestion misapplies *Kucera*. Unlike the City, the *Kucera* litigants identified a specific harm when they brought a claim under the State Environmental Protection Act, damage to the shorelines of their property. *Id.* The only speculation related to whether the State’s operation of a ferry caused this damage. *See id.* at 206-07. Thus, while the cause was yet “speculative and undocumented,” the litigants had standing because they alleged “immediate, concrete, and specific” property damage. *Id.* at 213.

Finally, the City’s alleged harms also cannot provide it with standing because these injuries stem from the Act’s exemption of the Salish Lodge property, not the Act’s requirement that the Muckleshoot Indian Tribe pay PILT. It is the exemption that causes a tax shift and could result in additional property not being subject to property taxes. *Belas v. Kigas*, 135 Wn.2d 913, 933, 959 P.2d 1037 (1998). The PILT condition, in contrast, does not injure the City at all, but benefits the City with additional revenue. *See* CP 470-71. Despite this benefit, the City’s claims challenge the PILT, not the exemption itself. This disconnect between the

purchased the property at issue from private entity); 273-80 (executing amendment to allow Tribe more time to meet development deadlines on property).

City's claims and the cause of its injuries is yet another reason why the City lacks standing to bring this case. *See State v. Rowe*, 60 Wn.2d 797, 799, 376 P.2d 446 (1962) (for standing, a person must be harmed by the "particular feature of the statute" alleged to be unconstitutional).

2. The City does not have representational standing on behalf of its residents.

The City further asserts that it has representational standing based on the "straightforward rule" that "municipalities acting on behalf of their residents have standing to raise constitutional issues." Resp. at 10 (quoting *Grant County II*, 150 Wn.2d at 803). But such a broad interpretation of representational standing raises serious concerns.

Typically, an organization has representational standing when its members otherwise have standing, its purpose is germane to the issue, and neither the claim nor the relief require its individual members to participate in the lawsuit. *American Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 595, 192 P.3d 306 (2008). The City claims that this rule only applies to private entities and that municipal corporations have representational standing whenever their "residents have sufficient interests at stake."³ Resp. at 10-12. But the City's approach essentially

³ The City asserted below, and the trial court agreed, that the City had representational standing on behalf of its taxpayers. *See, e.g.*, CP 540, 683. On appeal, the City expands its argument to claim representational standing on behalf of all its residents,

turns municipalities into private attorneys general. It would allow a municipality to challenge any property tax exemption because its resident property owners would always be affected. In fact, a municipality would have standing to challenge any law that somehow impacted its residents. The only limit to such challenges would be whether a municipality deemed such litigation appropriate. *See* Resp. at 11.

The City also misstates this Court's previous decisions on representational standing. *See* Resp. at 10-11. While the City relies upon *Grant County II* for its theory, that case did not adopt the City's proposed test.⁴ Resp. at 10 (citing 150 Wn.2d at 803). Instead, the Court concluded that several fire districts lacked representational standing to bring a constitutional challenge against annexation statutes because their only interest in the case was to protect their tax base. 150 Wn.2d at 804. Likewise, the City's true interest in this case is to ensure that the total amount of taxable property within its jurisdiction remains the same. *See* Resp. at 8. This interest is insufficient to provide the City with representational standing.

not just taxpayers. Resp. at 11 n.2. This raises even further doubts that the City has representational standing because the Act affects only City property owners.

⁴ The City also relies on *City of Seattle*, but this argument fails as well. Resp. at 11. In *City of Seattle*, the Court concluded that the city itself had standing and then stated in dicta that the city also had representational standing based upon a statutory duty to represent its residents' interests in the annexation process. 103 Wn.2d at 669. Here, the City fails to point to any similar statutory duty.

The City further misstates the Department's arguments on representational standing. The Department does not argue that representational standing "requires that no taxpayers could possibly be joined as parties." *See* Resp. at 13. Instead, the Department argues that this Court should consider, among other factors, whether the City's request for relief requires taxpayers to participate.⁵ *See* App. at 20. Here, the City sought to implement the trial court's decision by seeking a tax refund. CP 755-65, 794-802. Such relief requires a taxpayer to be in the lawsuit. *See, e.g.,* RCW 84.69.030(1)(a). Because this Court cannot provide the City with the relief it seeks, the City lacks standing. This Court should reverse the trial court without reaching the merits.⁶

B. The Legislature Has Wide Discretion To Impose PILT As A Method For Treating Indian Tribes Like Other Governments.

Nearly all of the City's claims rest upon the same premise: the Legislature intended the PILT to be an alternative property tax scheme granted to a group of landowners, contrary to constitutional uniformity requirements. Resp. at 17-36. The City's premise is wrong. It ignores the

⁵ The City suggests that this means the tax assessors in *Belas v. Kiga* would not have had standing. Resp. at 13. *Belas* did not address standing, but if it had, the Court likely would have concluded that the tax assessors had standing because they had a statutory duty to uphold the constitutional provisions in question. *See Snohomish County Bd. of Equalization v. Dep't of Revenue*, 80 Wn.2d 262, 264-65, 493 P.2d 1012 (1972). Here, neither the City nor its officials are responsible for assessing real property or exempting property that may be subject to the Act. *See* RCW 36.21.011, .015; RCW 84.36.815.

⁶ The City also presents no extraordinary circumstances that indicate this Court should disregard the standing requirements in this case. *See* App. at 22-23.

Legislature's intent in enacting the economic development exemption and PILT to treat Indian tribes like other governments with tax exemptions.

The Washington Constitution mandates that all real estate be taxed uniformly. Const. art. VII, §§ 1, 9. While these uniformity requirements are certainly important, there is an exception to uniformity: tax exemptions. *Belas*, 135 Wn.2d at 930. The Constitution specifically allows the Legislature to exempt property from taxation. Const. art. VII, § 1 (“Such property as the legislature may by general laws provide shall be exempt from taxation.”). While the City recognizes this, the City fails to mention the Legislature's plenary authority to create such exemptions. *See Resp.* at 17-18. This Court has explained that the Legislature has “extensive authority to make classifications for purposes of legislation and even broader discretion in making classifications for taxation than it has for regulation.” *City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 234, 787 P.2d 39 (1990). Given this broad discretion, courts generally uphold property tax exemptions unless they are arbitrary or unreasonable. *Pacific Nw. Annual Conf. of United Methodist Church v. Walla Walla County*, 82 Wn.2d 138, 144, 508 P.2d 1361 (1973).

Here, the Legislature merely exercised its broad discretion to create a property tax exemption. Through the Act, the Legislature exempted tribal economic development properties from property taxes.

Laws of 2014, ch. 207, § 5 (codified as RCW 84.36.010(3)). The Legislature intended the expanded exemption to “create jobs and improve the economic health of tribal communities.” *Id.* at § 1.

In creating the exemption, however, the Legislature also meant to achieve another purpose, which the City ignores entirely. The Legislature intended to subject Indian tribes to the same conditions that other governments face with their property. Laws of 2014, ch. 207. As a result, the Legislature imposed several conditions for Indian tribes to receive the economic development exemption. The Act requires private lessees of exempt tribal property to pay leasehold excise tax in the same manner that private lessees of government-owned property must pay leasehold excise tax. *Id.* at §§ 2, 9 (RCW 82.29A.010(1)(d); RCW 84.36.012(2)(a)). When no leasehold interest exists, the Act requires Indian tribes to pay PILT to the county where the property is located in the same manner that other government entities make PILT-type payments to counties. *Id.* at §§ 8-9 (RCW 82.29A.055(1); RCW 84.36.012(2)(b)). Thus, whether imposing the leasehold excise tax or the PILT, the Legislature had a reasonable basis for doing so: “to fairly compensate governmental units for services” rendered to exempt tribal properties. Laws of 2014, ch. 207, § 2; *see also* H.B. Rep. on E.S.H.B. 1287, 63rd Leg., at 4-5 (Wash. 2014); S.B. Rep. on E.S.H.B. 1287, 63rd Leg., at 4 (Wash. 2014).

Refusing to recognize the PILT's purpose, the City insists that this case is not about tribal property at all, but about whether the Legislature can subject any group of landowners to an alternative property tax. Resp. at 19. The City's claims disregard the Act's plain language. Laws of 2014, ch. 207 ("AN ACT subjecting federally recognized Indian tribes to the same conditions as state and local governments for property owned exclusively by the tribe."). Thus, treating tribal property the same as other government-owned property is exactly what this case is about.

Viewed in this light, the City's claims of constitutional disaster relating to the Act do not add up. Upholding the Act does not eliminate the Constitution's uniformity requirements as the City suggests, because the PILT is not a property tax. *See* Resp. at 19. It is a condition to a property tax exemption that the Legislature imposed to treat Indian tribes like other sovereigns. Nor does upholding the Act give the Legislature unfettered discretion to grant property tax exemptions with a PILT condition to any group of landowners. *See* Resp. at 19-20. Other constitutional provisions ensure that this does not occur. *See, e.g.*, Const. art. I, § 12 (privileges and immunities clause). Thus, contrary to the City's claims, the Legislature cannot arbitrarily pick and choose when to provide a property tax exemption with a PILT condition.

C. The PILT Is A Fee, Not A Tax.

Because almost all of the City's claims apply only to taxes, the City argues that the PILT is tax, rather than a fee. Resp. at 26. The Legislature's intent as expressed in the Act demonstrates otherwise.

Not all demands for payment from the government amount to a tax. *Dean v. Lehman*, 143 Wn.2d 12, 25, 18 P.3d 523 (2001). Instead, some charges are considered a fee. *Id.* Accordingly, to determine whether the PILT is a tax or a fee, this Court should apply the three-factor *Covell* test. *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). The City does not contest this, but misapplies the test to the PILT.

The first *Covell* factor requires examining whether the PILT's primary purpose is more like a tax or a fee. *Id.* at 879. The City frames the question as whether the primary purpose of the PILT is to raise revenue or to regulate. Resp. at 26. But the City's description of the first *Covell* factor oversimplifies the distinction between a tax and a fee. All charges, whether a tax or a fee, are intended to raise revenue. The true difference between a tax and a fee is the purpose of raising such revenue. *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 371, 89 P.3d 217 (2004). A tax raises revenue for a general government purpose, while a fee may raise revenue to pay for regulation, but also to pay for a service

provided or to mitigate a burden created. *Id.* Failing to understand this distinction, the City misapplies the first *Covell* factor.

The City argues that the PILT's purpose is to "generate revenue in lieu of the standard real property tax." Resp. at 26. But the City points to nothing in the Act that expresses this purpose. Rather, the City assumes that PILT must be a replacement property tax because it is a condition of a property tax exemption. This assumption ignores that the Act is meant to treat Indian tribes like other governments that make PILT-type payments and are exempt from paying property taxes. Laws of 2014, ch. 207.

While the City also points to the Act's legislative history as supporting its argument, the City again is mistaken. Resp. at 26. Instead, this legislative history confirms that the PILT is intended to offset burdens to local authorities in the same manner as other PILT-type payments that governments make. *See* H.B. Rep. at 4-5 (analogizing the PILT to payments the federal government makes to counties for public services in relation to tax exempt properties); S.B. Rep. at 4 ("Tribes should have the same application of property tax as state and local government property held in fee."). Nothing in the legislative history indicates the Legislature meant for the PILT to be a replacement property tax.⁷

⁷ If anything, the legislative history demonstrates that the Legislature intended the PILT to be a substitute leasehold excise tax. H.B. Rep. at 4 (PILT addresses concerns

The second *Covell* factor also demonstrates that the PILT is more like a fee. To be a fee under the second factor, the PILT must be allocated exclusively for its authorized purpose. *Covell*, 127 Wn.2d at 879. The Act requires the PILT to be distributed to the local jurisdictions where the property is located. Laws of 2014, ch. 207, § 8 (RCW 82.29A.055(3)). The City asserts that this allocation is insufficient because the PILT is distributed in the same manner as the leasehold excise tax. Resp. at 26-27. But unlike the leasehold excise tax, none of the PILT is allocated to the state's general fund. Laws of 2014, ch. 207, § 8 (RCW 82.29A.055(3)). Instead, the Legislature specifically limited the PILT distribution to the local governments that are burdened by the tribal property. *Id.* Thus, the PILT meets the second *Covell* factor with this limitation. *See Dean*, 143 Wn.2d at 31 (explaining that an exclusive allocation need not be exact).

Finally, the City argues that the PILT cannot meet the third *Covell* factor because the PILT is not a fee that relates "directly to a specific service provided on an individualized basis." Resp. at 27-28. But this is not true. A county and an Indian tribe negotiate in good faith to determine the PILT for each specific tribal economic development property. Laws of 2014, ch. 207, § 8 (RCW 82.29A.055(2)). This is very different from the cases that the City references where this Court concluded that the charge

over tax exempt property without a leasehold interest). This supports the Department's argument in Section D that if the PILT is a tax, it is an excise tax.

at issue was a tax, rather than a fee. *See Lane v. City of Seattle*, 164 Wn.2d 875, 883, 194 P.3d 977 (2008) (fixed hydrant cost was tax because ratepayers paid the same regardless of whether they used the hydrants); *Okeson v. City of Seattle*, 150 Wn.2d 540, 554, 78 P.3d 1279 (2003) (streetlight charge was a tax because same increased rate applied to all customers). In contrast, the Act's negotiation process ensures that the PILT represents the burden each tribal property causes to local jurisdictions. Thus, each of the *Covell* factors demonstrates that the PILT is more akin to a fee than a tax, and therefore, it is not subject to constitutional limitations on taxation.

D. If The PILT Is A Tax, It Is An Excise Tax, Not A Property Tax.

Even if the PILT is a tax, it is not a property tax. *See Resp.* at 31-36. If the PILT is a tax at all, it is an excise tax arising from an Indian tribe's decision to use its property for economic development and to seek an exemption based on that use. And because the PILT is an excise tax, this Court should reject the City's uniformity claims. *See In re Estate of Hambleton*, 181 Wn.2d 802, 832, 335 P.3d 398 (2014) (constitutional uniformity requirements only apply to direct taxes like property taxes).

A property tax arises exclusively from ownership in property, and therefore, has an element of "absolute and unavoidable demand." *High*

Tide Seafoods v. State, 106 Wn.2d 695, 699, 725 P.2d 411 (1986);
Quinault Indian Nation v. Grays Harbor County, 310 F.3d 645, 652 (9th Cir. 2002). In contrast, excise taxes are imposed upon a voluntary act from which the taxpayer received a benefit. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 800, 123 P.3d 88 (2005). Applying these definitions, the PILT is much more like an excise tax than a property tax. An Indian tribe's obligation to pay PILT does not result from merely owning the property at issue. To the contrary, the PILT obligation arises only if a tribe chooses to use certain types of property for economic development and applies for the Act's exemption. Laws of 2014, ch. 207, §§ 8-9 (RCW 82.29A.055(1); RCW 84.36.012(2)(b)). Thus, the PILT is imposed upon a tribe's voluntary actions from which the tribe benefits.

The City argues that the PILT must be a property tax because it is "closely linked" to the purpose and effect of a property tax. Resp. at 32. But this assertion adds nothing to the City's argument. The "purpose and effect" of all taxes, both property and excise, is to raise revenue for public benefits. *Covell*, 127 Wn.2d at 879. And the mere fact that the Legislature passed the PILT as a condition of the economic development exemption does not mean that it is "closely linked" to property taxes. If the Legislature intended PILT to be "closely linked" to any tax, it would be the leasehold excise tax. PILT is "in lieu of leasehold excise taxes," and

the Legislature added the PILT provision to the leasehold excise tax chapter, not the property tax chapter. Laws of 2014, ch. 207, § 8 (RCW 82.29A.055). The Act itself demonstrates that the PILT is similar to an excise tax.

Even while accepting that the PILT arises partly from an Indian tribe's use of certain property for economic development, the City still asserts that the PILT is a property tax. Resp. at 34. It claims that the PILT cannot be a tax on "commercial activity" because that conduct is already subject to other excise taxes. Resp. at 33. But the Legislature may impose more than one tax on related activities. *E.g., P. Lorillard Co. v. City of Seattle*, 83 Wn.2d 586, 521 P.2d 208 (1974) (cigarette wholesaler could be subject to city business and occupation tax, plus the state excise tax on cigarettes). And in this case, PILT does not arise from "commercial activity" alone. It only applies when an Indian tribe uses certain property for economic development and when the tribe seeks the Act's exemption for that property. Laws of 2014, ch. 207, §§ 8-9 (RCW 82.29A.055(1); RCW 84.36.012(2)(b)). This conduct is not already subject to tax.

The City further claims that the PILT is a property tax because it amounts to a tax on a fundamental element of ownership, the ability to use property. Resp. at 34. The City, however, disregards the fact that there are numerous excise taxes based upon "necessary elements of ownership" in

property. *See* Resp. at 34-35. Most obvious is the leasehold excise tax, which is imposed on the occupation and use of public property through a leasehold interest. RCW 82.29A.030(1); *see Wash. Public Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 652, 62 P.3d 462 (2003) (concluding leasehold excise tax is a “true excise tax” despite its connection to property ownership). In addition, many other types of excise taxes apply quite broadly to the mere privilege of possessing property. *See, e.g.*, RCW 82.21.030(1) (pollution tax applies to the privilege of possessing hazardous substances).

The City also argues that the manner in which the PILT is measured demonstrates the PILT cannot be an excise tax, noting that the PILT does not relate to the extent of economic development on tribal property. Resp. at 33-34. This Court, however, has already rejected similar arguments. *E.g., Sheehan*, 155 Wn.2d at 801 (while a closer nexus between the privilege and taxation method is conceivable, the constitution does not require such a precise fit for the tax to be a valid excise tax). Nothing requires, as the City suggests, that the PILT amount be based upon specific conduct for it to qualify as an excise tax. In fact, many excise taxes are assessed based upon the value of the property in use. *See, e.g., Sheehan*, 155 Wn.2d at 801 (motor vehicle tax is an excise tax based upon the value of a vehicle). Unlike a property tax, however, neither the

PILT nor any of these excise taxes stems from the value of the property after an annual assessment. *Quinault Indian Nation*, 310 F.3d at 652.

Accordingly, if the PILT is a tax, it is an excise tax, not a property tax.

This Court should reverse the trial court's order concluding that the PILT is a property tax subject to constitutional uniformity requirements.

E. Rather Than Surrender Its Taxing Power, The Legislature Lawfully Delegated Its Authority To Determine PILT To Counties Or The Department.

The City continues to argue that the Act is unconstitutional because it surrenders the Legislature's taxation authority to Indian tribes, while also delegating that same authority to counties and the Department without minimum standards. Resp. at 37-42. The Court should reject these arguments, however, because they would impose strict and unworkable requirements upon the Legislature, and hinder its ability to work cooperatively with Indian tribes as sovereign entities.

The Constitution prohibits the Legislature from suspending, surrendering, or contracting away its taxation power. Const. art. VII, § 1. While courts never presume that the Legislature has surrendered its taxation power, this is exactly what the City does. *Gruen v. State Tax Comm.*, 35 Wn.2d 1, 54, 211 P.2d 651 (1949), *overruled on other grounds by State ex. rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963). The City assumes that the Act surrenders the

Legislature's taxation authority because it authorizes counties to negotiate with Indian tribes to determine the PILT amount. Resp. at 38. But the fact that a county may establish the PILT amount through negotiations with an Indian tribe does not render the Act unconstitutional. In fact, this Court recently upheld a similar scheme where the Legislature authorized the executive branch to negotiate agreements with Indian tribes on fuel taxes. *See Automotive United Trades Organization v. State*, No. 89734, 2015 WL 5076289 (Wash. Aug. 27, 2015). Thus, legislation permitting negotiation between the State, or County and Indian tribes as sovereign entities is not "unprecedented" as the City suggests. Resp. at 39.

High Tide Seafoods does not require a different conclusion. *See* 106 Wn.2d at 700-01 (rejecting unlawful delegation claim because regardless of allowable deductions, the taxpayer remained liable for total amount of food fish tax). According to the City, *High Tide Seafoods* demonstrates that the Legislature surrenders its taxation authority when it chooses not to impose a specific tax rate for which a taxpayer will be liable. Resp. at 38-39. But unlike in that case, the Legislature here delegated to counties the authority to determine the tax amount through a negotiation. The Constitution specifically permits the Legislature to delegate local taxing authority to municipalities, like counties. Art. VII, § 9; Art. XI, § 12. This Court has upheld multiple statutes where the

Legislature delegated to a municipality the discretion to determine the ultimate tax rate. *See, e.g., Larson v. Seattle Popular Monorail Authority*, 156 Wn.2d 752, 754-55, 131 P.3d 892 (2006) (statute granting municipality the power to collect motor vehicle excise tax not exceeding certain rate was permissible delegation). While the Act requires a county to exercise its discretion through negotiation with an Indian tribe, the Legislature imposed limits on the discretion by defining a maximum PILT amount. Accordingly, the Legislature did not surrender its taxing power.

Rather than surrendering the Legislature's taxation power, the Act lawfully delegates that power. The Legislature may delegate its authority to public bodies when the Legislature establishes (1) "standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it" and when it creates (2) procedural safeguards "to control arbitrary administrative action and any administrative abuse of discretionary power." *AUTO*, 2015 WL 5076289 at *9 (internal quotations omitted). The City acknowledges this test, but applies it in an unduly harsh manner, ignoring this Court's decisions allowing for flexibility in delegations.

First, the City claims that the Act provides no "standards to be followed, or goals to be pursued." Resp. at 41. This is not true. Indeed, the Act meets the level of detail that this Court recently explained is necessary

for a proper delegation. *AUTO*, 2015 WL 5076289 at *9. In *AUTO*, the appellant similarly challenged a statutory scheme delegating to the executive branch the power to negotiate agreements with Indian tribes concerning fuel taxes. *Id.* The statutes set forth a framework for these negotiations: they permitted the Governor or the Department of Licensing to negotiate agreements with the tribes, required tribes to purchase previously taxed fuel, specified how tribes could use any refund of paid fuel taxes, and provided for audits and reports to the Legislature to ensure compliance. *Id.* This Court held the scheme provided “fairly detailed standards and guidelines” to constitute a proper delegation. *Id.*

The same is true here. The Act provides a level of detail similar to that provided in the fuel tax statutes. The Act allows a county to negotiate the PILT in good faith with a tribe, or alternatively the Department may determine the PILT. Laws of 2014, ch. 207, § 8 (RCW 82.29A.055(2)). The Act requires that a PILT amount be determined before a tribe may receive the economic development exemption. *Id.* at §§ 8-9 (RCW 82.29A.055(1); RCW 84.36.012(2)(b)). It even establishes a maximum amount for the PILT, creating a specific limit on the negotiation process. *Id.* at § 8 (RCW 82.29A.055(2)). Finally, the Act requires a report to JLARC concerning the Act’s effects, which ensures that the Act’s objectives are being achieved. *Id.* at § 11 (RCW 43.136.090).

The City claims that nothing in the Act guides the determination of the PILT. As in *AUTO*, however, “a fair reading” of the Act demonstrates that the PILT’s purpose is to offset the burden that otherwise exempt tribal property causes to local jurisdictions. *See AUTO*, 2015 WL 5076289 at *10 (sufficient guidelines existed when “a fair reading” of the statutes showed they were aimed at reaching an agreement on conflicts over tribal immunity and state fuel taxes). This purpose, along with PILT’s connection to leasehold excise tax, can guide a county’s negotiations with a tribe to determine the PILT. *See RCW 82.29A.020(2)(g)* (how to determine leasehold excise tax without the benefit of contract terms).

The City’s argument that there are insufficient limits on the discretion to determine the PILT amount is also incorrect. *Resp.* at 42. Similar to the statutes in *AUTO*, the Act requires a report to be submitted to JLARC on the impacts of exempting economic development properties. Laws of 2014, ch. 207, § 11 (RCW 43.136.090). While not an annual report, the report must indicate any reductions to state and local revenues, as well as increases and shifts from all tax sources affected. *Id.* This acts as a procedural safeguard to ensure the Act’s objectives are achieved.

That the Act itself does not contain additional procedural safeguards is not a constitutional defect. “[S]eparation of powers does not require the safeguards be found in the same statute under challenge – just

that the safeguards exist.” *AUTO*, 2015 WL 5076289 at *10. Thus, even when the route to challenge a PILT determination may not be obvious from the Act itself, this does not mean that judicial review is impossible. *See id.* (“We have found sufficient safeguards exist because of administrative review and the availability of writs of certiorari, among other things.”). A City property owner could challenge a PILT agreement on equal protection or privileges and immunities grounds. A third party could also challenge an arbitrary and capricious PILT determination by the Department under the Administrative Procedures Act. *See* RCW 34.05.570(4). As a result, adequate procedural safeguards exist to protect against administrative abuse under the Act. The Legislature properly delegated its authority in the Act, without surrendering its taxing power.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and grant summary judgment to the Department.

RESPECTFULLY SUBMITTED this 14th day of October, 2015.

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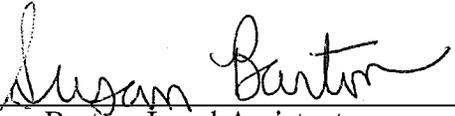
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 15th day of October, 2015, at Tumwater, WA.



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