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No. 96360-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

KING COUNTY WATER DISTRICTS Nos. 20, 45, 49, 90, 111, 119 and 125,
CEDAR RIVER WATER AND SEWER DISTRICT; COAL CREEK UTILITY
DISTRICT; COVINGTON WATER DISTRICT; FALL CITY WATER
DISTRICT; HIGHLINE WATER DISTRICT; LAKEHAVEN WATER AND
SEWER DISTRICT; NE SAMMAMISH SEWER AND WATER DISTRICT;
SAMMAMISH PLATEAU WATER AND SEWER DISTRICT; SKYWAY
WATER AND SEWER DISTRICT; SOUTHWEST SUBURBAN SEWER
DISTRICT; VALLEY VIEW SEWER DISTRICT; VASHON SEWER
DISTRICT; WOODINVILLE WATER DISTRICT

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

Respondents.

**DISTRICTS' ANSWER TO *AMICUS CURIAE* BRIEF FILED BY
WASHINGTON STATE ASSOCIATION OF COUNTIES**

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I. INTRODUCTION

The District Respondents (“Districts”) are not surprised that the Washington State Association of Counties (“WSAC”) has decided to weigh in on this case by filing an *amicus curiae* brief seeking the reversal of the trial court’s order. Many of WSAC’s member counties suffer from the same chronic financial challenges as those experienced by King County (“County”). CP 213-14. The counties’ inability to secure express legislative authority to impose utility taxes has led to the current situation where the County is attempting to charge water-sewer districts, and other public utilities providing water, sewer, gas and electricity, what it characterizes as “rent” for the use of public rights-of-way.

The issue before this Court is not whether the County has the right to regulate and control public rights-of-way. Its right to do so has not been contested by the Districts or the Intervenor Respondents. Rather, as noted by the trial court, “the issue before this Court is whether the franchise compensation as set forth in [Ordinance 18403] is legal.” RP 56. Instead of addressing the legal issues relating to the County’s imposition of the rental fee/tax, WSAC largely ignores this issue, choosing only to make a perfunctory statement that charging reasonable rental compensation for the use of public rights-of-way is consistent with long standing

constitutional prohibitions on gifts of public funds (as to private utilities) and accountancy principles (as to public utilities). WSAC Br. at 14. However, WSAC offers no citations or legal argument to support its conclusory statement. The Districts' and the Intervenor Respondents' arguments regarding these unsupported assertions are addressed in their respective Response briefs.

Instead of arguing the legal merits of the trial court's decision as it relates to the legality of the rental fee/tax, WSAC attempts to convince this Court, without supporting evidence, that upholding the trial court's decision will "dramatically alter decades of established county regulation of county-controlled public rights-of-way" which will deprive counties of the ability to regulate and control public right-of-way under their jurisdiction. WSAC Br. at 1. However, upholding the trial court's decision will not deprive counties of their recognized right to regulate and control public rights-of-way. Certainly (and correctly) it will prohibit the County, as well as other Washington counties that might follow the County's lead, from imposing similar rental fees/taxes against water, sewer, gas and electric utilities to fund the counties' general government programs and services.

In many respects, WSAC's decision to file an *amicus curiae* brief

in support of the County's appeal confirms the Districts' and the Intervenor Respondents' deep concerns that counties across the State are keeping a close watch on this case and will seek to impose similar rental fees/taxes as a new revenue source if the Court does not affirm the trial court's ruling invalidating portions of the Ordinance relating to the rental fee/tax.

II. STATEMENT OF THE CASE

The Districts incorporate herein the statement of the case contained in the Districts' Response Brief and the Intervenor Respondents' Response Brief to the County's opening brief.

In addition, the following facts are particularly relevant to the issues raised by WSAC in its *amicus curiae* brief.

A. King County is the First County to Attempt the Imposition of the Rental Fee/Tax.

In their motion for summary judgment, the Districts advised the trial court that they were not aware of any other counties or cities within the state of Washington that charge water-sewer districts rent to use public rights-of-way. CP 1014. At the summary judgment hearing, the County conceded that no other county in the State was charging rent for

the use of rights-of-way in the manner authorized by the Ordinance. RP 9-10.

B. The County has Allowed Utilities to Use Rights-of-Way On Expired Franchises for Years.

The County has entered into approximately 170 franchise agreements with utilities using the public rights-of-way. At the time the Ordinance was adopted, 73 franchises (approximately 43%) were either expired or expiring in the 2017-2018 biennium. CP 286, CP 1248.

The County's Director of Facilities Management Division testified that Puget Sound Energy hadn't had a franchise for "almost two decades." CP 231. In addition, several of the Districts sued by the County also had expired franchises. For example, Sammamish Plateau Water and Sewer District's franchises expired in 2006 and 2010. CP 120. Skyway Water and Sewer District's franchises expired in 2011. CP 804. In fact, Skyway Water and Sewer District was one of 5 water-sewer districts that had been attempting to negotiate new franchises with the County since 2014. The other four districts included: Coal Creek Utility District, King County Water District No. 125, Sammamish Plateau Water and Sewer District and Valley View Sewer District. Yet, the County declined to

enter into franchise negotiations with these districts for new franchise agreements. CP 804-05.

The record contains no evidence that the lack of franchises with these utilities has impacted the County's ability to regulate the rights-of-way.

III. ARGUMENT

WSAC attempts to portray the trial court's ruling as one which could dramatically interfere with the authority of counties to regulate and control public rights-of-way. WSAC's Br. at 1. WSAC's arguments are unsupported and should be rejected.

A. The Districts Adopt the Intervenor Respondents' Answer to WSAC *Amicus Curiae* Brief.

The Intervenor Respondents' Answer to WSAC's *amicus curiae* brief succinctly and effectively responds to WSAC's feigned concerns about the potential impact of the trial court's ruling. In order to avoid unnecessary repetition, the Districts' adopt and support the arguments contained in the Intervenor Respondents' Answer to WSAC's *amicus curiae* brief.

B. Counties Do Not Need Franchises to Regulate the Use of Rights-of-Way.

WSAC's main concern relates to the trial court's ruling which provides as follows:

“7. 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;”

WSAC Br. 2-3; CP 2283. WSAC asserts that this portion of the ruling calls into question the necessity of franchise agreements and eliminates a county's ability to require any terms or conditions in conjunction with granting franchises. WSAC Br. 1-2. WSAC's assertions are not well founded for several reasons.

As established by the Intervenor Respondents, Paragraph 7 of the order is an accurate statement of the law and it should not be a controversial subject. Intervenor Respondents' Answer 3-4 (*citing Burns v. City of Seattle*, 161 Wn.2d 129, 142, 164 P.3d 475 (2007) and *City of Lakewood v. Pierce County*, 106 Wn. App. 63, 74, 23 P.3d 1 (2001)).

Further, it is important to highlight the fact that the language in Paragraph 7 of the trial court's order is substantially similar in all material respects to Paragraph 6 of the *proposed* order which was agreed to by all parties and submitted to the trial court for consideration. The *proposed*

language submitted to the trial court read as follows:

Franchises are contracts which require the parties to negotiate and agree upon terms. As such, King County cannot compel the utility defendants to accept King County's franchise terms.

CP 2187, CP 2214.

For good reason, the County has not previously asserted the argument that Paragraph 7 of the trial court's order is erroneous. Therefore, it is improper for this issue to be raised for the first time by WSAC in its *amicus curiae* brief. See *Long v. Odell*, 60 Wn.2d 151, 153-54, 372 P.2d 548 (1962) (an appellate court does not generally consider points raised only by *amici curiae*).

Additionally, WSAC's arguments regarding the purported dramatic impact the trial court's decision could have on counties is based on the erroneous assumption that counties must be able to require utilities to enter into franchise agreements in order to be able to regulate and control the utilities' use of public rights-of-way. In most cases, counties and utilities will be able to negotiate mutually acceptable terms for a franchise. However, even if negotiations fail to result in a franchise agreement, it is clear that counties do not need franchises in order to regulate and control secondary uses of rights-of-way by utilities.

1. Counties have a recognized statutory authority to regulate public rights-of-way.

As argued in other briefs, it is not contested by any party in this case that RCW 36.75.020 and RCW 36.32.120 both grant counties the authority to regulate and control county roads. RC W 36.75.020 gives counties the authority to establish, lay out, construct, alter, repair, improve, and maintain county roads as agents of the state. Similarly, RCW 36.32.120(2) authorizes county legislative bodies to “[l]ay out, discontinue, or alter county roads and highways within their respective counties, and do all other necessary acts relating thereto according to law.”

Where the Districts and the Intervenor Respondents part company with the County and WSAC, is on the scope of the regulatory powers granted to counties through these statutes. The Districts’ and the Intervenor Respondents’ position, accepted by the trial court, is that the right to regulate rights-of-way does not authorize the imposition of the rental fee/tax, which is really the only issue before this Court. The Districts’ legal arguments regarding the invalidity of the County’s Ordinance and the rental fee/tax are thoroughly briefed in the Districts’ Response to the County’s opening brief and in the record below.

2. Utility Accommodation Policies.

One prime example of counties' authority to regulate and control public rights-of-way are regulations adopted by counties in order to comply with Chapter 136-40 WAC (Standards of Good Practice – Accommodation of Utilities on County Roads.) These WAC regulations recognize the authority of counties to regulate and control the use of rights-of-way by utilities. Importantly, WAC 136-40-010(3) specifically recognizes the authority of counties to:

Exercise its police power; each county legislative authority shall adopt a generally applicable written policy ("utility policy") to provide administrative, procedural, and technical guidance for the installation, replacement, adjustment, relocation, and maintenance of all above and below ground utilities and other transmission or transport facilities located within all county road rights of way.

WAC 136-40-010(3).

Further, WAC 136-40-020 contains a comprehensive list of the items that are required to be included in a county's utility accommodation policy. For example, utility accommodation policies are required to: (1) address all public and private utilities installed, replaced, adjusted, relocated or maintained within a county road pursuant to franchises, permits and/or exemptions from the permit process; (2) include general standards and requirements for the location, design and construction of

each utility; (3) incorporate a written permit process for all utility work not exempted by the provisions of the policy; (4) address location and alignment of underground and above ground facilities; and (5) address site restoration and cleanup, traffic control and other public safety issues. These are precisely the types of policies that WSAC wrongly asserts can only be addressed through mandatory franchise agreements. As a result, these WAC regulations on utility accommodations severely undercut WSAC's arguments and demonstrate that WSAC is engaging in pure hyperbole in its *amicus curiae* brief.

Additionally, WAC 136-40-030 requires all counties to adopt similar utility accommodation policies. Pursuant to this authority, by Ordinance 13015 dated February 23, 1998, the County adopted its "Regulations for Accommodations of Utilities on County Road Rights-of-Way." ("Regulations"). CP 424-464. The County's Regulations contain 15 separate chapters covering issues like relocations, underground and above-ground utilities, restoration, traffic control, emergency repairs, and permit applications. In fact, Section 1.04 of the County's Regulations states, in part, that: "All Utilities with facilities within King County road rights-of-way, *whether or not the Utility holds a franchise from King County*, shall comply with these Regulations and with all applicable

federal, state and local laws, codes, rules and regulations. . .” CP 432 (Emphasis added).

As such, the County’s own Regulations acknowledge that the County has the authority to regulate utilities regardless of whether the utilities have a franchise with the County or not. The Districts do not challenge the County’s authority to impose reasonable regulations relating to the use of public rights-of-way.

Moreover, the fact that the County has allowed a substantial number of franchises to expire over the past 10-20 years also undercuts WSAC’s argument that without franchises counties would be unable to regulate and control public rights of way. There is no evidence in the record to establish that the lack of current franchises with a substantial number of utilities has in any way prevented the County from regulating the county roads and rights-of-way.

3. County Road Standards and Work in the Rights-of-way.

In addition to the County’s Utility Accommodation Policy, the County has also adopted King County Road Standards that are addressed in King County Code (KCC) Chapter 14.42. These Road Standards provide an additional set of regulations which would have to be followed by utilities working within County Roads. The enforceability of these

Road Standards does not require a franchise agreement.

Further, the County has adopted additional regulations governing utilities on County rights-of-way which are contained in KCC Chapter 14.44. It is important to note that KCC 14.44.020 specifically requires the issuance of permits for all utility work occurring within the County's rights-of-way, even utilities that hold franchises. The permitting process provides another opportunity for the County to impose reasonable terms and conditions on the performance of utility work within County rights-of-way.

The preceding paragraphs provide ample evidence of the County's ability to regulate its rights-of-way, with or without a franchise.

C. The Sample Franchise Agreements Included in the Appendices of WSAC's *Amicus Curiae* Brief Are Irrelevant.

WSAC attached to its *amicus curiae* brief copies of six franchises that were not a part of the record below and that do not involve the Districts, the Intervenor Respondents or the County. The Districts and the Intervenor Respondents moved to strike WSAC's brief believing that the six franchise agreements included in the appendices to WSAC's brief were improper pursuant to RAP 10.3(a) and RAP 9.11. However, after considering the Districts' and the Intervenor Respondents' objections, the

Court allowed WSAC to file its *amicus curiae* brief. Since the six franchise agreements are now before this Court, the Districts feel compelled to address the relevancy of these six franchise agreements.

The franchise agreements offered by WCAS are irrelevant to the issue involved in this case which is the legality of the rental fee/tax imposed by the County's Ordinance. Notably, none of the six franchises include a rental fee/tax of the type enacted by the County. As previously noted, King County is the first county to attempt the imposition of a rental fee/tax on water-sewer districts as a condition of using its rights-of-way. Moreover, the terms of the various franchises actually undercut WSAC's argument that franchises are necessary in order for counties to be able to regulate the use of their rights-of-way. In fact, the franchises actually establish that these counties already regulate the use of rights-of-way through other regulations adopted by the counties and do not rely solely upon franchise agreements for that purpose.

For example, all the franchises include terms which require the issuance of permits as a condition of working in rights-of-way. *See* Peshastin Water District franchise (Chelan County) ¶12 App. 7; Zirkle Fruit Company franchise (Kittitas County) §3.A App. 16; Jopp Water Company franchise (Pierce County) ¶I App. 27; Silver Lake Water &

Sewer District franchise (Snohomish County) ¶4.2 App. 48; Whitworth Water District No. 2 franchise (Spokane County) ¶15 App. 82; and Lake Whatcom Water & Sewer District franchise (Whatcom County) ¶5 App. 103. In other words, the granting of a franchise does not provide franchisees with unfettered use of the counties' rights-of-way. Even franchised utilities would need to seek permits from the counties which gives counties an opportunity to review and consider project specific impacts that can be addressed in the permit issuance process. Even without a franchise, each of these counties would still retain the right to impose reasonable conditions on utilities working in the rights-of-way through the permitting process.

In addition, the following items in the six franchises provide additional evidence of the counties' regulatory powers which exist outside of the franchise agreements.

1. Paragraph 5 of the Peshastin franchise acknowledges that Chelan County retains all powers and rights to regulate the use and control of county roads. Peshastin Water District franchise. App. 5.

2. Paragraphs 3C and 3H of the Zirkle Fruit franchise refers to the requirement to follow the Kittitas County's utility accommodation policy. Zirkle Fruit Company Franchise. App. 16.

3. Paragraph I of the Jopp Water Company franchise refers to the requirement to comply with the general rules adopted by the Pierce County Public Works and Utilities Department. Jopp Water Company Franchise. App. 27.

4. Section 1 of the Silver Lake Water & Sewer District franchise refers to the requirement to follow the County's Engineering Design and Development Standards. Silver Lake Water & Sewer District Franchise. App. 46.

5. Paragraph 15 of the Whitworth Water District No. 2 Franchise requires plans to comply with the County's Utility Accommodation Plan Standards. Whitworth Water District No. 2 Franchise. App. 84.

6. Section 9 of the Lake Whatcom Water & Sewer District Franchise acknowledges that Whatcom County retains all powers and rights to regulate the use and control of county roads. App. 105.

The point of the preceding paragraphs is to demonstrate that franchises do not take the place of regulations that are imposed by counties to regulate and control the use of public right-of-way. Therefore, even without a franchise, the six counties that are the subject of the franchise agreements offered by WSAC still have the ability to utilize

other regulations involving work within public rights-of-way.

It should also be noted that each of the referenced six counties have adopted Utility Accommodation Policies as required by Chapter 136-40 WAC. *See* Chelan County Code 15.30.070(18); Kittitas County Code 12.23.010; Pierce County – Manual on Accommodating Utilities (website link:<https://www.co.pierce.wa.us/ArchiveCenter/ViewFile/Item/4710>); Snohomish County Engineering Design and Development Standards – Chapter 8 of Spokane County Code Chapter 9.55; and Whatcom County Code Chapter 12.27. These utility accommodation policies demonstrate that many of the concerns raised by WSAC about terms that have to be included in a franchise agreement in order to protect counties and the public are, or can be, covered within these policies. As such, WSAC’s assertion that a decision by this Court upholding the trial court’s ruling will result in utilities refusing to enter into franchise agreements and that the counties will be left without any regulatory authority is unfounded.

IV. CONCLUSION

WSAC’s *amicus curiae* brief offers little, if any, relevant arguments on the issue before this Court. Rather than address the legality of the County’s rental fee/tax, WSAC attempts to convince this Court with new “facts” and frail arguments that counties would not be able to

function if they can't force utilities to sign franchise agreements. As demonstrated above, even without a franchise, counties will retain the legal authority to regulate and control public rights-of-way. Therefore, the Court should disregard WSAC's brief in its entirety.

Respectfully submitted this 3rd day of September, 2019.

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I, Leslie M. Addis, declare under penalty and perjury under the laws of the State of Washington, that on the 3rd day of September, 2019, I caused to be served a true and correct copy of the foregoing document, via E-Service through the Washington State Appellant/Supreme Court Portal, upon the parties listed below:

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