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STATE OF WASHINGTON  
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No. 96585-4

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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LAKEHAVEN WATER and SEWER DISTRICT, et al.,

Appellants,

v.

CITY OF FEDERAL WAY,

Respondent.

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**BRIEF OF AMICUS SUBMITTED BY THE RENTAL HOUSING  
ASSOCIATION OF WASHINGTON IN SUPPORT OF  
APPELLANTS**

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## **I. IDENTITY AND INTEREST OF AMICUS**

Rental Housing Association of Washington (RHA) is a statewide non-profit organization in existence since 1935. RHA provides education and assistance to rental property owners to comply with rental housing laws, and regularly advocates for uniformity and fairness in state and local policymaking affecting rental property. Because housing costs imposed by government are often passed directly to tenants or become reflected in the rental rates charged to tenants, both landlords' and tenants' interests in such costs are aligned.

Most of RHA's 5,300 members rent out single-family homes, often on a temporary basis for work, personal, or financial reasons. Members of the RHA have rental properties in the City of Federal Way. Over ninety percent of its members are owners of less than 10 residential units. The RHA is committed to promoting public policies that support a viable and efficient private market for affordable housing. This includes support for fair tax policies and adherence to the constitutional protections against discriminatory and excessive taxation of real estate. RHA opposes Federal Way's effort to place a further burden on the cost of basic utility services provided by governments because it is contrary to the goal of promoting affordable housing.

## **II. INTRODUCTION**

By Ordinance 18-847, the City of Federal Way seeks to tax governments for providing essential water and sewer service, with the funds to be used for general purposes. The substantive effect of that Ordinance, if upheld, would be to impose a regressive tax on the ratepayers of the respondent governments (the “Districts”) and to open the door to similar exactions around the state. Federal Way has no authority to impose such a tax under the governmental immunity doctrine, and for good reason. If essential public services provided by governments are to be taxed, the Legislature should be the one expressly authorizing it. The trial court’s decision upholding that tax should be reversed.

## **III. STATEMENT OF THE CASE**

RHA adopts the Statement of the Case presented by the Districts.

## **IV. ARGUMENT**

### **A. If the Court authorizes Federal Way to Tax the Districts, It Will Have a Statewide Effect**

If the Court authorizes Federal Way to impose a utility tax on the Districts, as noted below, it will affect ratepayers across the State of Washington in a regressive manner because the Districts and other governmental utilities, such as Title 54 Public Utility Districts, will recover the tax from their ratepayers. Federal Way is not the first city to attempt to tax essential public services, such as water, provided by another government entity. Federal Way passed its ordinance after Division III’s

decision in *City of Wenatchee v. Chelan County Pub. Util. Dist. No. 1*, 181 Wn. App. 326, 325 P.3d 419 (2014), which decision held that the governmental immunity doctrine that generally precludes one municipality from taxing another absent express legislative authorization did not apply to proprietary activities such as providing water. In addition, after Federal Way passed its ordinance, the City of Edgewood also passed an ordinance seeking to tax the essential public services provided by a Title 57 water-sewer district. See City of Edgewood Ordinance No. 18-0520, <http://cms4.revize.com/revize/edgewoodwa/ORDINANCE%20NO.%2018-0520.pdf> (last visited Nov. 18, 2019 (authorizing 6% tax on water services)). There is presently a lawsuit pending over the legality of that tax, and the matter is stayed pending resolution of the legality of Federal Way's utility tax. Appendix A, Nov. 14, 2018 Order Staying Case. Thus, it is clear that a ruling in favor of Federal Way will result in the imposition of utility taxes on essential public services such as water and sewer by other cities across the state.

Moreover, by law, Title 57 water-sewer districts and other governmental utilities subject to such a tax (e.g., Title 54 public utility districts) must pass the tax through to their utility ratepayers as a "cost of service" (see, e.g., RCW 57.08.081(2)), applicable to Title 57 water-sewer

districts). Thus, 100% of the taxes imposed by cities on essential public services such as water and sewer will be passed through to ratepayers. As the tax is uniform, it is regressive (i.e., it more adversely affects those with less money to pay for necessities such as water and sewer service). Therefore, a ruling in favor of Federal Way will result in a regressive tax being imposed upon ratepayers in cities all over the State of Washington.

B. There is No Limit on the Amount of the Tax

The statewide impact of a ruling in favor of Federal Way will be magnified by the fact that there is *no limit on the amount of the tax*. Although Federal Way's tax is 7.5% and the City of Edgewood's tax is 6%, if the Court ruled such taxes lawful, there is no legal limit in RCW 35A.82.020, the statute which Federal Way contends authorizes the tax, on the rate at which these essential public services can be taxed. Federal Way admitted that it "is not aware of any limitation under state law regarding the tax rate for a utility tax imposed on water and sewer utilities." Federal Way's own evidence documented tax rates by cities on their own utilities as high as 36%. CP. 389, 646. Moreover, although there *may* be a requirement to include a referendum clause when a city initially imposes a utility tax or raises the rate, this is not clear—and, either way, absent the referendum requirements being met, a city can impose a utility tax at one

rate on essential public services one year and then increase the rate via an ordinance amendment the next year. See <http://mrsc.org/Home/Explore-Topics/Finance/Revenues/Utility-Tax.aspx> (last visited Nov. 19, 2019). Thus, a city would be free to repeatedly increase the amount it is taxing another municipal entity for that municipal entity's provision of essential public services (which tax will be passed on directly to ratepayers).

C. Taxes on Essential Public Services such as Water and Sewer Will Adversely Impact Tenants

Utility taxes adversely affect tenants. In many instances, such as for tenants in single family homes and newer apartment buildings, which tend to be submetered, tenants directly pay for their utilities, including any governmental taxes passed through by the utilities. Even in those instances where the landlord is responsible to pay the utility costs directly, such as in older apartment buildings, those costs are factored into the rent paid by tenants. To the extent that costs are not passed through to tenants, they are borne by the landlords. This increased cost makes it less likely that a landlord will decide it is economically feasible to rent property (as compared to selling, redeveloping into condos, etc.).

Federal Way has already recognized that vulnerable groups can be affected by utility tax increases through its Utility Tax Rebate Program, which provides assistance for senior and disabled citizens.

<https://www.cityoffederalway.com/page/utility-tax-rebate-program> (last visited Nov. 19, 2019) (“In 2003, the Federal Way City Council recognized that senior and disabled citizens could be negatively affected by increases in utility taxes. They created the Utility Tax Rebate Program. In 2007, disabled citizens were included in the program.”).<sup>1</sup> Given the adverse impacts on vulnerable populations, the Court should not countenance the taxation of essential public services provided by other governments where the express imprimatur of the Legislature is lacking.

D. Water and Sewer are Essential Public Services

As noted by the Districts, in the modern age, potable water and sewage collection, treatment, and disposal are central to society’s existence. (Reply Br. at 17.) This Court has recognized that water and sewers are essential public services. *See Southcenter Joint Venture v. National Democratic Policy Committee*, 113 Wn.2d 413, 432, 780 P.2d 1282 (1989) (noting that “[a] shopping mall is not a town and malls do not provide all essential public services such as water, sewers, roads and sanitation...”). Sewage treatment facilities and water plants are essential

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<sup>1</sup> Where the utilities are in the name of the landlord, it does not appear vulnerable groups would qualify for the limited programs that Federal Way provides to senior and disabled citizens. *See* Federal Way Mun. Code §§3.10.220 (providing for reimbursement to qualified individuals for “all utility bills billed to and paid by the person directly”) & .230 (requiring that person requesting relief “have made the payment of city utility taxes from his or her income or resources”).

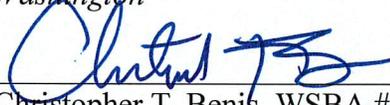
public facilities within the meaning of RCW 36.70A.200(1)/WAC 365-196-550. The provision of water and adequate plumbing is so important that they are included as part of the Residential Landlord Tenant Act. RCW 59.18.060(8), (11). The Legislature should have the chance to make the final decision on whether a City can tax a government entity providing such essential public services.

#### V. CONCLUSION

For the foregoing reasons, a ruling in favor of Federal Way will likely result in the cost of essential public services such as water and sewer service increasing, perhaps steeply. As landlords and/or tenants are forced to bear these tax increases, the RHA's goal of promoting affordable housing will be undermined.

Respectfully submitted this 2 day of <sup>December</sup> November, 2019.

*Attorney for Rental Housing Association of  
Washington*

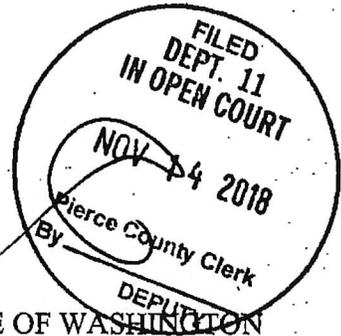


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# Appendix A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

LAKEHAVEN WATER DISTRICT, a  
municipal corporation,  
  
Petitioner,  
  
v.  
  
CITY OF EDGEWOOD, a municipal  
corporation,  
  
Respondent.

NO. 18-2-07769-4

**[PROPOSED] AGREED ORDER  
GRANTING MOTION FOR ORDER  
AUTHORIZING PAYMENT INTO  
REGISTRY OF THE COURT AND  
STAYING MATTER PENDING  
RESOLUTION OF RELATED CASE**

**[Clerk's Action Required]**

**ORDER**

THIS MATTER having come before this Court on Petitioner's MOTION FOR ORDER AUTHORIZING PAYMENT INTO REGISTRY OF THE COURT AND STAYING MATTER PENDING RESOLUTION OF RELATED CASE, and this Court having considered the Motion, including the declarations related thereto, and the filings and papers on record with the Court and being fully advised in the premises, and Respondent having agreed to entry of this order,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Petitioner's Motion is GRANTED.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Petitioner is authorized to submit amounts related to the amount the Respondent claims is due, which is

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1 6.0% of the revenue Petitioner receives from water and sewer service rates and connection  
2 charges collected from properties and property owners within Edgewood's municipal  
3 boundaries, into the Court Registry. The Clerk shall place such deposits in an interest bearing  
4 account per RCW 36.48.090. Amounts so deposited and interest accruing thereon shall remain  
5 until a subsequent order authorizing dispersal is entered by this Court. If and to the extent that  
6 Lakehaven deposits funds to cover the amount that Respondent claims is due, any claim to  
7 prejudgment interest related to those funds shall be limited to the amount of interest that accrues  
8 on such funds less amounts required to be paid to a third party under RCW 36.48.090.

9 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that this Order  
10 (a) is not intended as and shall not be construed to be a finding that Petitioner, in fact, owes any  
11 amount to Respondent and (b) is not and is not intended to be a limitation on the ability of  
12 Lakehaven to argue that any amount so deposited or any other amount is not due to Respondent.

13 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the Order  
14 Setting Case Schedule filed on August 17, 2018, is hereby VACATED and this matter is  
15 STAYED pending further Order of this Court.

16 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Petitioner  
17 is directed to file an update with this Court and Respondent regarding the status of *Lakehaven*  
18 *et al. v. City of Federal Way*, King County Superior Court Cause No. 18-2-08785-6 KNT, on or  
19 before August 24, 2019, and every six months thereafter during the pendency of this stay.

20 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that either  
21 party, at any time and upon giving notice provided for by the Civil and Local Rules, may file a  
22 motion seeking an order lifting this stay, and such an order shall only be granted upon a showing  
23 of good cause by the moving party or the stipulation of the parties.

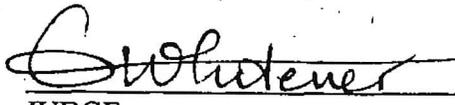


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IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that, during the pendency of this stay, the parties shall not conduct discovery or otherwise take actions to litigate this case.

ENTERED this 9th day of November, 2018.

  
JUDGE

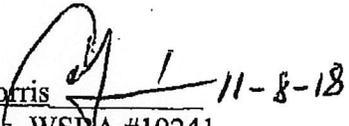
**JUDGE G. HELEN WHITENER**

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# HECKER, WAKEFIELD & FEILBERG, PS

December 02, 2019 - 11:10 AM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96585-4  
**Appellate Court Case Title:** Lakehaven Water and Sewer District, et al v. City of Federal Way

### The following documents have been uploaded:

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- 965854\_Motion\_20191202110816SC273516\_8700.pdf  
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