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No. 96360-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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KING COUNTY,

Appellant,

v.

KING COUNTY WATER DISTRICTS  
Nos. 20, 45, 49, 90, 111, 119, 125, et al.,

Respondents.

AMES LAKE WATER ASSOCIATION, DOCKTON WATER  
ASSOCIATION, FOOTHILLS WATER ASSOCIATION, SALLAL  
WATER ASSOCIATION, TANNER ELECTRIC COOPERATIVE,  
and UNION HILL WATER ASSOCIATION,

Intervenor-Respondents.

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**APPELLANT KING COUNTY'S RESPONSE TO BRIEFS OF  
AMICI CURIAE WASHINGTON WATER UTILITIES COUNCIL  
AND WASHINGTON PUBLIC UTILITY DISTRICTS ASSOC.**

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**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. ARGUMENT ..... 1

    A. The Court Should Ignore Issues Not Raised Below..... 1

    B. The Forbearance Provision Is Valid..... 3

    C. Amici’s Claims that the Ordinance Is Arbitrary and  
    Capricious Are Meritless..... 9

    D. King County Is Entitled to Full Declaratory Relief ..... 12

    E. The Ordinance’s Indemnification Requirement Is Valid ..... 17

III. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

### Washington Cases

<i>Anderson v. Soap Lake Sch. Dist.</i> , 191 Wn.2d 343, 423 P.3d 197 (2018).....	18
<i>Asarco Inc. v. Dep’t of Ecology</i> , 145 Wn.2d 750, 43 P.3d 471 (2002).....	4
<i>Bloome v. Haverly</i> , 154 Wn. App. 129, 225 P.3d 330 (2010).....	16, 17
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	passim
<i>Chemical Bank v. Wash. Pub. Power Supply Sys.</i> , 102 Wn.2d 874, 691 P.2d 524 (1984).....	14, 15
<i>City of Seattle v. Montana</i> , 129 Wn.2d 583, 919 P.2d 1218 (1996).....	10, 13
<i>City of Tacoma v. O’Brien</i> , 85 Wn.2d 266, 534 P.2d 114 (1975).....	10
<i>Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	4
<i>Henry v. Town of Oakville</i> , 30 Wn. App. 240, 633 P.2d 892 (1981).....	16
<i>Hoppe v. State</i> , 78 Wn.2d 164, 469 P.2d 909 (1970).....	10
<i>In re Marler</i> , 108 Wn. App. 799, 33 P.3d 743 (2001).....	7
<i>Lenci v. City of Seattle</i> , 63 Wn.2d 664, 388 P.2d 926 (1964).....	10
<i>Long v. Odell</i> , 60 Wn.2d 151, 372 P.2d 548 (1962).....	2

<i>Madison v. State</i> , 161 Wn.2d 85, 163 P.3d 757 (2007).....	2
<i>P.E. Sys., LLC v. CPI Corp.</i> , 176 Wn.2d 198, 289 P.3d 638 (2012).....	19
<i>Pac. Tel. &amp; Tel. Co. v. City of Everett</i> , 97 Wash. 259, 166 P. 650 (1917).....	18
<i>Palermo at Lakeland, LLC v. City of Bonney Lake</i> , 147 Wn. App. 64, 193 P.3d 168 (2008).....	5, 11
<i>Petstel, Inc. v. King Cty.</i> , 77 Wn.2d 144, 459 P.2d 937 (1969).....	5
<i>Primark, Inc. v. Burien Gardens Assocs.</i> , 63 Wn. App. 900, 823 P.2d 1116 (1992).....	16
<i>Rasmussen Farms, LLC v. State</i> , 127 Wn. App. 90, 110 P.3d 823 (2005).....	7
<i>Riley v. Iron Gate Self Storage</i> , 198 Wn. App. 692, 395 P.3d 1059 (2017).....	20
<i>Samis Land Co. v. City of Soap Lake</i> , 143 Wn.2d 798, 23 P.3d 477 (2001).....	3
<i>Schmidt v. Cornerstone Investments, Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	16
<i>Seattle Nw. Sec. Corp. v. SDG Holding Co., Inc.</i> , 61 Wn. App. 725, 812 P.2d 488 (1991).....	18
<i>Singh v. Covington Water Dist.</i> , 190 Wn. App. 416, 359 P.3d 947 (2015).....	19
<i>Sonitrol Nw., Inc. v. City of Seattle</i> , 84 Wn.2d 588, 528 P.2d 474 (1974).....	11
<i>State ex rel. Guthrie v. City of Richland</i> , 80 Wn.2d 382, 494 P.2d 990 (1972).....	6

<i>State v. Gonzalez,</i> 110 Wn.2d 738, 757 P.2d 925 (1988).....	2
<i>State v. Mullin-Coston,</i> 152 Wn.2d 107, 95 P.3d 321 (2004).....	3
<i>Town of Ruston v. City of Tacoma,</i> 90 Wn. App. 75, 951 P.2d 805 (1998).....	14
<i>Treyz v. Pierce Cty.,</i> 118 Wn. App. 458, 76 P.3d 292 (2003).....	12, 13, 16
<i>Wood v. Postelthwaite,</i> 82 Wn.2d 387, 510 P.2d 1109 (1973).....	3
<i>Zuver v. Airtouch Commc'ns, Inc.,</i> 153 Wn.2d 293, 103 P.3d 753 (2004).....	19

**Federal Cases**

<i>Keego Harbor Co. v. City of Keego Harbor,</i> 657 F.2d 94 (6th Cir. 1981) .....	5
---	---

**Washington Statutes**

RCW 7.24.060 .....	16
RCW 7.24.110 .....	15
RCW 35A.80.010.....	6
RCW 35.58.050 .....	5
RCW 35.92.050 .....	6
RCW 35.92.070 .....	6, 7
RCW 36.55.010 .....	9
RCW 36.94.020 .....	5
RCW 54.08.010 .....	5
RCW 54.16.300 .....	5

RCW 54.16.420 .....	14
RCW 54.36.070 .....	14
RCW 70.315.060 .....	17

**Washington Ordinances**

King County Ordinance 18403 .....	20
-----------------------------------	----

**Other Authorities**

12 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34:55 (3d ed. updated July 2019).....	19
1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 739 (1938).....	7

## **I. INTRODUCTION**

The briefs of Amici Curiae Washington Water Utilities Council (“WWUC”) and Washington Public Utility Districts Association (“WPUA”) (collectively, “Amici”) primarily raise new issues that are not before the Court in this appeal. This Court should decline to take up the claims made only by Amici that the Ordinance’s forbearance fee provision (which the trial court upheld) is invalid, that the Ordinance is arbitrary and capricious, or that the County violated the Uniform Declaratory Judgment Act (“UDJA”). If the Court does consider Amici’s new arguments, however, it should reject them. The County properly adopted its Ordinance and, after receiving threats of litigation from various utilities, correctly sought a determination that the Ordinance is valid. The forbearance provision is facially valid and consistent with this Court’s decision in *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007). This Court should disregard Amici’s arguments and focus on the issue before this Court on appeal, specifically, the County’s authority to obtain rental compensation for the utilities’ use of its ROW.

## **II. ARGUMENT**

### **A. The Court Should Ignore Issues Not Raised Below.**

Amici attempt to inject a number of issues into this appeal that have not been raised by any party, nor included in the issue statements

when this Court accepted direct review. Against a challenge below, the trial court upheld the Ordinance's separate forbearance provision (Section 9); no party has appealed that determination. *See, e.g.*, CP 2170 (earlier proposed order more broadly limiting compensation), 2186 (County's objection to earlier proposed order that could have restricted forbearance authority); VRP (Aug. 30, 2018) at 16:12-21 (same); CP 2283 (final order eliminating provision objected to). Likewise, claims that the Ordinance is arbitrary and capricious or that this case contravenes the UDJA are not issues the parties have argued. *See, e.g.*, CP 88-117, 1029-42; WWUC Br. at 13; WPUDA Br. at 7, 14-20; *see also* County's Resp. to PSE Br., § II(C). Consideration of issues raised solely by Amici should be rejected.

It is well established that this Court "does not consider issues raised first and only by amici." *Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007); *see also State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (listing cases). Rather, the "case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court." *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (quotations omitted). Despite this rule, virtually the entirety of WWUC's brief addresses section 9 of the Ordinance, and Amici attempt to raise UDJA and other procedural issues not raised by the parties. New challenges by a nonparty should not be

addressed for the first time on appeal through amicus briefing. *See, e.g., Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803 n.3, 23 P.3d 477 (2001) (declining to consider amici’s statutory argument where parties did not seek review on that basis); *State v. Mullin-Coston*, 152 Wn.2d 107, 120 n.6, 95 P.3d 321 (2004) (similar); *Wood v. Postelthwaite*, 82 Wn.2d 387, 389, 510 P.2d 1109 (1973) (court will not consider issues not in the petition for review or answer). Accordingly, the Court should disregard Amici’s arguments on this basis alone.

**B. The Forbearance Provision Is Valid.**

Even if the Court considers Amici’s arguments, each fails on the merits. Under Section 9 of the Ordinance, the County may enter into a contract with a utility company to forbear from, among other things, establishing a county utility that would compete with the utility company. *See* CP 278-79. Despite this Court’s decision in *Burns*, 161 Wn.2d 129, which upheld the validity of such agreements, WWUC claims that the County lacks authority to establish a competing water utility<sup>1</sup> in other utilities’ service areas without a public vote, and therefore cannot contract to forbear from doing so.

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<sup>1</sup> WWUC does not address other types of utilities such as sewer or electric. Regardless, the County has authority to establish competing utilities in each of these areas as discussed further below.

Under *Burns*, forbearance agreements are facially valid. 161 Wn.2d at 154-55, 161 (non-compete agreement was proper exercise of municipal proprietary authority). The County thus has general authority to enter such agreements and, absent statutory or constitutional constraints, they will be upheld on judicial review “unless a particular action or contract is arbitrary and capricious.” *Id.* at 154.<sup>2</sup>

Although some of the Respondents have entered into similar forbearance agreements with other jurisdictions, *see, e.g.*, CP 1849-51, there were no forbearance agreements before the trial court and thus none are before this Court.<sup>3</sup> There is no basis for an as-applied challenge (which requires review of specific terms) and any challenge to a hypothetical forbearance agreement is unripe. *See Asarco Inc. v. Dep’t of Ecology*, 145 Wn.2d 750, 759, 43 P.3d 471 (2002), *amended on denial of reconsideration*, 49 P.3d 128 (2002) (“If we find ‘applied challenges’ justiciable before anything has been applied, we risk becoming an advisory court and overstepping our constitutional authority.”).

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<sup>2</sup> As discussed below, because no forbearance agreements are before the Court in this case, there is also no basis to hold any such agreement is arbitrary and capricious.

<sup>3</sup> Even if any forbearance agreements were before the Court, it is questionable that WWUC’s members, as special purpose municipal corporations rather than ratepayers, would have standing to challenge them. *See Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803-04, 83 P.3d 419 (2004) (holding that special purpose districts lacked standing to challenge annexation).

At any rate, WWUC does not seriously dispute that counties have sufficient statutory authority to operate sewerage and/or water systems, or to facilitate the formation of public utility districts for electrical and other utility services. RCW 35.58.050; RCW 36.94.020; RCW 54.08.010; RCW 54.16.300.<sup>4</sup> Such authority is more than sufficient to support the Ordinance’s provision authorizing the County to enter into forbearance agreements with utilities. *See Burns*, 161 Wn.2d at 154 (citing statute authorizing cities to acquire and operate electric utilities in upholding forbearance agreement). Although WWUC claims that other Washington statutes may preclude the County from doing so in particular circumstances, that claim (even if true) is irrelevant to the County’s

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<sup>4</sup> WWUC is wrong to the extent it argues that the County cannot rely on these statutes if they are not cited in the Ordinance. First, this Court has held that no constitutional rule requires that local legislation contain formal findings. *See Petstel, Inc. v. King Cty.*, 77 Wn.2d 144, 151-52, 459 P.2d 937 (1969). Second, similar to the Respondents in this case, WWUC erroneously transposes the County’s authority as a charter county. As discussed in prior briefing, the question for a home rule county is not whether any state statute expressly authorizes county legislative action, but whether the action is prohibited under the state constitution or statutes. *See Opening Br.* at 45-48; *Reply Br.* at 17-22. Accordingly, the County was not required to state in the Ordinance every statute that might possibly grant it authority to agree to forbear establishing a competing utility. Rather, the proper question is whether any statute or constitutional provision precludes the County’s action. The answer here is no. Finally, the cases WWUC cites for this argument are inapposite, as both involve the factual (not legal) information and data before the municipality at the time it adopted the ordinance. *See Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 98-99 (6th Cir. 1981) (under first amendment analysis, city was required to establish that its zoning restrictions were necessary to meet delineated city goals; court rejected city’s “post hoc” attempt to justify its zoning restrictions as necessary to prevent blight and control traffic where the city did not consider those factors at the time of enactment); *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 76, 82-85, 193 P.3d 168 (2008) (court must review the data considered by the city at the time it adopted the ordinance; city could not rely on new set of facts to justify reasonableness of connection charge).

*general authority* (unchallenged on appeal in this case) to enter forbearance agreements with utilities—i.e., the authority set forth in Section 9 of the Ordinance. Whether the County may compete with preexisting utilities in a particular location (and, thus, agree to forbear from competing) is an issue to be addressed on a case-by-case basis during forbearance negotiations (or subsequent court cases with a developed record)—not by Amici in the first instance.

WWUC is also wrong that authority contingent on a vote of the people confers insufficient rights for purposes of forbearance. *See* WWUC Br. at 6-8. To the contrary, this Court in *Burns* approved a forbearance arrangement whereby an electric utility agreed to pay a portion of its revenues to several cities in exchange for the cities’ promise not to establish a competing utility. The cities’ electric utility authority at issue stemmed from RCW 35.92.050 and RCW 35A.80.010—which both generally require a public vote. *See Burns*, 161 Wn.2d at 154; *see also* RCW 35.92.050, 35.92.070 (cities and towns seeking to acquire or construct a public utility must submit an ordinance for ratification by voters, subject to certain exceptions); RCW 35A.80.010 (code cities may “provide utility service . . . and exercise all powers *to the extent authorized by general law for any class of city or town*” (emphasis added)); *State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 382, 385-87,

494 P.2d 990 (1972) (subject to certain exceptions, city decision to acquire, open, or operate a public utility is subject to voter approval under RCW 35.92.070). Indeed, in describing the cities’ “valuable right” to form their own electric utilities, this Court quoted a source specifically recognizing that such a right may be contingent on a vote:

In 1932, Franklin D. Roosevelt discussed the importance of community-owned utilities, stating, “the very fact that a community can, *by vote of the electorate*, create a [utility] of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a ‘birch rod’ in the cupboard to be taken out and used only when the ‘child’ gets beyond the point where a mere scolding does no good.”

*Burns*, 161 Wn.2d at 158 (quoting 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 739 (1938) (emphasis added)). Under *Burns*, authority to operate a utility—whether or not conditioned on a public vote—is sufficient for forbearance purposes.<sup>5</sup>

WWUC complains that Section 9 of the Ordinance imposes an improper “disguised franchise compensation fee” prohibited under *Burns*.

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<sup>5</sup> The cases cited by WWUC are not on point. In *Rasmussen Farms, LLC v. State*, 127 Wn. App. 90, 95-98, 110 P.3d 823 (2005), the Court of Appeals invalidated a Department of Ecology regulation limiting burn waivers for farmers on grounds that Ecology’s enabling legislation required it to certify a practical alternative to burning before it could withhold waivers. *In re Marler*, 108 Wn. App. 799, 807-08, 33 P.3d 743 (2001), addressed a parole board’s authority to release an inmate in the absence of statutorily required findings that the inmate was rehabilitated and fit for release. Unlike *Burns*, neither case involved forbearance analysis or competing utilities, nor was the legal authority at issue conditioned on a public vote. *Burns* controls.

See WWUC Br. at 14-17. As an initial matter, *Burns* involved a statute expressly prohibiting *cities* from imposing *franchise fees*. 161 Wn.2d at 140. No similar statute applies to counties. To the extent WWUC interprets *Burns* to somehow prohibit *counties* from obtaining *rental compensation* for use of the ROW, that argument should be rejected.

WWUC's attempt to distinguish the forbearance charges authorized by the Ordinance from those approved by this Court in *Burns* also fails. The Ordinance does not "impose" unilaterally a forbearance fee on utilities. WWUC Br. at 16. Rather, it authorizes the County, in exchange for a forbearance payment, to contract with a utility company to forbear from competing with the utility company or to forbear from requiring reasonable compensation for use of the ROW. See CP 279 ("In exchange for a forbearance payment by a utility company, the county *may* contract with the utility company . . . [t]o forbear . . . ." (emphasis added)). The Ordinance's forbearance provisions are simply an alternative means by which the County may agree to allow secondary uses of public ROW. The amount of the payment and other aspects of such an agreement are subject to negotiation on a case-by-case basis. If a utility does not wish to enter a forbearance agreement with the County, it may decline to do so.

There is also no language in the Ordinance deeming forbearance the exclusive means for allowing secondary uses of public ROW. Instead,

the Ordinance's rental compensation and forbearance mechanisms are independent means to allow such uses. *See* CP 277-79. Thus, regardless of the County's legal authority to forbear, it still has separate and ample authority including under RCW 36.55.010, this Court's precedent, and home rule principles to condition its assent to a franchise upon a utility's agreement to pay reasonable rental compensation for use of public ROW. *See* Opening Br. at 21-48. The validity of the Ordinance's separate forbearance provision is wholly distinct from that determination.

Finally, this Court should reject WWUC's claim that the County must have express statutory authority to impose the forbearance charges authorized under Section 9. WWUC Br. at 17. Such charges are authorized as part of the County's authority to enter into contracts in the exercise of its proprietary capacity. *See Burns*, 161 Wn.2d at 154-55.

In sum, the forbearance provision is facially valid under *Burns*. There is no basis to overrule the trial court's (correct) ruling upholding this provision, particularly where no party has appealed the issue.

**C. Amici's Claims that the Ordinance Is Arbitrary and Capricious Are Meritless.**

As with Amici's forbearance arguments, this Court should not consider Amici's claims that the Ordinance is arbitrary and capricious, but even so, those claims are without merit. WPUA both reverses the

burden of proof and misstates the law in suggesting the County must prove the Ordinance is lawful and “reasonable.” WPUDA Br. at 6. As even the cases cited by WPUDA confirm, “[a] legislative enactment is presumed constitutional, and the parties challenging it must prove it violates the Constitution beyond a reasonable doubt.” *City of Seattle v. Montana*, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996). Further, “[i]t is presumed that the legislation was passed with respect to any state of facts which could be reasonably conceived to warrant the legislation.” *Id.* at 592.

Amici nonetheless attempt to contest the findings of the County Council. The Council made specific legislative findings that the County’s rental compensation charge was in the best interests of the public given that “[f]ranchises grant a valuable property right to utility companies to use the right-of-way, which allows the utility companies to profit and benefit from the use of the right-of-way in a manner not generally available to the public,” among other specific findings. CP 267-68. These findings are generally conclusive and binding. *See, e.g., City of Tacoma v. O’Brien*, 85 Wn.2d 266, 270-71, 534 P.2d 114 (1975) (courts will not controvert legislative findings of fact); *Hoppe v. State*, 78 Wn.2d 164, 169, 469 P.2d 909 (1970) (legislative declaration of the basis and necessity for an enactment is deemed conclusive and given effect unless the declaration on its face is obviously false); *Lenci v. City of Seattle*, 63 Wn.2d 664, 668,

388 P.2d 926 (1964) (“[I]f a state of facts justifying the ordinance can reasonably be conceived to exist, such facts must be presumed to exist and the ordinance passed in conformity therewith.”).

WPUDA does not even attempt to satisfy its heavy burden. Instead of recognizing the deference afforded to the Council’s findings in support of the Ordinance, WPUDA simply asserts its own claims regarding the public benefit from utilities and speculates that the County’s rental compensation will cause utilities to pass that cost along to their customers. These assertions, unsupported by the record, do not establish that the County’s findings in support of the Ordinance are false or that the adoption of the Ordinance was “a willful and unreasonable action, without consideration and regard for facts or circumstances” such that it was arbitrary and capricious.<sup>6</sup> *Palermo at Lakeland, LLC*, 147 Wn. App. at 78. Amici’s policy preferences with respect to County franchise procedures and requirements do not raise a constitutional issue for this Court to resolve. *See, e.g., Sonitrol Nw., Inc. v. City of Seattle*, 84 Wn.2d 588, 593-94, 528 P.2d 474 (1974) (“It is not the function of this Court in cases like

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<sup>6</sup> WPUDA’s contention that utilities do not profit from use of the ROW is meritless. At a minimum, utilities that operate in the ROW clearly benefit from doing so. Moreover, there is substantial evidence that utilities do actually profit from their use of the ROW. *See County’s Resp. to PSE Br.*

the present to consider...the motives, or to criticize the public policy which prompted the adoption of the legislation.” (quotations omitted)).

Likewise, WWUC’s claim that Section 9 of the Ordinance<sup>7</sup> is arbitrary or void because it rests on “contrived consideration,” *see* WWUC Br. at 12-14, is based entirely on its incorrect assertion that the County lacks authority to forbear from competing with other utilities. This argument is without merit, as set forth above. *See* Section II(B), *supra*. Amici fail to demonstrate that the Ordinance is arbitrary and capricious.

**D. King County Is Entitled to Full Declaratory Relief.**

WPUDA next makes the grandiose claim that “[a]ll” of its members—public utility districts (“PUDs”) that provide electricity, renewable gas, water, and sewer services, and wholesale and retail telecommunications—are necessary parties to this lawsuit. WPUDA Br. at 15, 2. But as WPUDA concedes, only one of its 27 members “owns a water system in King County.” *Id.* at 15. The remaining 26 PUDs do not operate within King County and would not be subject to the Ordinance, which is the sole subject of this litigation. A party is a “necessary party” under the UDJA only if it is “one whose ability to protect its interest in the subject matter of the litigation would be impeded by a judgment.” *Treyz*

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<sup>7</sup> WWUC’s arbitrary and capricious challenge is limited to only Section 9 (the Ordinance’s forbearance provision).

*v. Pierce Cty.*, 118 Wn. App. 458, 462, 76 P.3d 292 (2003) (quotations omitted). In other words, a party is necessary only if a complete determination of the controversy cannot be had without its presence. *Id.*

As noted above, an ordinance is presumed constitutional and the party challenging it bears a high burden. *Montana*, 129 Wn.2d at 589. The County initiated this action against 21 utilities that publicly challenged the constitutionality of the Ordinance. *See* CP 1-9. After the suit was initiated, another six utilities intervened due to their belief in the Ordinance's unconstitutionality. *See* CP 82-84. The utility districts aggressively publicized their position on the County's Ordinance to the media. CP 1960-74, 82-97. Because statutes are presumed constitutional, the UDJA does not require the County to poll every utility in the state—including those outside King County—to determine if they plan to abide by a lawful ordinance. The 27 utilities who are parties in this action competently argued the case below. Although WPUDA opted not to intervene below, it and other Amici have taken full advantage of their opportunity to address this Court through seven separate amici briefs.

The single WPUDA member and PUD that operates within King County is also not a necessary party. First, there was no reason to presume—especially in the face of this PUD's silence—that it would be challenging a presumptively constitutional Ordinance. Second, the current

parties to this lawsuit adequately represent its interests. *See, e.g., Chemical Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 887-89, 691 P.2d 524 (1984) (bondholders were not necessary parties to payment dispute even where they wished to “add claims not previously made”); *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805 (1998) (residents were not necessary parties to boundary dispute because the municipalities represented their interests). WPUDA fails to demonstrate why there cannot be “a complete determination of a controversy” in this case without the participation of a PUD. *See id.* (quotations omitted). To the contrary, the only substantive arguments advanced by WPUDA as to why PUDs must be joined as necessary parties track arguments already made by the Respondents. *See* WPUDA Br. at 17-18 (claiming alleged statutory franchise and condemnation authority).<sup>8</sup> The issue on appeal is the County’s general authority to enact the Ordinance, not the individual rights of specific utilities.

Although WPUDA or its members could have intervened in this case (as six other utilities did), WPUDA’s brief is essentially a belated and disguised request to do so. All applications to intervene must be timely,

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<sup>8</sup> WPUDA also cites RCW 54.36.070, which concerns certain payments by utilities for construction projects, and is not relevant here. *See* WPUDA Br. at 18. And WPUDA mischaracterizes RCW 54.16.420(10), which only concerns franchises for a “public utility district providing cable television service.” *See id.*

“even when intervention is a matter of right granted by statute.” *Chemical Bank*, 102 Wn.2d at 887-88. This requirement applies with equal force to declaratory judgment actions brought pursuant to RCW 7.24.110. *Id.* at 886-88. In *Chemical Bank*, this Court rejected as untimely a request to intervene that was filed at the “late stages of the appellate process,” noting that intervention “would require reevaluation of matters already argued by the parties and determined by the trial court,” which would in turn require “duplication of work by attorneys and the judicial system at a staggering cost to all.” *Id.* at 888. The Court also noted that the “principles of finality weigh[ed] in favor” of a finding of untimeliness because “thousands of potential intervenors” existed. *Id.*

Here, too, WPUDA’s attempt to “intervene” in this appeal is too late, especially given that other public utilities successfully intervened at the trial court. WPUDA was well aware of this case from the outset. *See* CP 1960-64. If it believed it was a necessary party, it could timely have sought relief to that effect. In the meantime, the County, the Districts, and the Intervenors all filed cross motions for summary judgment, briefs on direct review, and merits briefing. The parties’ substantial efforts and resources would have to be duplicated were they required to relitigate the matter. Despite knowledge of the case and many opportunities to intervene, WPUDA did not appear until amicus briefs were due in this

Court. The Court should neither dismiss the lawsuit nor limit the County's requested relief based on WPUDA's untimely (and unmeritorious) arguments presented in the guise of an amicus curiae.<sup>9</sup>

WPUDA alternatively asserts that the Court need not enter a declaratory judgment based on RCW 7.24.060. WPUDA Br. at 16. WPUDA's reference to RCW 7.24.060 is mere assertion without argument, which this Court need not consider. *See, e.g., Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990). Regardless, the sole case upon which WPUDA relies is distinguishable. In *Bloome v. Haverly*, 154 Wn. App. 129, 225 P.3d 330 (2010), a downhill property owner executed a covenant that benefited an uphill property owner. *Id.* at 133. The downhill owner sought a declaratory judgment that the covenant did not prohibit or limit construction of buildings on his property. *Id.* at 134. The court held that issuance of a declaratory judgment would be improper because of the downhill owner's "failure to set forth facts over which the parties could litigate" the scope of the covenant—specifically, architectural plans or

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<sup>9</sup> If the Court disagrees, it should at most remand the case to give the County the opportunity to join necessary parties given that the issue was not raised until appeal. *See Treyz*, 118 Wn. App. at 464; *Henry v. Town of Oakville*, 30 Wn. App. 240, 246, 633 P.2d 892 (1981); *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 906, 823 P.2d 1116 (1992). But under the circumstances of this case, such relief would be extraordinary.

other evidence that it would be impossible to build a structure on his property without interfering with the view from the uphill property. *Id.* at 141-42, 137, 145. Here, however, the validity of the Ordinance and the Rule is purely a question of law, i.e., whether the County has authority to charge utilities reasonable rental compensation for use of the ROW.

For these reasons, the Court should not refuse to enter a declaratory judgment or limit the scope of the judgment.

**E. The Ordinance’s Indemnification Requirement Is Valid.**

WWUC’s challenge to the indemnity provision of the Ordinance essentially repeats the arguments of the Respondents and fails for the same reasons set forth in prior briefing. *See* Reply Br. at 57-58. The indemnification provision is consistent with RCW 70.315.060. The County, by conditioning its assent to a franchise on appropriate indemnification provisions, merely seeks to guard against the very risk created by a utility’s decision to use the ROW.

WWUC’s only new claim, that the County’s Ordinance constitutes an adhesion contract, is unpersuasive. A contract is adhesive only when it meets three requirements: it “is a standard form printed contract,” it “was prepared by one party and submitted to the other on a ‘take it or leave it’ basis,” and “there was no true equality of bargaining power between the

parties.” *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 375, 423 P.3d 197 (2018) (quotations omitted).

Here, the first element is not met because franchise agreements are fully negotiated contracts between the County and utilities, not mass-produced, preprinted forms. *See* CP 1249. The second element also is not met because utilities have options, including the option to locate their facilities outside the County’s ROW rather than enter into a franchise agreement with the County.<sup>10</sup> *See Pac. Tel. & Tel. Co. v. City of Everett*, 97 Wash. 259, 267, 166 P. 650 (1917). Similarly, the third element is not met because many of the utilities have negotiated franchise agreements with the County and other jurisdictions in the past and are familiar with the terms of the agreements and the manner in which the agreements are entered into. *See, e.g., Seattle Nw. Sec. Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 738, 812 P.2d 488 (1991) (concerns surrounding adhesion contracts inapplicable where both parties are sophisticated entities with opportunity to bargain over terms).

Simply because the County may condition its assent by requiring particular terms in its franchise agreements does not mean that the

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<sup>10</sup> Ironically, if utilities are able to effectively “veto” any franchise provisions desired by the County and remain in the ROW, it is the County that would be left with no option but to suffer the utilities’ continued occupation of the ROW under terms dictated by the utilities. There is no negotiation process unless the County is able to condition its assent to ROW use upon reasonable terms and conditions.

agreements are adhesive. *See, e.g., Singh v. Covington Water Dist.*, 190 Wn. App. 416, 418, 424, 359 P.3d 947 (2015) (upholding municipality’s inclusion of nonnegotiable terms in system extension agreement); *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 207-10, 289 P.3d 638 (2012) (upholding inclusion of nonnegotiable term in contract because it was agreed to by both parties). Rather, a municipality “may impose” (1) “conditions on the company which will be binding on [the company] if [the company] accepts the right to use the streets” and (2) “whatever conditions [the municipality] pleases upon a renewal” of the agreement. 12 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34:55 (3d ed. updated July 2019).

Regardless, not all adhesion contracts are unconscionable, as WWUC mistakenly assumes. *See WWUC Br.* at 18; *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 304, 103 P.3d 753 (2004). Instead, the relevant inquiry is whether the utilities lack a “meaningful choice.” *Zuver*, 153 Wn.2d at 306. “At minimum,” this requires a showing that the drafting party “refused to respond” to “questions or concerns,” “placed undue pressure” to sign the agreement without “reasonable opportunity to consider” the terms, and/or that the “terms of the agreement were set forth in such a way that an average person could not understand them.” *Id.* at 306-07. WWUC fails to assert any of these requirements with respect to

the County. Moreover, because many of the utilities previously entered into franchise agreements with the County containing general indemnification provisions, WWUC cannot reasonably contend that the utilities lack a meaningful choice to enter into the agreements. *See, e.g.*, CP 1306, 1324, 1342, 1350, 1358, 1366, 1377, 1386, 1400, 1413, 1425, 1449, 1459, 1470, 1500, 1512, 1538, 1553, 1568, 1580, 1591, 1608, 1626, 1640; *see also Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 710, 395 P.3d 1059 (2017) (customer entered into agreement by choice and had reasonable opportunity to understand terms because customer did not raise issue until years later).

### III. CONCLUSION

Amici raise new issues that are not before the Court or simply repeat the arguments of the Respondents. This Court should disregard Amici's arguments, reverse, and uphold Ordinance 18403.

RESPECTFULLY SUBMITTED this 5th day of September, 2019.

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I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 5<sup>th</sup> day of September, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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