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No. 96360-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

KING COUNTY WATER DISTRICT No. 20, *et al.*,

Respondents,

and

AMES LAKE WATER ASSOCIATION, *et al.*,

Intervenor-Respondents.

BRIEF OF INTERVENOR-RESPONDENTS

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I. INTRODUCTION

In recent years King County has repeatedly asked the state legislature for authority to tax utilities, and has been rebuffed each time. CP 201; CP 214-15, 222. Frustrated by its inability to obtain explicit taxing authority, the County seized upon the idea of charging the utilities "rent" for use of public rights-of-way ("ROW"). The rental income would not be used for road purposes (as required by RCW 36.82.010 & .020),[1] but would be paid into the County's general fund. CP 206-07, 218-19.[2] The so-called "rent" is not only a disguised and unauthorized tax on the utilities and their ratepayers, and not only contrary to plat dedications and established statutory and regulatory schemes for managing delivery of essential utility services, but the very notion of charging "rent" for use of a public road is contrary to the basic idea of what it means for a road to be a public way.

To the extent the County tries to rationalize its "rent" charge by arguing that the utilities generate revenues or "profit and benefit from" the

[1] RCW 36.82.010 requires that all funds received by a county arising from road use must be deposited into the "county road fund." RCW 36.82.020 provides that any money in that fund can only be used for "proper county road purposes." Those purposes are set forth in later sections of RCW ch. 36.82. They do not include making deposits to the county's general fund or using the "county road fund" for general county purposes.

[2] The cited references are to the deposition testimony of the County's budget director. In briefing to the trial court, the County admitted that "franchise rental compensation" would be deposited into the County's general fund (CP 1827, boldface heading), but erroneously stated that §6.F of Ordinance 18403 so provided. Actually, §6.F refers only to franchise administrative fees payable under §6, not to "franchise rental compensation" payable under §8. In any event, there is no dispute that "rental" proceeds would go into the general fund.

use of public ROW (*see, e.g.*, Ordinance §1.D at CP 1169; KC Br. at 11), so too does anyone else who uses a county road "benefit" from its use. Businesses that transport their goods or services over county roads generate revenues or "profit and benefit" from using the public ROW, as does anyone who drives to work every day.[3]

While the primary purpose of a public roadway may be for transportation, a long recognized secondary purpose is for delivery of utility services. *State ex rel. York v. Board of County Commissioners of Walla Walla County*, 28 Wn.2d 891, 898, 184 P.2d 577 (1947) (primary purpose of roads is for "the convenience of public travel," but there are also numerous secondary uses, "such as for water mains, gas pipes, telephone and telegraph lines, etc."). Indeed, WAC 136-40-030, promulgated by the state County Road Administration Board (CRAB, created pursuant to RCW ch. 36.78), requires each county to "formally adopt a utility policy regarding accommodation of utilities on county road rights of way." The stated purpose of the standards established by the Board is "to set forth the requirement that each county provide for the accommodation of utilities within its right of way." WAC 136-40-010. The County's novel idea of

[3] The "rental" charges the County seeks to impose are neither (i) charges for a transportation benefit district nor (ii) tolls for highways or bridges. Such charges and tolls can be imposed only as authorized by statute and used only for special purposes. *See* RCW 36.73.065 and 47.56.031. The County does not contend that either of those statutory schemes is applicable here.

charging rent for a long established use of public roads would upset the way essential utility services are delivered across the state.

The trial court ruled correctly that the County ordinance imposing the rental charge is invalid, and its ruling should be affirmed in all respects.

II. STATEMENT OF ISSUES

The County's list of "Issues Pertaining to Assignments of Error" is not a fair or neutral statement of the questions presented. Some of the flaws in the County's description of the issues are subtle but significant, and others are plainly wrong statements of the law.

For example, as to Issue A (KC Br. at 3-4), the question presented is not really whether the County lacks authority to "obtain" "rental compensation" from a utility willing to pay it, but whether the County lacks authority to require a utility to pay it. This is a subtle but significant instance of the County's attempt to cloak imposition of a mandatory charge in the guise of a negotiated term in a "voluntary" franchise agreement.

Contrary to the introductory clause of Issue B, while the County of course has broad police powers over local affairs it does not "hold legislative powers as broad as the State," at least not as to matters of state or joint state-and-local concern, nor does it have power to impose a tax unless expressly authorized by the legislature. Furthermore, state law <u>is</u> in conflict "with the operative provisions of Ordinance 18403." As explained

below in part IV.G of this brief, the ordinance is in violation of RCW 36.75.040(5), which is the only statute cited by either side that refers explicitly to charging rent for use of county roadways. As explained below in part IV.E of this brief, the ordinance is also contrary to the state's (and the County's own) legislative and regulatory schemes for managing delivery of essential utility service.

As to the County's statement of Issue C, it should be noted that RCW 57.08.005 not only authorizes the water-sewer districts to "purchase or condemn property" for utility purposes, but that statute also expressly authorizes the districts to "conduct" water and sewage by constructing and laying pipelines "along and upon public highways, roads, and streets, within and without" the district. *See* RCW 57.08.005(3) (water) & (5) (sewer). Moreover, the trial court did not rule that that statute applies to "public *and* private" utilities; the trial court's ruling on that statute referred only to the water-sewer districts. *See* Order, ¶4 (CP 2312).

As to Issue D, it is not true that "no provision of state law authorizes private utilities to operate in the public ROW."[4] Principles of statutory and

[4] The County's use of the term "private utility" is misleading at best. It uses the term "private utility" to mean a utility that is not publicly owned, in supposed distinction from a "public utility." However, the usual meaning of the term "public utility" is a utility that serves the public, whether it is publicly owned (like a municipal utility or PUD), investor-owned (like Puget Sound Energy), or consumer-owned (like the intervenor-respondents in this case). *See, e.g.,* Black's Law Dictionary (10th ed. 2014) (a "public utility" is a "company that provides necessary services to the public, such as telephone lines and service, electricity, and water"). All of the respondents in this case are "public utilities."

common law authorize public utilities (*i.e.*, utilities serving the public, regardless of how they are owned) to operate in public ROW where the ROW was established by plat dedications or other easements for public purposes, since delivery of utility service is well recognized as a secondary use of public ROW. As noted above, state regulations promulgated by the CRAB require counties to "provide for the accommodation of utilities within its right of way." WAC 136-40-010. Furthermore, as explained below in part IV.E of this brief, state legislation provides for development and approval of comprehensive water and sewer utility system plans, including detailed information showing methods and locations for conveying water and sewage, including the use of public ROW for those purposes. While the CRAB regulations and those legislative schemes may not address explicitly the issue of whether rent can be charged for use of the ROW, they certainly do confirm that using public ROW for utility purposes is a state-sanctioned use of county roads, for which the county serves as a mere "agent" of the state. *See* RCW 36.75.020.

A fair and neutral statement of the issues presented in this case would be as follows:

1. Is the County authorized to require the respondent utilities to pay rent for use of county-managed roads for delivery of utility service?

2. Do plat dedications and state and County legislative and

regulatory schemes authorize utilities to use county-managed roads for delivery of utility service, subject to the County's right to regulate road use?

3. Does Ordinance 18403 violate the rental statute, RCW 36.75.040(5)?

4. Are the County's "home rule" powers broad enough to allow it to require utilities to pay rent for use of county roadways?

5. Is the County entitled to require that new terms, such as requiring payment of rent for use of county roadways, be added to new or existing franchise agreements over the objection of the franchisees?

6. Is the rental charge imposed under Ordinance 18403 in actuality a disguised and unauthorized tax and therefore invalid?

III. STATEMENT OF THE CASE

A. The Parties

Appellant King County is a political subdivision of the State of Washington. Wash. Const., Art. XI, §1. The County has adopted a Home Rule charter, under Wash. Const., Art. XI, §4. However, as explained below in part IV.H of this brief, the County's "home rule" powers do not extend to matters of paramount state or joint state-and-local concern, nor does the County have power to impose taxes except as expressly authorized by the legislature.

The twenty respondent water-sewer districts are publicly-owned

water and/or sewer utilities organized under RCW Title 57. Each of them serves ratepayers located within a unique geographic district. Under RCW 57.08.005(3) & (5), they are authorized to conduct water and sewage by constructing and laying pipelines "along and upon public highways, roads, and streets, within and without" the geographic district they serve.

The six intervenor-respondents, on whose behalf this brief is submitted, are Ames Lake Water Association ("Ames Lake"), Dockton Water Association ("Dockton"), Foothills Water Association ("Foothills"), Sallal Water Association ("Sallal"), Tanner Electric Cooperative ("Tanner"), and Union Hill Water Association ("Union Hill"). Each of them is a small, nonprofit, consumer-owned utility providing water service or (in the case of Tanner) electric service to residents in rural or semi-rural areas of King County. Distributing water or electricity to their customers requires them to have water mains or electric transmission lines and related facilities in public ROW managed by the County. Because they are non-profit entities, any additional costs imposed by the County must be passed along to the utility ratepayers. CP 1044, 1064, 1086, 1109, 1130, 1152.

Except for the fact that the intervenor-respondents are organized under a separate title of the RCW and are generally much smaller than the water-sewer districts, they function similarly, are governed similarly (they are governed by boards elected by ratepayers), and (at least as to the water

utilities) are subject to the same public utility laws and regulations as the districts. As the County correctly points out, RCW 57.08.005 does not apply to the intervenor-respondents.[5]

B. County Roads

The County's interests in public roadways have been acquired in a variety of ways, including (i) purchase, (ii) donation, (iii) condemnation, (iv) dedication, and (v) statutory prescription (roadways maintained by the county for seven or more years or used by the public for 10 or more years, RCW 36.75.70 & .80). CP 1244-45. The majority of the County's roads have been acquired by dedication, *i.e.*, by land developers' dedicating roadways for public use in plats recorded with the County. CP 1245, ¶10. There are variations in the specific dedicatory language, but typically the dedications are "for public use," or "for transportation and other public purposes," or "for public purposes including utilities," or the like. *See, e.g.*, CP 109, 1997, 2012-13, 2017, 2022.

State law and the King County Code provide that by approving a final plat, short plat, binding site plan or quitclaim deed the County accepts the terms of the road dedications shown therein. RCW 58.17.020(3); KCC

[5] The County unfairly and inaccurately asserts that the trial court erroneously "lumped in" the intervenors together with the water-sewer districts as enjoying the privileges conferred by RCW 57.08.005. The trial court did no such thing. *See* Order and Judgment Granting Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, ¶4 (CP 2283) (referring only to water-sewer districts).

19A.04.090. Preliminary and final plats for land development and applications for building permits must show that adequate provision has been made for utility service, including showing the location of utility easements or public ROW to be used for utility service. *See, e.g.,* RCW 58.17.110; RCW 19.27.097; KCC 19A.08.150 & .160; KCC 19A.16.040 & .050. Thus, as to most of the county roadways, *i.e.,* those acquired by dedication, there is express or implied acceptance and approval by the County for the utilities' use of the public ROW for delivery of essential utility service.

Presumably any roadways acquired by condemnation were for "public use" as required by RCW 8.08.010, *et seq.* Similarly, any donations of land for roadways and any purchases by the County of land for roadways were also presumably for "public use." However, it would be a monumental task to search through the multitudes of historical records showing how the many different segments of hundreds of county roads have been acquired by the County over the years, to determine precisely the conditions and stated purposes for which particular road segments were acquired, or to examine whether variations of the precise wording in dedicatory language or in condemnation orders or quitclaim deeds might have some bearing on the extent to which utility use of the ROW was expressly or only impliedly authorized for a particular segment of a particular road.

Neither side in this case undertook such a monumental review in connection with the summary judgment briefing in the trial court. Nevertheless, we assume both sides in this appeal believe the Court can and should decide the issues presented by this appeal on a "generic" basis, applicable to all county roads, without the necessity of conducting that kind of painstaking review of the numerous historical records pertaining to each road.[6] This is due in part to the County's role as a mere "agent" of the state in managing all county roads, no matter how they were acquired: "*All* of the county roads in each of the several counties shall be established, laid out, constructed, altered, repaired, improved, and maintained by the legislative authority of the respective counties *as agents of the state*." RCW 36.75.020 (emphasis added).

Furthermore, state regulations promulgated by the CRAB require counties to "provide for the accommodation of utilities within its right of way," WAC 136-40-010. In compliance with that requirement, the County has adopted "Regulations for Accommodation of Utilities on County Road Right-of-Way," CP 435-465, which are applicable "whether or not the

[6] But if the Court were to conclude that the factual record before the Court is inadequate, then it is inadequate both ways. In other words, if the Court were to decide that the record is insufficient to affirm the trial court's grant of summary judgment for the utilities, then by the same token the record would be insufficient to reverse the trial court's denial of the County's motion for summary judgment (the County, as movant, had the burden of showing that it was entitled to judgment as a matter of law).

Utility holds a franchise from King County." CP 433. Again, the requirement to "provide for the accommodation of utilities within its right of way" applies to *all* county roads, regardless of how they were acquired.

In addition to those statutory and regulatory provisions applicable to all county roads, it is well established in Washington that delivery of essential utility services is recognized as a "public use" of public roadways. We submit that it should not be necessary to examine the historical records as to how all particular segments of all county roads were acquired in order to reaffirm that generic principle.

C. <u>The Franchise Agreements</u>

As noted in King County's own "Regulations for Accommodation of Utilities on County Road Right-of-Way," the County does not need to have a franchise agreement in order to regulate roadway use. Nevertheless, the County has entered into franchise agreements with all or nearly all of the respondent utilities. None of the franchise agreements require payment of rent for use of the public ROW.

Three of the intervenor-respondents (Ames Lake, Sallal, and Tanner) have existing franchise agreements with the county that are scheduled to expire in 2020; one (Union Hill) has an existing agreement that is scheduled to expire in 2023; and one (Foothills) has an agreement that is scheduled to expire in 2024. The sixth intervenor (Dockton) had a franchise

agreement that expired in 2007 but has not yet been renewed. The franchise agreements provide (or, in Dockton's case, provided) for the County's regulation of the utility's use of public ROW, require the utility to pay or reimburse the County for its administrative fees and regulatory expenses, and impose various obligations on the utilities for road repairs, facilities relocations, maintenance, and the like.[7]

D. Ordinance 18403 and Rule RPM 9-2

The county ordinance at issue in this case is Ordinance 18403.[8] It begins with a recitation of dubious (or downright false) and self-serving "findings," including that the County has authority to require utilities to pay "reasonable compensation" for use of public ROW (Ord. §1.F), that it is "in the public interest" to require such compensation (§1.G), that the County is authorized to establish its own municipal utilities (§1.H),[9] and that some utilities "may" desire to agree to pay "a negotiated amount" in exchange for the County's forbearance from competing with them (§1.I).

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[7] Copies of the intervenor-respondents' franchise agreements can be found at CP 1043-58 (Ames Lake), CP 1151-1161 (Dockton), CP 1085-1103 (Foothills), CP 1063-1080 (Sallal), CP 1129-1146 (Tanner), and CP 1108-1124 (Union Hill).

[8] For the full text of the ordinance, see the first item in the Appendix to the County's brief. It can also be found at various places in the Clerk's Papers, including CP 1168-1185.

[9] *See also* Ordinance §9, authorizing the county executive to "consider" establishing the County's own utility and allowing the County to "forbear" from competing with another utility in exchange for a "forbearance payment." §§1.H & 9 ignore limitations on the County's authority to compete with existing utilities whose service areas have already been established and approved. *See, e.g.,* RCW 36.94.170 (consent of existing utility required).

The ordinance goes on to addresses a number of topics relating to utility franchises, including requiring a utility to have a franchise in order to use county road ROW (§4), providing for significant increases in the administrative fees charged to utilities for franchise applications and regulation (§6), requiring water, sewer, gas and electric utilities to pay "franchise compensation in the nature of rent" for use of county roadways (§§7.B & 8), and providing for revocation of a franchise and ejectment from the ROW for failing to agree to a "required" franchise (§10). The ordinance authorizes the County's facilities management division (FMD) to "establish policies that create a process for the determination of franchise compensation." Ord. §8.D. Acting under that provision, on December 29, 2017 FMD issued its "Rules for Determining Franchise Compensation under K.C.C. 6.27.080," denominated RPM 9-2, with an effective date of January 29, 2018 (second item in Appendix to County's brief; it can also be found at CP 1187-91).

E. <u>The Lawsuit</u>

The County was aware that the validity of its new utility franchise rental charge was controversial and would likely be challenged by numerous utilities. Shortly before RPM 9-2 was to become effective, on January 25, 2018 the County filed a Complaint for Declaratory Judgment against twenty-one water-sewer districts, seeking a judicial declaration that

Ordinance 18403 and RPM 9-2 were valid (one of the original defendants was dismissed by stipulation, leaving twenty districts in the case).

In May 2018 six small, consumer-owned non-profit utilities asked and were allowed to intervene as defendants in the case. They were called the "intervenor-defendants" to distinguish them from the original water-sewer district defendants.

The water-sewer districts and intervenor-defendants filed answers and counterclaims seeking a judicial declaration that the ordinance and RPM 9-2 were invalid in certain respects, principally relating to the new "rental" charge for use of the public ROW.[10] The utilities did not challenge the validity of the ordinance provisions relating to increased administrative charges for regulation of roadway use.

The parties agreed to a briefing schedule leading up to a July 27, 2018 hearing on cross-motions for summary judgment on the parties' respective claims, following minimal discovery.

The Washington Rural Electric Cooperative Association (WRECA)

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[10]Another provision the utilities challenged was Ord. §7.C.2, requiring a water utility to indemnify the County against any damages "arising from fire suppression activities," regardless of whether the utility had any fault or had anything at all to do with the fire or the fire suppression activities. That provision is directly contrary to RCW 70.315.060, which provides that a water utility is <u>not</u> liable for any such damages unless the county and the utility have "mutually agreed" that the utility would provide indemnification for the county. It was not necessary for the trial court to reach that issue, since it held correctly that the County had no right to force a utility to "agree" to franchise terms to which the utility objected.

sought and was granted permission to file an *amicus curiae* brief in support of the utility defendants' position, emphasizing the serious adverse statewide implications of allowing the ordinance to stand. CP 1991-2008.

F. The Ruling Below

The parties' cross-motions for summary judgment were heard by the trial court on the agreed date. RP 1-53. The court took the issues under advisement and announced its oral decision granting summary judgment for the utilities in a telephone conference call a few days later on August 1, 2018. RP 53- 61. Counsel were instructed to prepare a written order. Counsel conferred but could not agree fully on the form of a proposed order, so competing forms were presented to the court at a hearing on August 30, 2018. RP 61-83. The court then took the issues about the form of the order under advisement and entered its own written order on September 4, 2018. CP 2277-85 (the order also attached and incorporated a transcript of the August 1 oral ruling, at CP 2286-2300).

The order denied the County's motion for summary judgment (CP 2282, Order ¶1) and granted the water-sewer districts' and the intervenor-defendants' respective motions for summary judgment "to the extent set forth herein" (Order ¶¶2-3). The order went on to declare that the water-sewer districts have statutory authority under RCW 57.08.005(3) & (5) to locate, operate and maintain their water and sewer facilities in "public

highways, roads, and streets" (Order ¶4), but that "King County may regulate the use of county roads and public rights-of-way in the public interest and charge utilities for the reasonable administrative costs of performing such regulation" (Order ¶5).

On the key issue of "franchise compensation in the nature of rent," the order declared as follows:

> However, King County (i) lacks authority to impose "franchise compensation" or "rent" as provided in Ordinance 18403 on the utility defendants for using county roads or public rights-of-way for delivery of utility services, and (ii) lacks the authority to require the utility defendants to pay, or to agree to pay, "franchise compensation" or "rent" as provided in Ordinance 18403 for use of county roads or public rights-of-way for delivery of utility services, either as a condition of obtaining, maintaining or renewing a franchise or otherwise.

Order, ¶6.

The order went to state:

> Franchises are contracts which must be negotiated and agreed upon by the parties thereto, and King County may not require the utility defendants to enter into a franchise agreement by accepting King County's franchise terms.

Order, ¶7.

The order did not declare invalid the entire ordinance, but only those provisions relating to "franchise compensation in the nature of rent" or that were otherwise inconsistent with the order:

> Sections 1.F, 1.G, 7.B, 8, and 10.B of Ordinance 18403, and the reference to franchise compensation in section 10.A thereof

> ("or to pay franchise compensation as required by K.C.C. 6.27.060.B"), as well as Rule RPM 9-2 promulgated pursuant to said Ordinance, and any other provision, interpretation or implementation of the Ordinance not consistent with this Order, are invalid and unenforceable.

Order, ¶8.

Finally, the order dismissed the County's complaint with prejudice (Order, ¶9), and deemed the utilities to be the prevailing parties for purposes of obtaining an award of costs (Order, ¶10).

The County filed a timely notice of appeal and sought direct review by this Court. The request for direct review was unopposed (although the utilities disputed the County's characterization of the case and the reasons why direct review was warranted). The request for direct review was granted on April 3, 2019.

IV. ARGUMENT

It is important to keep in mind what this case is about and also what it is not about. This case is about whether King County can require a utility to pay "rent" for use of a county road for underground or overhead water, sewer or electric lines for delivery of essential utility service. This case is not about whether the County can regulate use of public roadways and charge users for the costs of administering such regulation. Of course it can, and the trial court expressly so ruled. *See* Order, ¶ 5 (CP 2283).

A franchise agreement is not necessary for the County to exercise its right to regulate roadway use. As noted above, in accordance with state CRAB regulations the County has adopted "Regulations for Accommodation of Utilities on County Road Right-of-Way," which are applicable "whether or not the Utility holds a franchise from King County." CP 261 (RFA 30), CP 425-465 (quoted language appears in ¶1.04 of the Regulations at CP 433). In ¶1.06 ("Objectives") of the Regulations, the County clearly recognizes "a need to accommodate utility companies in their provision of public services," although that need is secondary to use of the roadways for transportation:

> It is recognized that there is a need to accommodate utility companies in their provision of public services; however, King County must insure that the primary purpose of the roadway, passage of vehicular, bicycle, and pedestrian traffic, is maintained to the greatest extent possible. The use of the roadway corridors by utility companies is secondary to the movement of traffic. These Regulations strikes [sic] a balance between the public need for efficient, safe transportation routes and Utility service within these routes.

CP 433.

Nor is this case about whether the County can grant a franchise to a utility for use of county road ROW. Of course it can, and no one challenges that authority. This case is not even about whether the County can ask a utility to pay a franchise fee "in the nature of rent," or whether a utility may agree to do so in exchange for some perceived benefit for the utility. Of

course the County and a utility are free to enter into a voluntary contract so long as it does not violate public policy. But this case is not about voluntary contracts. It is about the County's claim that it can <u>require</u> a utility to pay rent for using a public ROW.

The County's arguments are premised on the simple notion that it "owns" the ROW and can place any conditions it wishes, including payment of rent, for use of "its" property. As is often the case with a supposedly "simple" notion, it is false. The County does not "own" county roads in the same way a private party owns property, or even in the same way a city may own city streets. Most of the County's roads were acquired by way of road easements in plat dedications from land developers or other abutting property owners. CP 1245, ¶10; CP 1194. The dedication language typically says the easements are "for public use," or "for transportation and other public purposes," or the like. *See, e.g.,* CP 109; CP 1997. The "public" uses or purposes for which such roadway easements are dedicated are generally recognized as including both transportation (as a primary purpose) and delivery of utility services (as a secondary purpose). *State ex rel. York, supra,* 28 Wn.2d at 898. In some cases, the dedicatory language expressly refers to utility service as an intended purpose of the dedication, in addition to transportation. *See, e.g.,* CP 1997; CP 2012-13, 2017, 2022.

Generally the County holds only an easement to use the roadways for public purposes, and the underlying fee interest remains with the owners of the abutting land. *Kiely v. Graves*, 173 Wn.2d 926 (2012). However, as to all county roads, not only those acquired by dedication but also those acquired by gift, condemnation or purchase, the County holds its interest in the roads as a statutory "agent" of the state. RCW 36.75.020.[11] In briefing to the trial court and this Court, the County has admitted that it holds county roads "in trust for the public" (CP 1814; KC Br. at 44); similarly, in argument to the trial court the County admitted it holds the county roads as a "trustee" for the state (RP 51), *i.e.*, to carry out the public purposes sanctioned by the state. Those state-sanctioned purposes include providing for transportation and for delivery of essential utility services, but do not include providing general revenue for the County in the form of a tax masquerading as "rent" for use of the public roads. By purporting to charge "rent" for use of the public roads, the County is in effect abusing its position as a trustee by seeking to profit "personally" from its trusteeship.

The County begins its brief by discussing what it describes as "more than a century" of Washington law, stretching back to "territorial days," purportedly supporting a county's right to charge rent for use of public

[11] Significantly, there is no similar statute saying that cities are "agents of the state" for managing city streets.

roads. KC Br. at 1. As explained below in part IV.B of this brief, the County is relying on snippets of *dicta* from the Washington cases it cites rather than the holdings of those cases. The only Washington authorities the County cites that actually support its contention are opinions of the County's own prosecutor's office and a 1977 attorney general opinion. While those opinions are entitled to due respect, they do not stand up under scrutiny. *See* discussion below in part IV.B of this brief.

The County also argues that it has "home rule" powers to do anything it wishes unless expressly prohibited by state law. As explained below in part IV.H of this brief, in Washington a local government's "home rule" powers are limited to matters of exclusively local concern; they do not extend to matters of paramount state concern or joint state and local concern. Since the County manages county roads only as an "agent" of the state, and since transportation and delivery of essential utility services are matters of at least joint state and local concern, the County's "home rule" powers do not extend to the issues presented here. Moreover, it is well established in Washington that even "home rule" cities and counties have no power to tax without express authorization from the state legislature.

In reviewing the parties' briefs and considering the issues presented, we ask the Court to be especially vigilant to keep an eye on one particular feat of logical sleight-of-hand attempted by the County, both in adopting

the ordinance in question and in making its arguments to the trial court and to this Court. That rhetorical misdirection has to do with the County's attempt to cloak its imposition of mandatory "rental" charges in the clothing of a voluntary franchise agreement. The ordinance says, and the County argues, that utilities must have franchise agreements in order to use the public ROW, and that the franchise agreements must provide for rental payments; in the next breath, the County describes a franchise agreement as a voluntary contract between a governmental entity and a utility, and then cites cases essentially holding that the parties to a franchise are free to agree on the terms of their voluntary agreement. This case is not about freely negotiated agreements between the County and the utilities; it is about the County's unilaterally seeking to impose new mandatory "rental" charges on utilities who already have rights to use public roadways for utility service.

A. Standard of Review

To avoid needless repetition, the intervenor-respondents adopt the Standard of Review set forth in the Districts' Response Brief.

B. The County Mischaracterizes Washington Precedents

The County's brief devotes much of its Introduction and Statement of the Case, and the first part of its Argument, to trying to show that there is a long tradition in Washington of counties charging rent or other franchise compensation for use of county roads. In argument to the trial court,

however, the County admitted that no other county in Washington is imposing such a charge, although it claimed that cities have been doing it for many years:

> THE COURT: Are the declarations correct that this would be the -- a brand new law in the state of Washington?
>
> MR. HACKETT: I think that –
>
> THE COURT: There's no other county that is doing this right now; is that correct?
>
> MR. HACKETT: Yes. The declarations are correct that no other county currently obtains franchise compensation, but certainly municipalities throughout the state of Washington have done that for over a hundred years. . . . Now, the fact that the County has not done this before doesn't mean that the County can't do it. There may have been various reasons in the past, for example, why the County chose not to go in this direction, one being that we wanted to encourage the expansion of utilities into rural areas.

RP 9-10. In this context there is an important difference between counties and municipalities: counties are political subdivisions of the state and by statute are "agents of the state" in managing county roads; incorporated cities have their own separate identities as municipal corporations, and there is no statute making them "agents of the state" in managing city streets. The statutes governing counties and cities and their respective powers, both generally and as to utilities in particular, are entirely different. One important difference is that cities can tax utilities, but counties cannot. *See, e.g., City of Wenatchee v. Chelan Cty. PUD No. 1*, 181 Wn. App. 326, 325

P.3d 419 (2014) (city can tax proprietary aspects of water utility); S. Lundin, *The Closest Governments to the People: A Complete Reference Guide to Local Government in Washington State* (2d ed. 2015) at 113-14 (cities have broader taxing authority than counties).[12]

Furthermore, the cases the County cites to support its claim that Washington law has long recognized "the authority of general municipal governments to charge reasonable rental compensation for the use of public rights-of-way ('ROW') by utilities along the jurisdiction's roads," KC Br. at 1, do not really support that contention. The County relies on snippets of *dicta* from three Washington cases in this regard, but the holdings of those cases do not support the County's claim.[13] The first case the County cites, on page 1 and in numerous places throughout its brief, is *City of Spokane v. Spokane Gas & Fuel Co.*, 175 Wash. 103, 26 P.2d 1034 (1933). That case was not about whether the City of Spokane could require a utility to pay rent for use of public ROW. It was about whether the city could by ordinance determine the amount of payments owed by a gas company under an existing contract after an original 25-year contractual period had elapsed. In that case the city had granted a franchise in 1904 to a gas company to use

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[12] The Lundin treatise can be found online at http://mrsc.org/getmedia/1c25ae05-968c-4edd-8039-af0cf958baa7/Closest-Governments-To-The-People.pdf.aspx?ext=.pdf.

[13] The County cites a fourth old case, *Rauch v. Chapman*, 16 Wash. 568 (1897) (KC Br. at 7), but only to explain why municipal debt limits were established. That case says nothing about whether a city or county can charge rent for use of public roads.

city streets for distribution of illuminating and fuel gas. The franchise agreement specified the rates to be charged to consumers, to be adjusted by the city every 10 years, and also provided for a payment to be made to the city for the first 25 years of the franchise in the amount of 2% of the gross receipts from the sale of gas, with the payment amount thereafter to be determined at the same time as the rates charged to consumers were to be set. No issue was raised in that case about whether it was lawful for the city to charge a rental fee for use of the city streets.

The issue addressed in that case was how the amount of an agreed contractual payment was to be determined after the first 25 years of the franchise. The problem arose because the provision in the franchise dealing with setting the rates to be charged to consumers was rendered moot by the legislature's creation of the Public Service Commission (now called the Utilities and Transportation Commission) to set utility rates charged to consumers. After the creation of the Commission, the provision in the franchise agreement for setting gas rates charged to consumers "was never acted upon." 175 Wash. at 104. Beginning in June 1929, after the initial 25-year period had elapsed, the gas company stopped making further payments to the city. In 1932 the city council adopted an ordinance saying that the amount owing to the city from June 1929 through 1931 was 2% of the company's gross receipts from gas sales. The company contended that

the ordinance was adopted without notice and without giving the company an opportunity to be heard, and that the 2% rate was unreasonable. *Id.* at 105. After the city sued and won a directed verdict, the company appealed.

This Court described the issue presented as follows: "The pith of the question with which we are confronted is whether appellant is bound by the city's finding in its Ordinance No. C5066 that 2 per cent of the gross receipts was reasonable." 175 Wash. at 105-106. The Court pointed out that "we are here dealing with a claimed right arising in contract," and that "'the exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion.'" *Id.* at 109, quoting 4 McQuillin, *Municipal Corporations* (2d ed.) at 936. Reasoning that setting the franchise payment was a proprietary act rather than a governmental one, the Court concluded that the reasonableness of the franchise payment was "open to challenge," reversed the trial court's directed verdict for the city, and remanded for trial on the question of the reasonableness of the charge. *Id.* at 110.

Thus, the case was not about whether the city (much less a county) had a right to charge rent for use of public ROW, but rather whether the utility had a right to challenge the reasonableness of the city council's determination of what was supposed to be a <u>contractual</u> franchise fee based on a percentage of sales receipts. The Court's reference to the franchise

payment as being "in the nature of rental" was pure *dicta*. The County's misuse of the case is a classic example of the folly of citing snippets of words from *dicta* in a case and attempting to characterize those snippets as if they were the holding.

Next, the County cites *Pacific Telephone & Telegraph Co. v. City of Everett*, 97 Wash. 259, 166 P. 650 (1917) (KC Br. at 1), and *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 142 P.2d 498 (1943) (KC Br. at 5). Neither of those cases was about whether a city or county can require a utility to pay rent for use of a public ROW, and neither of them provides any real support for the County's argument in this case.

In *Pacific Telephone & Telegraph Co.*, the City of Everett had granted a franchise in 1896 to a telephone and telegraph company. The franchise agreement contained various regulatory provisions but did not provide for any non-regulatory payments to the city. By 1912 the city had grown in population enough to qualify as a first class city with power to adopt its own city charter. In 1915, in accordance with the newly adopted city charter, the city council enacted an ordinance levying an annual "license tax" of fifty cents for each utility pole used by a utility and located in or upon city streets. The telecom company sued to enjoin enforcement of the ordinance. The trial court sustained the city's demurrer and dismissed the complaint, and the utility appealed from that judgment.

On appeal, this Court held that the 50¢-per-pole "license tax" was for the purpose of raising general revenue and thus "cannot be sustained as a police regulation" (97 Wash. at 266), and that although a city can generally enter into a franchise agreement "upon terms mutually agreed upon," a city cannot "afterwards during the life of the franchise annex additional burdens thereto without the consent of the grantee." *Id.* at 269. The Court went on to explain that while a city may not surrender "the right of regulation necessary to the public health and safety, or the general taxing power," once it grants a franchise it "cannot be changed or altered at the will of the city without the consent of the other party thereto," stating:

> Turning to the ordinance granting the franchise to the appellant corporation, it will be seen that the grant is made upon enumerated terms and conditions. The right to exact a charge upon the poles of the grantee as a condition precedent to their maintenance is not one of such conditions. It is therefore an additional burden which the city seeks to impose upon the right to use its streets which it has contracted may be used without such burden. *This we hold the city may not do*.

97 Wash. at 269 (emphasis added).

Thus, the case does <u>not</u> hold that the city was authorized to charge rental compensation for use of public ROW, which is the proposition for which the case is cited on page 1 of the County's brief. In addition to calling the franchise charge a "tax," the actual holding in the case supports the respondents' argument that Ordinance 18403 cannot validly add a "rental"

payment obligation to existing franchises without the utilities' consent.

Similarly, the next Washington case cited by the County, *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.* (KC Br. at 5), was not at all about the question now before this Court. That case was about numerous challenges to a public service commission rate-setting decision. The portion of the opinion cited by the County was not about whether municipal rental charges for use of public ROW were valid, but whether the differing amounts of taxes and franchise fees imposed by individual cities should be differentiated and paid by ratepayers on a city-by-city basis in each particular city, or blended together and spread among all ratepayers across the utility's service area. The Court held, in effect, in what it characterized as a "rather finely drawn distinction," that taxes should be differentiated and charged to ratepayers on a city-by-city basis, but that franchise fees could be blended together as general operating expenses and charged to ratepayers generally – except that the rate-setting commission "might well, if it deemed a franchise exaction so excessive as to in part amount to a tax, apportion the payment between general operating expense and the local rate payers." 19 Wn.2d at 281-282. The holding in that case, like the holdings in the other two Washington cases cited by the County for its claim about a century of Washington law upholding the validity of rental charges for use of public ROW, does not support the County's contention. Once again, the County is

erroneously citing a snippet of *dicta* as if it represented the case holding.

The only other Washington authority the County cites to support its claim about a century of Washington law consists of an attorney general opinion (AGO 1977 No. 19, cited at KC Br. at 1-2) and two opinions of the County's own prosecutor's office (PAO 1935 No. 59, cited at KC Br. at 9, and PAO 1970 No. 17, cited at KC Br. at 26). There is very little analysis in any of those opinions. They rely on general statements in the McQuillin treatise based on cases from other jurisdictions, such as the statement that a municipality has "entire control of its streets"; but in Washington a county does not have "entire control" of county roads: it manages county roads as a mere "agent of the state" and must comply with state CRAB requirements. The AGO and PAO opinions also rely, in a very superficial way, on the general county franchise statute (RCW 36.55.010), which says a county can "grant" franchises but says nothing about what can be charged or whether a county can "require" a franchise or can require a public utility to pay rent for using public roads, and on *dicta* from the *City of Spokane* case discussed above, which does not really support the County's claim. Neither the attorney general opinion nor either of the prosecutor's opinions offers any serious analysis of the issues presented in this appeal.

A more recent and better reasoned analysis is the court of appeals decision in *City of Lakewood v. Pierce County*, 106 Wn. App. 63, 23 P.3d

1 (2001). In that case Pierce County and the City of Lakewood could not agree on the terms of a franchise for the county to operate county sewer facilities under city streets. The city sued for declaratory relief as to whether it could require the county to enter into a franchise agreement and to require the county to pay franchise fees. The court of appeals held that "Until both parties agree on terms, no franchise exists and Lakewood may not compel the County to agree to its terms." 106 Wn. App. at 74. The court also held that the city could charge franchise fees but only to recover its actual administrative costs: "In sum, the franchise fee Lakewood seeks is a 'fee' and not an impermissible 'tax' *as long as the amount of the fee is limited to Lakewood's costs* associated with the County's operation of a sewerage system under Lakewood's streets." *Id.* at 76-77 (emphasis added). Thus, that case directly supports two key arguments of the utilities: (1) that the County may not compel the utilities to accept franchise terms with which they do not agree, and (2) that franchise fees cannot exceed the amount of the County's actual administrative costs for regulating the ROW.

This Court should follow the sound analysis in *City of Lakewood* rather than the superficial AGO and PAO opinions cited by the County.

C. <u>RCW 36.55.010 Does Not Authorize the Rental Charge</u>

The County's principal argument is that RCW 36.55.010 authorizes counties to grant a franchise to a utility for use of county road ROW. No

one challenges that proposition. There may be plenty of reasons why a county and a utility would find it mutually beneficial to have a franchise agreement that sets forth in a tidy package the terms and conditions for road use and the county's and utility's respective rights and obligations regarding access to underground or overhead utility facilities for installations or repairs, or regarding facility relocation or pavement restoration, and the like. However, the statute does not say that a county can <u>require</u> a utility to have a franchise in order to use public ROW for delivery of utility service. The power to "grant" a franchise is not the same as a power to "require" one. *City of Lakewood, supra,* 106 Wn. App. at 73; *Burns v. City of Seattle*, 161 Wn.2d 129, 142, 164 P.3d 475 (2007) ("A city has the statutory authority to 'grant' a franchise, not to 'require' one," citing *Lakewood*). As noted above, the County already has in place regulations that apply where there is no franchise agreement.

Nor does the statute say anything about what charges can or cannot be imposed on a utility under a franchise agreement. That is why the statute must be read in conjunction with other laws and principles relating to utility use of public ROW. What is perfectly clear, however, as even the County acknowledges (KC Br. at 24), is that a franchise agreement is an <u>agreement</u>, which the parties are free to negotiate and then either accept or reject. *See Burns,* 161 Wn.2d at 142 (franchise fee is "a bargained-for exchange"); *City*

of Lakewood, 106 Wn. App. at 74 ("Until both parties agree on terms, no franchise exists").

The County's argument seems to rely largely on the notion that the county has "entire control of its streets." (KC Br. at 24, citing McQuillin statement about municipalities, and at 25, citing 1977 AGO No. 19). But as noted above in questioning the persuasiveness of the AGO and PAO opinions cited by the County, under Washington law the County does not have "entire control" of county roads. It holds county roads in trust for the public, and it manages all county roads as an "agent of the state" and must comply with state mandates, including the requirement to "provide for the accommodation of utilities within its right of way." WAC 136-40-010.

The County argues (KC Br. at 31-34) that the legislature's enactment of RCW 35.21.860(1) in 1982, prohibiting cities from imposing a franchise fee (other than taxes and administrative fees) on certain kinds of utilities for use of public ROW, without simultaneously prohibiting counties from imposing such fees, should be construed as indicating that the legislature intended to allow counties to impose them. That argument is an example of why it can be risky to presume to ascribe a specific intent to legislative silence. It could be argued with at least equal force that the legislature found it unnecessary to enact a similar prohibition as to counties because the legislature understood that counties had no right to impose such

fees in the first place.

D. Plat Dedications Provide for Utility Use of County Roadways

Most of the County road ROW has been acquired through dedications and plat approvals. CP 1245, ¶10; CP 1194. By approving a plat, the County accepts the road dedications shown therein. RCW 58.17.020(3); King County Code 19A.04.090. Those dedications typically provide for utility use of the road ROW either expressly (*see, e.g.,* CP 1997; CP 2012-13, 2017, 2022) or impliedly (*see, e.g.,* CP 109; CP 171-198; CP 787-798; CP 935-950; CP 980-1012); *see Northwest Supermarkets, Inc. v. Crabtree*, 54 Wn.2d 181, 186, 338 P.2d 733 (1959) (quoting with approval 11 McQuillin, *Municipal Corporations* (3d ed.) 212, § 31.18 ("The right to the use of a public street or alley by a municipal corporation for sewer and drainage purposes is necessarily incident to the use for which streets and alleys are opened and laid out"); *State ex rel. York, supra*, 28 Wn.2d at 898 (recognizing that the primary purpose of roads is for "the convenience of public travel," but that there are also numerous secondary uses, "such as for water mains, gas pipes, telephone and telegraph lines, etc."); *North Spokane Irrigation Dist. No. 8 v. Spokane County*, 86 Wn.2d 599, 547 P.2d 859 (1976) (reservation of a right to lay down and maintain water pipes in street dedicated to the public did not interfere with county's right to use street for transportation nor deprive county of power to regulate and control public

streets, and county's acceptance of the dedication with that reservation created an easement for the utility). Indeed, a plat for a new subdivision would not be approved unless adequate provision were made for delivery of essential utility services, typically utilizing road ROW for that purpose. *See, e.g.,* RCW 58.17.110 (proposed subdivision will not be approved unless appropriate provisions are made for utilities).

Neither in the trial court nor in this appeal has the County established (nor could it) as a matter of law that it acquired "ownership" of any county road ROW free of any reservation, either express or implied, for use by the utilities. The property right the County acquires as a result of a road dedication is merely an easement, not fee ownership. *Kiely v. Graves, supra*. The County's right to regulate and control use of the ROW is not the same as having "ownership" of the road. The County manages all county roads merely as an agent of the state (RCW 36.75.020) and subject to the terms in any dedication instrument, not as a full-fledged "owner."[14]

The County's limited property interest in public roadways is similar in some ways to rights held by railroads under federal railway grants. Since the railroad right-of-way cases involve specific federal statutes, in some

[14] *See also, e.g., Pope Resources, LP v. Wash. State Dept. of Natural Resources*, 190 Wn.2d 744, 418 P.3d 90 (2018) (although DNR exercises extensive control over the Port Gamble Bay tidelands, it does so merely as an agent of the state and not as an "owner or operator" of the tidelands within the meaning of MTCA).

respects they are not directly relevant to this case. However, several aspects of the railroad cases are worth noting.

In *Great Northern R. Co. v. United States*, 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942), the U.S. Supreme Court ruled that the railroad's interest in a ROW obtained under the Act of March 3, 1875 was in the nature of an easement and the railroad had no right to profit from the oil and minerals lying beneath the ROW. 315 U.S. at 279. Similarly, in *United States v. Union Pac. R. Co.*, 353 U.S. 112, 77 S. Ct. 685, 1 L. Ed.2d 693 (1957), the Court held that even in what are referred to as "limited fee" cases where the railroad claimed a more substantial interest in the ROW, the railroad received only the surface rights to the ROW and all rights incident to a use for railroad purposes. The railroads were not entitled to exploit the mineral lands lying below the ROW for their own purposes. 353 U.S. at 119. A more recent and perhaps more instructive case is *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.*, 231 Cal. App.4th 134, 160-178, 180 Cal. Rptr.3d 173 (2014). In that case, after an exceptionally thorough discussion of the history of the railroad easement cases, the court held that federal grants of railroad ROW did not confer sufficient property interest to justify collection of rent from a subsurface pipeline company.

The pertinent points to be taken from the railroad ROW cases are that the interests held by the railroads were (i) something less than a full fee

ownership (they were sometimes referred to as "limited-fee" interests) or (ii) mere easements, and in either case the railroads were prevented from gaining financial advantage from their limited interests in ways unrelated to the operation of a railroad. By analogy, here the County is improperly seeking to exploit its limited interest in the public ROW to raise general fund revenue for unrelated purposes.

E. State and County Legislative and Regulatory Schemes Provide for Utility Use of County Roads

Public utility infrastructure, including delivery systems making extensive use of county road ROW, has been developed over many decades. Those systems serve an important public purpose, and that is why public ROW has been made available for delivery of essential utility services. Utility systems, particularly water and sewer systems, are extensively regulated by the state and County. For example, RCW 70.116 and WAC 246-293-90 require coordination of public water systems (*i.e.*, systems serving the public). WAC ch. 173-240 requires development and approval of general sewer system (wastewater) plans. KCC ch. 13.24 requires preparation and County approval of water and sewer comprehensive plans. Those plans provide for water distribution and wastewater collection facilities located in county road ROW.

There are a myriad of DOE, DOH, CRAB, and County regulations

that have developed over the years and that affect planning for and approval of utility delivery systems making extensive use of the county road system. For present purposes, the point is simply that the state and county governments have long recognized the need for the utilities to utilize county roads, without imposition of a "rental" charge for that use. If a fundamental change is to be made in the conditions under which utilities can use public ROW managed by a county as an agent of the state, the change should be made by the state legislature and not by a county council looking for new general revenue sources.

F. The Washington Constitution and Accountancy Act Do Not Require Rental Payments

Neither Article VIII, §7 of the Washington Constitution nor RCW 43.09.210 requires utilities to pay rent to the County for use of public ROW, because the County does not "own" the ROW and is not "giving" or "transferring" any property to the utilities. In using the public ROW the utilities are exercising rights they already have under franchise agreements (if there is one), under plat dedications, under state statutes (such as RCW 57.08.005 as to the water-sewer districts), under state regulations (such as the CRAB regulations requiring counties to provide for utilities' use of county road ROW), and under common law principles recognizing that delivery of essential utility service is an established use of public ROW.

G. <u>The Ordinance Violates the Rental Statute</u>

The only statute cited by either side in this case that refers explicitly to a county's authority to rent land or air space above or below a county road is RCW 36.75.040(5). That statute provides, in pertinent part:

> The board of county commissioners of each county . . . shall have the power and it shall be its duty to:
>
> (5) In its discretion rent or lease any lands, improvements or air space above or below any county road or unused county roads to any person or entity, public or private: PROVIDED, That the said renting or leasing will not interfere with vehicular traffic along said county road or adversely affect the safety of the traveling public: *PROVIDED FURTHER, That any such sale, lease or rental shall be by public bid in the manner provided by law*: AND PROVIDED FURTHER, That nothing herein shall prohibit any county from granting easements of necessity.

(Emphasis added).

This statute does not actually apply to the use of county road ROW for delivery of utility service, because the County is not really "renting" any real property to the utilities. The utilities do not have exclusive rights to occupy any space above or below the county roads; they have only a non-exclusive right to use the space, subject to extensive regulation by the County and subject to having to relocate their facilities, at their own expense, whenever required by the County for transportation purposes. It is the County, however, that takes the position that it is entitled to charge the utilities rent for using county roads for utility service. If the County is

deemed to be renting above-ground or below-ground roadway space to the utilities, then the County would have to comply with the public bidding requirement of this statute. Since Ordinance 18403 and RPM 9-2 bypass any public bidding process, they would be in violation of RCW 36.75.040(5) if the County were actually renting anything to the utilities.

H. The County's Home Rule Powers Do Not Extend to Charging for Use of County Roads

The County argues that because it has adopted a "home rule" charter, it has all the powers of the state unless a specific power has been expressly denied it by the legislature, and that since there is no statute expressly saying the County cannot charge rent to the utilities, the county must be authorized to do so. KC Br. at 45-48. The County's view of its "home rule" powers is astonishingly overbroad.

In the first place, as the County itself apparently acknowledges by quoting from the following passage, in Washington "home rule" powers apply only to "purely local affairs":

> In adopting the county home rule provision by constitutional amendment, the people of Washington sought "the right to conduct their *purely local affairs* without supervision by the state, so long as they abided by the provisions of the constitution and did not run counter to considerations of public policy of broad concern, expressed in general laws." *State ex rel. Carroll v. King Cty.*, 78 Wn.2d 452, 457-58, 474 P.2d 877 (1970).

KC Br. at 46 (emphasis added).

That limitation on "home rule" powers was explained in greater depth by this Court in *Chemical Bank v. Washington Public Power Supply System*, 99 Wn.2d 772, 666 P.2d 329 (1983). That case was about whether Washington cities and PUDs ("participants") had validly entered into financing agreements with a Washington joint operating agency for the construction of two nuclear power plants. The Court found that there would have been statutory authority for the participants to buy electric power, or to construct power plants themselves as owners, but that the financing agreements at issue were an unauthorized hybrid arrangement, committing the participants to spend billions of dollars without acquiring an ownership interest in the plants and regardless of whether the projects were ever completed or any power was ever delivered. One of the issues the Court addressed was whether first-class cities having "home rule" powers had authority to enter into such arrangements where there was no express authority from the legislature to do so. The Court explained that in Washington "home rule" powers are less broad than in some other states:

> In Washington, the courts have interpreted the home rule powers of first class cities more narrowly. Professor Trautman perceptively characterized these limitations:
>
> > The conclusion to be drawn is that in Washington a home rule city is subordinate to the legislature as to any matter upon which the legislature has acted, whether it be regarded as of state, local, or joint concern. In the event of an inconsistency, the

> statute prevails. However, in those instances in which the legislature has said nothing, an analysis of interests is vital. If the subject is of paramount state concern, some delegation of power by the legislature, express or implied, to the municipal corporation must be found. This is likewise true in those instances in which there is a joint state-local problem. Since the state will be affected by any action of the municipal corporation, it is necessary that an authorization to act from the legislature be found. In those instances in which the matter is solely of local interest, however, home rule cities may act without a delegation from the legislature, express or implied.
>
> Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash.L.Rev. 743, 772 (1963). This court has applied that reasoning: "[t]herefore, at least when the interest of the State is paramount to or joint with that of the municipal corporation, the municipal corporation has no power to act absent a delegation from the legislature." *Massie v. Brown*, 84 Wash.2d 490, 492, 527 P.2d 476 (1974). Thus, the question is whether the State has acted in a manner inconsistent with the powers asserted here; or, the State has not acted, but has either a paramount interest or a joint interest with local municipalities.

99 Wn.2d at 792-93. Because the Court found that the nuclear projects were "a subject of at least joint state and local interest," it concluded that the cities' "home rule" powers were insufficient to authorize them to enter into the hybrid financing agreements. *Id.* at 793-94, 798-99.

The County has offered no reason why a county's "home rule" powers should be deemed any broader than a first-class city's, and we are aware of none, so the same limitations on a city's home rule powers should

be deemed applicable to a county's home rule powers. Since (i) county roads are part of the statewide transportation system, (ii) the County manages all county roads as an "agent of the state," and (iii) the state promulgates regulations requiring county roads to meet state-prescribed standards (including the CRAB requirement that each county must "provide for the accommodation of utilities within its right of way"), the use of county roads for delivery of utility service is "a subject of at least joint state and local interest." Thus, the County's home rule powers do not extend to that subject, and as to that subject the County has only those powers conferred upon it by the state constitution and the legislature.

Another limitation on home rule powers is that they do not extend to the power to tax. A city's or county's power to tax must be granted expressly. *See Okeson v. City of Seattle*, 150 Wn.2d 540, 556, 78 P.3d 1279 (2003) (city's power to tax must be granted expressly); *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) (county's power to tax must be granted expressly). As explained in a particularly thorough and well-reasoned attorney general opinion, a county's home rule charter cannot confer the power to tax:

> Accordingly, in summary, it is our opinion that while a county in adopting a "home rule" charter has considerable flexibility in the structuring of its government, it does not have the authority to endow itself with taxing authority. The authority of any county, including a home rule county, to

> levy taxes only exists to the extent the state legislature has authorized the exercise of taxing authority.

AGO 1980 No. 9, at 7-8 (*see* copy of opinion attached as Appendix hereto).

As explained below in part IV.J of this brief, the County's proposed franchise "rental" fee is in actuality a disguised tax. Despite its home rule charter, the County has no authority to impose such a tax.

I. The County Has No Right to Add Terms Unilaterally to Existing Franchise Agreements.

In March 2018 the County sent notices to utility franchisees informing them that "your obligation to pay franchise compensation as required by Ordinance 18403 will accrue 180 days from the date of this notice." *See, e.g.,* CP 1082, 1105, 1126, 1148.

The trial court rejected the County's attempt to add new contract terms unilaterally to existing franchises, ruling that the County lacks authority to require the utilities to pay, or to require them to "agree" to pay, the franchise rental charge "as a condition of obtaining, maintaining, or renewing a franchise" (Order, ¶6) and that "Franchises are contracts which must be negotiated and agreed upon by the parties thereto, and King County may not require the utility defendants to enter into a franchise agreement by accepting King County's franchise terms" (Order, ¶7).

The elementary principle that a franchise is a contract, the terms of which must be agreed to by the contracting parties and not forced upon one

side by the other, has long been recognized in Washington. *See, e.g., Pacific Telephone & Telegraph Co., supra* , 97 Wash. at 269 (city can enter into franchise agreement "upon terms mutually agreed upon" but cannot "afterwards during the life of the franchise annex additional burdens thereto without the consent of the grantee"; once a city grants a franchise it "cannot be changed or altered at the will of the city without the consent of the other party"); *City of Lakewood, supra,* 106 Wn. App. at 74 ("Until both parties agree on terms, no franchise exists and Lakewood may not compel the County to agree to its terms"); *Burns, supra,* 161 Wn.2d at 142 ("a franchise is a contract"; "A city has statutory authority to 'grant' a franchise, not to 'require' one"; "A 'city cannot ... compel the [utility] to accept its terms for the continued occupation of the streets'" (quoted citations omitted)).

A special comment about *Burns* is appropriate. In that case Seattle City Light ratepayers challenged the validity of franchise agreements in which the municipal utility agreed to pay to suburban cities certain fees the ratepayers contended were "imposed" by the suburban cities for the utility's use of city streets, in violation of RCW 35.21.860. This Court concluded that the statute was not applicable because it found that the fees in question were not actually for use of the suburban cities' streets, but rather were "forbearance" payments in exchange for the suburban cities' agreement not to form their own competing utility. The franchise agreements were upheld

as valid because Seattle City Light entered into the franchise agreements voluntarily, based on what it perceived to be a genuine benefit from the suburban cities' forbearance. Nothing in that case suggests that any franchise terms can be forced on a utility over its objection.[15]

The County argued in the trial court (but has not argued in its opening brief on appeal) that some utilities' existing franchise agreements contain a "reservation of rights" provision allowing the County to "exercise authority it has or may acquire in the future to secure and receive fair market compensation for the use of its property, pursuant to an ordinance." *See, e.g.,* CP 1077-78, 1100-01, 1121, 1142-43. In case the County raises that point in further briefing or argument, the Court should note that the same "reservation of rights" provision then goes on to state:

> Nothing in this section shall be construed as an agreement by the Grantee of King County's right to exercise authority it has or may acquire in the future to secure and receive fair market compensation for the use of property. Nothing in this section shall be construed to prohibit the Grantee from challenging, in King County Superior Court or a court of competent jurisdiction, the legality of such right.

[15] The "forbearance" provisions of King County Ordinance 18403 were no doubt designed to give the County "cover" under the *Burns* decision for imposition of the "rental" charge for use of county roads. But *Burns* is of no help to the County in this case, because in *Burns* Seattle City Light perceived a benefit from the suburban cities' forbearance commitment and voluntarily agreed to make the payments in question in exchange for the forbearance commitment. Unlike the situation in *Burns*, in this case the utilities recognize that there is no realistic prospect of competition from the County and therefore see no real benefit from the proffered forbearance commitment. Thus, the utilities object to the rental charges and are not voluntarily agreeing to pay them.

Id. Thus, the franchisees have not agreed in advance to accept whatever new "franchise compensation" payment obligations the County might try to force upon them. If they had made such an agreement, presumably the franchise contracts would have been so open-ended as to be illusory and unenforceable in that respect.

J. The Rental Charge Is an Unauthorized and Invalid Tax

This Court recently reaffirmed that the three-part *Covell* test[16] is to be used in determining whether a governmental charge is a tax or a fee. *Watson v. City of Seattle*, 189 Wn.2d 149, 160-61, 401 P.3d 1 (2017).[17] Applying that test leads inexorably to the conclusion that the so-called rental charge is in actuality a tax:

1. The first – and most important – factor is *whether the primary purpose of the charge is to raise revenue or to regulate*. Here, the primary (and only) purpose of the rental charge is to raise general revenue, not to regulate. CP 206-07, 218-19.

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[16] *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995).

[17] Usually the parties challenging the validity of a governmental charge contend that the charge is a tax masquerading as a fee; but in *Watson* the plaintiffs flipped that around and claimed that the city's charge imposed on the sale of guns and ammunition was a regulatory fee masquerading as a tax (the plaintiffs contended that as a regulatory fee, the charge ran afoul of state legislation prohibiting local regulation of firearms). Applying the *Covell* factors, the Court concluded that the charge was indeed a tax and not a regulatory fee, and therefore it was not prohibited or preempted by state law. Even the concurring and dissenting opinions recognized the continuing vitality of the *Covell* test, at least where preemption is not at issue. *See* 189 Wn.2d at 177-78 (concurring) and 183 (dissenting).

2. The second factor is *how the money is used*. Here, the money raised from the rental charge goes into the County's general fund; it is not used or earmarked for any special or regulatory purpose. *Id.*

3. The third factor is *whether there is a direct relationship between the charge and a service received or a burden produced by the payer*. Here, there is no direct relationship between the rental charge and any service or commodity received from the County or any burden placed on the County. The rental charge has nothing to do with any administrative or other expenses incurred by the County (they are covered by the unchallenged fees imposed under §6 of the ordinance), and there is no other burden placed on the County. Nor is the County giving anything to the utilities that they are not already entitled to use anyway (subject to the County's right to regulate county roads as an agent of the state and in the public interest).

Under the *Covell* test, the rental charge is clearly a tax.[18] Since the County cannot point to any legislation expressly granting the authority to impose such a tax, the rental charge is unauthorized and is invalid.

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[18] In the trial court, and in its opening brief to this Court, the County's main argument on the tax issue was that in *City of Snoqualmie v. King County Executive Dow Constantine*, 187 Wn.2d 289, 386 P.3d 279 (2016), this Court "clarified" that some governmental charges may not be neatly categorized as either a tax or a fee. CP 1824; CP 2085; KC Br. at 48. In that case, the Court explained that the issue was not whether the charge in question (a "payment in lieu of taxes") was a fee or a tax, but simply whether it was a tax or not. 187 Wn.2d at 300. The Court then proceeded to apply a "broader version" of the three-part *Covell* test and concluded that the charge there was not a tax. 187 Wn.2d at 300-03. Applying the same test here compels the conclusion that the rental charge is indeed a tax.

Furthermore, because the tax is disguised as a "rental" charge, it is exactly the kind of "hidden tax" prohibited under Article VII, §5 of the Washington Constitution, which provides:

> 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.

Disguising the new tax as a "rental" charge undermines the principles of transparent governmental finance and accountability underlying Article VII, §5. When taxpayers are charged hidden taxes disguised as something else, they cannot easily scrutinize government finances to see how taxes are being raised and what they are being used for.[19] When a new tax is buried in higher utility rates, instead of being assessed openly and transparently as a new or additional tax as required by Article VII, §5, the ratepayers/taxpayers are deprived of the transparent governmental accountability to which the state constitution entitles them.

As this Court explained in the *Okeson* streetlight case:

> Article VII, section 5 of the Washington Constitution states: "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." Ordinance 119747 does not explicitly state that it imposes a tax, nor does it state the object to which such a tax shall be applied. Therefore, the method of imposing the street lighting tax--by adoption of Ordinance 119747--violated the state constitution.

[19] Because publicly-owned and consumer-owned non-profit utilities, including all of the respondents in this case, must pass any additional costs on to their ratepayers, a new tax imposed on the utilities is in effect imposed on their ratepayers as well.

Okeson v. City of Seattle, *supra,* 150 Wn.2d at 556 (city ordinance transferring street lighting expenses from general fund to municipal electric utility was unconstitutional imposition of disguised tax on utility and its ratepayers). The same is true of the disguised tax in this case.

Thus, the "rental" charge imposed by the County under Ordinance 18403 is an invalid tax both (i) because it is unauthorized by the legislature and (ii) because it is disguised as something else.

V. CONCLUSION

The County does not "own" the public rights-of-way used for county roads. It manages them as a trustee of the state, for state-sanctioned public roadway purposes. Those purposes include both transportation and delivery of essential public utility service. The County has no right to demand payment of "rent" for use of the public rights-of-way for those state-sanctioned public purposes. The so-called "rent" charge imposed by Ordinance 18403 is in actuality a disguised and unauthorized tax. The charge is invalid, and the ruling below should be affirmed in all respects.

Respectfully submitted this 15th day of May, 2019.

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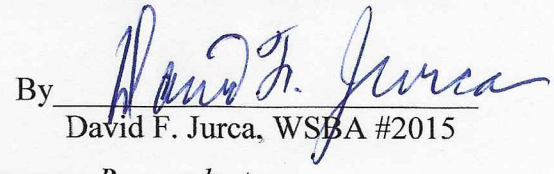
By 
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APPENDIX

Published on *Washington State* (https://www.atg.wa.gov)

Attorney General Slade Gorton

COUNTIES -- HOME RULE CHARTER -- TAXATION -- AUTHORITY OF A "HOME RULE" CHARTER COUNTY TO IMPOSE A COUNTY-WIDE BUSINESS AND OCCUPATION TAX

A county, including a county which has adopted a "home rule" charter under Article XI, § 4 (Amendment 21) of the Washington Constitution, does not have the authority, in the absence of some form of statutory authorization by the state legislature, to impose a county-wide business and occupation tax.

- - - - - - - - - - - - -

March 12, 1980

Honorable David S. McEachran
Prosecuting Attorney
Whatcom County
311 Grand Avenue
Bellingham, Washington 98255

Cite as: AGO 1980 No. 9

Dear Sir:

By letter previously acknowledged you requested our opinion on a question which we paraphrase as follows:

Where a county has adopted a "home rule" charter under Article XI, § 4 (Amendment 21) of the Washington Constitution and, in that charter, has provided that the county council shall have the power ". . . to levy taxes, appropriate revenue and adopt budgets for the county . . .", does that county thereby have the authority, in the absence of some form of statutory authorization by the state legislature, to impose a county-wide business and occupation tax?

We answer the foregoing question in the negative for the reasons set forth in our analysis.

ANALYSIS

Let us, preliminarily, make two pertinent observations. First, as explained in AGLO 1979 No. 2, cities and towns of all classes possess the authority to license and [[Orig. Op. Page 2]] tax

businesses for the purpose of revenue and to measure the amount of such a license tax on the basis of the gross receipts of the licensed businesses. Accord,Pacific Telephone & Telegraph Co. v. Seattle, 172 Wash. 649, 21 P.2d 721 (1933) and Wells & Wade Hardware v. Wenatchee, 64 Wn.2d 103, 390 P.2d 701 (1964). In all instances, however, the underlying basis for that power is purely statutory, even in the case of a first-class, charter, city such as Seattle. Pacific Telephone & Telegraph Co. v. Seattle, supra; and see also, P. Lorillard Co. v. Seattle, 8 Wn.App. 510, 507 P.2d 1212 (1973) wherein the Court, in discussing the power of the City of Seattle to levy a business and occupation tax, said, at pp. 512-513:

"The power of a municipality to support the performance of its functions through taxation is derived from the state. Article 11, section 12 of the Washington State Constitution provides:

The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.

"The reservation to the state of the complete power to tax is presumed. Tacoma v. State Tax Comm'n, 177 Wash. 604, 612, 33 P.2d 899 (1934); State ex rel. Tacoma School Dist. v. Kelly, 176 Wash. 689, 30 P.2d 638 (1934); Outlook Irrigation Dist. v. Fels, 176 Wash. 211, 28 P.2d 996 (1934). Municipal corporations possess only such taxing power as has been granted to them by the state constitution or the statutes; and if there is a doubt as to whether a power has been granted, it must be denied. Pacific First Fed. Sav. & Loan Ass'n v. Pierce County, 27 Wn.2d 347, 178 P.2d 351 (1947). A city is a municipal corporation and as an agency of the state exercises only delegated taxing powers. State ex rel. Pacific Tel. & Tel. Co. v. Department of Pub. Serv., 19 Wn.2d 200, 272, 142 P.2d 498 (1943).

[[Orig. Op. Page 3]]

"It was said in State ex rel. King County v. State Tax Comm'n, 174 Wash. 668, 671, 26 P.2d 80 (1933):

The power of taxation is an attribute of sovereignty residing in the state alone. Municipal corporations, as such, have no inherent right to levy taxes. If the power to tax is not conferred directly upon them by the constitution, it must be granted by the legislature. Our constitution makes no direct grant of the taxing power to municipal corporations, but provides that the legislature may vest them with this power."

Conversely, there presently exists no comparable statutory authorization for any class ofcounty to (in the words of AGLO 1979 No. 2, supra) ". . . license and tax businesses for the purpose of revenue and to measure the amount of such a license tax on the basis of the gross receipts of the licensed business . . .", or, in other words, to impose a business and occupation tax. And therefore it is clear, at least in the case of a non-charter county, that such taxing power does not exist. See, e.g.,Great Northern Ry. v. Glover, 194 Wash. 146, 77 P.2d 598 (1938) together withPacific First Federal Savings & Loan Ass'n v. Pierce County, 27 Wn.2d 347, 178 P.2d 351 (1947) which, although dealing, specifically, with the taxing powers of a port district, stated the applicable principle in somewhat broader terms as follows:

"Unlike the sovereign state, counties and other municipal subdivisions possess no inherent power to taxation. The constitution itself does not grant them the taxing power, but, by Art., VII, § 9, the legislature is authorized to vest them with this power."

Our second preliminary observation relates to the oft-cited case ofWinkenwerder v. Yakima, 52 Wn.2d 617, 328 P.2d 873 (1958). There, in upholding the authority of the City of Yakima to allow commercial advertising on its municipal parking meters, the Court said, at page 622:

"Yakima is a city of the first class. With respect to the powers of a city of the first class, we said in State ex rel. Ennis v. Superior Court (1929), 153 Wash. 139, 279 Pac. 601:

[[Orig. Op. Page 4]]

"'It is evident from the constitution of this state and legislative enactments that, in Washington, cities of the first class, are vested with very extensive powers, and that, under Rem. Comp. Stat., § 8982, supra, the statutes of this state concerning the same must be liberally construed by the courts for the purpose of carrying out the manifest intent of the legislature to establish cities of the first-class as self-governing bodies, only "subject to the controlled by general laws."'

"It is clear from theEnnis case and from many other decisions of this court that the only limitation on the power of cities of the first class is that their action cannot contravene any constitutional provision or any legislative enactment. SeeState ex rel. Billington v. Sinclair (1947), 28 Wn. (2d) 575, 183 P.2d 813;State ex rel. Griffiths v. Superior Court (1934), 177 Wash. 619, 33 P. (2d) 94;Walker v. Spokane (1911), 62 Wash. 312, 113 Pac. 775. (Cf.Washington Fruit & Produce Co. v. Yakima (1940), 3 Wn.2d 152, 100 P.2d 8, 103 P.2d 1106, 128 A.L.R. 159; and Brennan v. Seattle (1929), 151 Wash. 665, 276 Pac. 886, relative to the broad police powers of a city of the first class.) The principles adhered to in the preceding cases clearly indicate that a city of the first class has as broad legislative powers as the state, except when restricted by enactments of the state legislature." At 622. (Emphasis supplied.)

In view of the similarities between Article XI, § 10 (Amendment 40) of our state constitution relating to first-class city charters and Article XI, § 4 (Amendment 21),supra, relating to "home rule" county charters, we have previously advised that the basic concept of the Winkenwerder case is equally applicable to a charter county. See,e.g., our letter opinions (copies enclosed) of October 4 and October 7, 1971, to then State Representative Norwood Cunningham and to the King County Prosecuting Attorney, respectively, relating to the establishment of a county transit system in King County. ButWinkenwerder simply did not involve the particular power here at issue;i.e., to impose taxes for the purpose of revenue. And, therefore, in our opinion, whatever else that case may mean in terms of a distinction between charter [[Orig. Op. Page 5]] cities (or counties) and non-charter municipalities with regard to other categories of governmental power, it is not in point insofar as the taxing power is concerned. Accord,P. Lorillard Co. v. Seattle, supra, wherein the Court, in identifying the underlying basis for Seattle's business and occupation tax, made no mention whatsoever of theWinkenwerder case but, instead, cited Pacific First Federal Savings & Loan Ass'n v. Pierce Co., supra.

The reason forWinkenwerder's inapplicability to municipal taxing power stems, in our judgment, from the existence of certain other provisions of the state constitution which deal, specifically, with that power. We have reference, first, to Article VII, § 9, which reads as follows:

"The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." (Emphasis supplied.)

In addition, of the same import, but here with an express reference to counties as well as cities, towns and other municipal corporations, is Article XI, § 12 of the constitution which provides that:

"The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes,but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes." (Emphasis supplied.)

Taken together, these two sections of our state constitution clearly contemplate that counties and cities derive their taxing authority solely from legislative enactment. Two related points should also be noted. First, these two provisions are theonly ones in the constitution which expressly speak about the source of taxing authority for counties and cities. And secondly, both Article VII, § 9, and Article XI, § 12, supra, should be contrasted with Article XI, § 11 which speaks about the source ofpolice power of [[Orig. Op. Page 6]] counties and cities in the following manner:

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

In short, when the framers of the constitution wanted to give a self-executing source of authority to counties and cities to do something they knew how to do it, for that is precisely what they did in Article XI, § 11,supra. But they did no such thing when it came to the power to impose taxes. Instead, they made that particular governmental power dependent upon authorization by the legislature. And that is why, in the case of all classes of cities and towns, the Court has looked to the statutes rather than the constitution itself in searching for the source of authority to impose business license fees (i.e. a business and occupation tax) for the purpose of revenue1/ --even in the case of a first-class city operating under its own charter and thus governed, generally, by the principles ofWinkenwerder v. Yakima, supra.

But what, then, is the effect of a county charter provision such as that involved in your question? That charter provision, as you have described it, provides that the county council shall have the authority ". . . to levy taxes, appropriate revenue, and adopt budgets for the county. . . ."

However, insofar as that provision purports to confer upon the council the power to levy taxes independent of any legislative enactment, our response must be that it is legally ineffective.2/

[[Orig. Op. Page 7]]

First, as we have earlier explained, the rule that units of local government (including counties) derive their taxing power only from legislative enactment is based upon the explicit constitutional language found in Article VII, § 9 (cities and towns) and Article XI, § 12 (counties, cities, towns, and other municipal corporations), supra. And the court has so recognized these two constitutional provisions as the source of that rule, as evidenced by P. Lorillard Co. v. Seattle, supra, andPacific First Federal Savings and Loan Assn. v. Pierce County, supra.

Secondly, the constitutional provision under which counties are authorized to frame "home rule" charters, Article XI, § 4 (Amendment 21),supra, in no way purports to create an exception to this rule for "home rule" counties. Indeed, it clearly contemplates that this rule, as embodied in Article XI, § 12, shall continue to apply to "home rule" counties. Note, particularly, the following portions of Article XI, § 4 (Amendment 21):

"Any county may frame a 'Home Rule' charter for its own government subject to the Constitution and laws of this state, . . .

"After the adoption of such charter, such county shall continue to have all the rights, powers, privileges and benefits then possessed or thereafter conferred by general law. . . .

"The provisions of sections 5, 6, 7, and the first sentence of section 8 of this Article as amended shall not apply to counties in which the government has been established by charter adopted under the provisions hereof. . . ."

Thus, the "home rule" charter is to be subject to all provisions of the state constitution relating to counties, except those explicitly mentioned in Article XI, § 4 itself. And Article XI, § 12 is not among those so mentioned.

CONCLUSION

Accordingly, in summary, it is our opinion that while a county in adopting a "home rule" charter has considerable flexibility in the structuring of its government, it does not have the authority to endow itself with taxing authority. The authority of any county, including a home rule county, to levy taxes only exists to the extent the state legislature [[Orig. Op. Page 8]] has authorized the exercise of taxing authority. We therefore must answer your question (as above paraphrased) in the negative.

We trust the foregoing will be of assistance to you.

Very truly yours,
SLADE GORTON
Attorney General

TIMOTHY R. MALONE
Assistant Attorney General

*** FOOTNOTES ***

1/P. Lorillard Co. v. Seattle, supra; Wells & Wade Hardware v. Wenatchee,supra; andPacific Tel. & Tel. Co. v. Seattle,supra.

2/This does not mean, however, that a charter provision such as that involved in your question is of no legal effect at all. Rather, it simply means that its effect is to vest the county council, and not in some other office created under the charter, with the power to levy taxes as authorized by statute. Though it

thus creates no taxing power it does determine which body or office shall exercise such taxing powers as are conferred by state statute.

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No. 96360-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

KING COUNTY WATER DISTRICT NO. 20, *et al.*,

Respondents,

and

AMES LAKE WATER ASSOCIATION, *et al.*,

Intervenor-Respondents.

DECLARATION OF SERVICE

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The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the 15th day of May, 2019, she caused to be served in the manner indicated below, a true and correct copy of ***Brief of Intervenor-Respondents; and this Declaration of Service***, to:

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DATED this 15th day of May, 2019, at Seattle, Washington.

/s/Joanne L. Burt
Joanne L. Burt, Legal Secretary

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