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SUPREME COURT
STATE OF WASHINGTON
9/3/2019 1:29 PM
BY SUSAN L. CARLSON
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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.

**INTERVENOR-RESPONDENTS' ANSWER TO
AMICUS CURIAE BRIEF OF
WASHINGTON STATE ASSOCIATION OF COUNTIES**

Richard Jonson, WSBA #11867
JONSON & JONSON, P.S.
2701 First Avenue, Suite 350
Seattle, WA 98121-1111
(206) 624-2521
richard@jonson-jonson.com

David F. Jurca, WSBA #2015
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
(206) 292-1144
djurca@helsell.com

Attorneys for Intervenor-Respondents

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	3
III. ARGUMENT.....	3
V. CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases	Page
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	4, 6
<i>City of Lakewood v. Pierce County</i> , 106 Wn. App. 63, 23 P.3d 1 (2001).....	4, 6
<i>Pacific Telephone & Telegraph Co. v. City of Everett</i> , 97 Wash. 259, 166 P. 650 (1917).....	3, 4
Washington Constitution and Statutes	
Washington Constitution, Art. VIII, §7.....	9
RCW 36.75.020.....	6
RCW ch. 36.78.....	2, 5
RCW 43.09.210.....	9
RCW 70.315.060.....	7
King County Ordinance and Regulations	
Ordinance 18403.....	2, 8
Regulations for Accommodation of Utilities on County Road Right-of-Way.....	2

I. INTRODUCTION

The amicus brief of the Washington State Association of Counties (“WSAC”) is devoted almost entirely to arguing a point that nobody is challenging – that a county has a right to regulate the use of county roads. Of course it does, and the trial court expressly so ruled: “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 and Judgment, ¶ 5 (CP 2283). Nobody has suggested otherwise, and no party has appealed from that aspect of the trial court’s ruling.

This case is not about whether King County can regulate its roads. It is about whether the County can make a public utility pay rent for using county roadways for delivery of essential utility services. WSAC devotes a single sentence – literally, just one – to addressing the rent issue. *See* WSAC Br. at 14. That sole, naked sentence is unsupported by any argument or any citation to law. To the extent it is intended to echo *sub silentio* the County’s arguments about a purported gift of public funds or a purported accountancy act violation, it suffers from the same flaws as the County’s arguments.¹ It also implies that by failing to charge such rent heretofore,

¹ *See* Intervenor-Respondents’ Br. at 38; Districts’ Br. at 40-41.

King County and all other counties have been violating the state constitution and the accountancy act for years. *See* discussion below at 8-9.

A county does not need a franchise agreement in order to exercise its right to regulate roadway use. As mandated by state law under regulations promulgated by the County Road Administration Board (“CRAB”) established under RCW chapter 36.78, King County has already adopted “Regulations for Accommodation of Utilities on County Road Right-of-Way,” which are expressly made 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). Nobody has asserted any argument in this case that would undermine the validity of those Regulations.

WSAC’s parade of horrors about the utter chaos that would result from the utilities’ “unfettered” use of county roads if the trial court’s ruling is allowed to stand is rhetorical nonsense. If the ruling below is affirmed, the utilities will continue using public roadways for underground or aboveground distribution lines just as they have been doing for decades, and King County will continue managing and regulating the utilities’ use of the roadways just as it has been doing for decades, except perhaps a little more tightly and with higher charges for regulatory costs as allowed by the parts of Ordinance 18403 that were not challenged by the utilities.

II. STATEMENT OF THE CASE

Since WSAC adopts the Statement of the Case set forth in King County's Opening Brief, the Intervenor-Respondents adopt the Statement of the Case set forth in their own brief in answer to the County's brief.

III. ARGUMENT

WSAC begins the Argument section of its brief by quoting ¶7 of the Order below² and arguing, with adamant indignation, that the Order, if upheld, “would upend more than a century of law” and “would deprive counties and the public of essential protections to their safety,” jeopardize public travel, and cause numerous other evils. (WSAC Br. at 2-3). One problem with that argument is that the quoted language from the Order, which WSAC finds so dangerous, comes almost verbatim from prior decisions of this Court and the court of appeals. Washington courts have long recognized that a franchise is an agreement, and that an agreement requires both parties to agree on its terms. *See, e.g., Pacific Telephone & Telegraph Co. v. City of Everett*, 97 Wash. 259, 269, 166 P. 650, 654 (1917) (city can enter into franchise agreement “upon terms mutually agreed upon” but cannot “afterwards during the life of the franchise annex additional

² That paragraph states: “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 (CP 2283).

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 v. Pierce County*, 106 Wn. App. 63, 74, 23 P.3d 1, 7 (2001) (“Until both parties agree on terms, no franchise exists and Lakewood may not compel the County to agree to its terms”); *Burns v. City of Seattle*, 161 Wn.2d 129, 142, 164 P.3d 475, 482 (2007) (“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’” (internal citations omitted)).

WSAC then proceeds to the first main section of its Argument, entitled “A. Washington Counties Enjoy Broad Control Over and Interests in Rights-of-Way.” (WSAC Br. at 3). The Intervenor-Respondents agree with the entirely non-controversial proposition stated in that title.

The second section of WSAC’s Argument is entitled “B. Counties and Utilities Have Long Recognized a County’s Right to Grant Franchises Governing Construction, Maintenance, and Operation of Utility Facilities Within Public Rights-of-Way.” (WSAC Br. at 5). Again, the Intervenor-Respondents have no quarrel with that proposition. As this Court stated in *Burns, supra*, a city (or here, a county) “has statutory authority to ‘grant’ a franchise, not to ‘require’ one.” 161 Wn.2d at 142, 164 P.3d at 482.

We must part company with WSAC, however, at page 7 of its brief, where it argues that allowing a utility to have facilities within a public ROW without a franchise agreement “is inconsistent with Washington law.” As explained at pages 2, 8-11, 18, and 34-38 of the Intervenor-Respondents’ Brief, allowing utilities to use county rights-of-way for delivery of utility services, *with or without* a franchise agreement, is not only entirely consistent with Washington law and CRAB regulations, but as noted above King County itself has adopted regulations governing utilities’ use of county roads “whether or not the Utility holds a franchise from King County.” *See* above, at 2. The answers to the series of questions posed by WSAC at the bottom of page 7 and top of page 8 of its brief can usually be found in the franchise agreement where there is one, or in the rules adopted by King County under the state CRAB regulations where there is no franchise agreement in effect.

The next section of WSAC’s Argument is entitled “C. Franchises Negotiated Between Washington Counties and Utilities Establish Conditions for Utilities’ Use of Rights-of-Way and Protect the Public and the Counties.” Once again, we have no quarrel with that proposition. It is a good idea for counties and utilities to negotiate and try to reach agreement on the conditions for utilities’ use of the ROW, whenever they can. That is a reason why counties and utilities should each be reasonable in the terms

they propose for inclusion in such agreements. But if an agreement cannot be reached, a county can nevertheless exercise its statutory right to manage county roadways as an agent of the state and in the public interest, and it can regulate utilities' use of county roadways accordingly. *See* RCW 36.75.020. None of that requires the existence of a franchise agreement as a prerequisite to reasonable regulation under a county's police powers.

The fourth and final section of WSAC's Argument is entitled "D. Upholding the Trial Court Order Could Deprive Counties of the Right to Establish Terms and Conditions for Utility Use of Rights-of-Way and Needlessly Multiply Litigation." (WSAC Br. at 12). Nothing in the trial court's order would lead to those results. King County can and already does regulate roadway use *with or without* a franchise agreement. Nothing in the trial court's order changes long-standing Washington law establishing that a county has authority to "grant" a franchise, not to "require" one (*Burns, supra*), and that "until both parties agree on terms, no franchise exists" and "a city [or county] may not compel [a utility] to agree to its terms" (*City of Lakewood, supra*). The only real effects of the trial court's order are (i) to confirm that King County can continue regulating the utilities' use of county roadways for delivery of utility service, as a secondary use subject to the primary use of the roadways for travel purposes, and can make the utilities pay for the costs of such regulation, and (ii) to prohibit the County from

requiring the utilities to pay rent for using the public roadways for delivery of public utility service.

The topics discussed at pages 14-17 of WSAC's brief are subjects that can be addressed under a county's unchallenged powers to regulate roadway use. The only limits on such powers are that they must be exercised in the public interest and consistently with applicable law, and they must not be exercised arbitrarily or capriciously.³ WSAC's gross mischaracterization of the trial court's ruling and the utilities' arguments as suggesting that the utilities have "unfettered authority to use county ROW," or that "utilities themselves may set the parameters of their use of ROW," or that the utilities "could engage in whatever behavior they choose on the county ROW" (WSAC Br. at 19), is simply absurd hyperbole. The trial court held nothing of the kind, and the utilities argued nothing of the kind.

Finally, it must be noted that WSAC's argument that allowing the ruling below to stand would lead to widespread litigation (WSAC Br. at 17-20), is exactly 180° wrong. If the order below is allowed to stand, roadway use and regulation will continue pretty much as they have prior to the County's recent adoption of Ordinance 18403, except with some higher

³ One specific limitation relates to the subject of indemnification. As explained in the Districts' Brief at 57-58 and in the Intervenor-Respondents' Brief at 14 n.10, under RCW 70.315.060 a county may not require a water utility to indemnify a county against damages arising from fire suppression activities unless the parties "mutually agree."

administrative fees and regulatory charges. But if the County is allowed to impose its new rental charge under the Ordinance, there will likely be litigation galore over the amount of rent owed by each utility for each stretch of county roadway. That is because of the vague, almost totally subjective standards to be used in determining the amount of the rental charge under the Ordinance. *See* Ordinance 18403, §§8.C & 8.D (CP 1180).⁴ It is hard to imagine any set of issues more likely to lead to litigation than those presented in attempting to apply those vague factors in determining the amount of rent to be paid.

Moreover, WSAC (and for that matter King County itself) may not fully realize the depth of the potential legal trouble for the counties they are inviting by arguing that charging the utilities rent for use of the county

⁴ §8.C provides: “Franchise compensation shall be determined through consideration of the following relevant factors, not all of which must be applied to each franchise: the land value of right-of-way within the applicant's service area; the approximate amount of area within the right-of-way that will be needed to accommodate the applicant's use; a reasonable rate of return to King County for the applicant's use of the right-of-way; the business opportunity made available to the applicant; density of households served; a reasonable annual adjustment; and other factors that are reasonably related to the value of the franchise or the cost to King County of negotiating the franchise.”

§8.D provides: “The facilities management division is authorized to establish policies that create a process for the determination of franchise compensation. These policies may include different processes for the determination of franchise compensation depending on the size and complexity of the franchise. As part of the process, the facilities management division may request from the applicant information relevant to the determination of franchise compensation. Also as part of the process, the facilities management division shall make a reasonable estimate of franchise compensation and provide that estimate to the applicant. Thereafter, the applicant shall have a reasonable opportunity to suggest adjustments to the estimate in order to reach agreement with King County as to the amount and type of franchise compensation.

roadways is necessary to avoid violating constitutional prohibitions on gifts of public property and accountancy act prohibitions on providing benefits to other agencies without receiving “true and full” payment therefor. See WSAC Br. at 14; Wash. Const., Art. VIII, §7; RCW 43.09.210(3). If rental payments were required by the state constitution or accountancy act, then King County and all other counties in Washington must have been violating the constitution and the accountancy act for all these many years by failing to charge such rent. The potential opportunities for taxpayer class actions against Washington counties are enough to make an enterprising class action attorney swoon.

IV. CONCLUSION

WSAC’s brief makes an eloquent case for county regulation of roadway use. But nobody disputes a county’s right to regulate county roads. That is not what this appeal is about. It is about whether King County may lawfully require public utilities to pay rent for using public rights-of-way. WSAC’s brief offers no helpful law, information or argument on that issue.

Respectfully submitted this 3rd day of September, 2019.

Richard Jonson, WSBA #11867
JONSON & JONSON, P.S.

HELSELL FETTERMAN LLP

By 
David F. Jurca, WSBA #2015

Attorneys for Intervenor-Respondents

HELSELL FETTERMAN LLP

September 03, 2019 - 1:29 PM

Transmittal Information

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Appellate Court Case Number: 96360-6
Appellate Court Case Title: King County v. King County Water Districts, et al

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- rthomas@perkinscoie.com
- ryancrawfordthomas@gmail.com

- spitzerhd@gmail.com
- sydney.henderson@pacificallawgroup.com
- tsarazin@insleebest.com

Comments:

Sender Name: David Jurca - Email: djurca@hellsell.com

Address:

1001 4TH AVE STE 4200
SEATTLE, WA, 98154-1154
Phone: 206-689-2140

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