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No. 96585-4

SUPREME COURT
OF THE STATE OF WASHINGTON

LAKEHAVEN WATER AND SEWER DISTRICT, HIGHLINE
WATER DISTRICT, and MIDWAY SEWER DISTRICT,
municipal corporations,

Appellants,

v.

CITY OF FEDERAL WAY, a municipal corporation,

Respondent.

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A. INTRODUCTION

The Court granted leave to the Rental Housing Association of Washington (“RHAWA”), the Alderwood Water & Wastewater District (“Alderwood”), the Washington Association of Sewer and Water Districts (“WASWD”), and the Washington State Association of Municipal Attorneys/Association of Washington Cities (“WSAMA”) to provide *amicus curiae* briefs in this case.

The appellant water/sewer districts (“Districts”) provide this single answer to all four briefs, focusing on the City’s taxing authority and the governmental immunity doctrine.¹

B. STATEMENT OF THE CASE

The *amici* largely rely on the Statements of the Case provided by the Districts or the City of Federal Way (“City”).

C. ARGUMENT

(1) RCW 35A.82.020 Does Not Confer Express Authority Upon Cities to Tax Other Units of Government

Unaddressed by any of the *amici* is a gateway question – the constitutional principle of local government taxation authority. The Districts address this key issue because of developments in the law

¹ None of the *amici* briefs addressed the Districts’ vagueness or article I, § 12 constitutional arguments. Consequently, the Districts rely on their merits briefs on those issues.

regarding its application in this case. If the Court agrees with the Districts on the City's lack of express statutory authority to impose its utility tax on the Districts, as other political subdivisions of the State, the Court does not need to reach the question of the scope of the governmental immunity doctrine.

Our Constitution contemplates local governments having taxation authority, Wash. Const. art. VII, § 9, art. XI, § 12, but this authority is *not* self-executing. The Constitution vests exclusive authority in the Legislature to *expressly* confer such local government taxing authority where, in its discretion, it chooses to do so. *City of Spokane v. Horton*, 189 Wn.2d 696, 702, 406 P.3d 638 (2017); *Watson v. City of Seattle*, 189 Wn.2d 149, 165, 401 P.3d 1, 9 (2017); *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 365-66, 89 P.3d 217 (2004); *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 343, 662 P.2d 845 (1983); *Carkonen v. Williams*, 76 Wn.2d 617, 627, 458 P.2d 280 (1969). In its recent decision in *King County v. King County Water Dists. Nos. 20, 45, 49, 90, 111, 119, 125*, ___ Wn.2d ___, 453 P.3d 681 (2019) ("*King County*"), this Court recognized the continuing validity of this principle even as to a home rule county:²

² Indeed, this Court's general analysis of home rule authority in *King County* fully undercuts not only the City's abbreviated home rule argument offered as a basis for its

This broad power means that generally, King County may legislate as it sees fit, so long as it does so within the confines of state and constitutional law. *Id.* However, King County may not tax without express authorization from the legislature. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 855, 827 P.2d 1000 (1992) (citing *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982)).

Id. at ¶ 14. It is no different for home rule cities like the City here.

Moreover, in *Horton*, this Court specifically rejected the proposition that a general legislative delegation of “all powers of taxation” in RCW 35A.11.020 included the power to grant tax exemptions, a point not addressed by the City or WSAMA in connection with that decision. This Court observed: “The delegation of powers of taxation under RCW 35A.11.020 is specific and limited by the statute’s express language.” 189 Wn.2d at 708. In other words, while the Legislature expressly conferred certain tax powers upon cities, it did not confer the authority to grant

authority to tax other governments, resp. br. at 10, but WSAMA’s echoing of that baseless argument as well. WSAMA br. at 11-14. Of course, WSAMA ignores the fact that the *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) court *rejected* its contention that general grants of taxing authority to local governments in RCW 35A.11.020 and RCW 35A.82.020 gave cities *carte blanche* to tax other governments. Not only does the City lack the power to tax, as the *King County* court noted, it lacks the authority to act without legislative authorization if the State’s interests are paramount to or joint with that of cities. *King County* at ¶¶ 14, 42-43. Clearly, as to taxation of other political arms of the State, the State’s interest meets that test. Moreover, the State’s interest in this area is at least joint where it created Title 57 RCW districts and entrusted the provision of water/sewer services and the exercise of governmental powers to them. The City must have express legislative authorization to act.

exemptions.³ *See also, Algona*, 101 Wn.2d at 791-93 (broad taxation statutes did not confer authority to tax other governments). As to powers pertaining to taxation, the Legislature must be specific in authorizing local governments to exercise them; it does not confer the power to levy taxes by implication, as the City suggests.

The power of one government to tax another is no different than tax exemption authority; such a power that must be *expressly* conferred upon the government seeking to assess such a tax. *Algona*, 101 Wn.2d at 794. Washington's antagonism toward allowing one municipality to tax another is well-understood as to excise taxes. As the *Algona* court observed: "The majority of jurisdictions adhere to this rule on the theory that a local tax imposed on a political subdivision such as a county is tantamount to a tax imposed on the state." *Id.* at 793-94. The Court there rejected the notion that broad taxing authority statutes like RCW 35A.11.020 constituted sufficiently express authority to allow taxation of another government. *Id.* at 793 ("The general grant of taxation power on which Algona relies in RCW 35A.11.020 contains no express authority to levy a tax on the state or another municipality."). Indeed, the City has never cited a *single*

³ The Court also noted that our Constitution confers express authority upon the Legislature to enact tax exemptions that depart from the constitutional principle of property tax uniformity, but no such authority is found in the Constitution for cities to do so. *Horton*, 189 Wn.2d at 708.

Washington case that has authorized a local government to levy taxes upon the State or its agencies without express legislative authorization. 16 Eugene McQuillin, *Municipal Corporations* (3d ed.) § 44:71 (noting that the general rule is that state property is immune from municipal taxation).⁴

This limitation is even rooted in our Constitution regarding property taxes: “Property of the United States and of the state, counties, school districts and other municipal corporations...shall be exempt from taxation.” Wash. Const. art. VII, § 1. *See City of Kennewick v. Benton Cty.*, 131 Wn.2d 768, 935 P.2d 606 (1997) (city’s 49% beneficial interest in stadium was exempt); *Spokane Research & Defense Fund v. Spokane Cty.*, 139 Wn. App. 450, 160 P.3d 1096 (2007) (garage exempt)

This Court’s recent decisions in *King County* and *Associated Press v. Wash. State Legislature*, __ Wn.2d __, __P.3d __, 2019 WL 6905840 (2019) (“*Associated Press*”) only confirm the validity of the Districts’ analysis of the need for express statutory authority before a government may tax other governments. Central to this Court’s analysis of King County’s authority to exact rent from water/sewer districts for use of its rights-of-way was the Court’s statement that statutes governing water/sewer districts

⁴ As the Districts have noted, app. br. at 18-19; reply br. at 13, cities may levy a utility tax on the rates paid by their citizens to their municipal utilities, *Burba v. City of Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989), but that has no bearing on cities’ authority to levy such taxes on other governments.

indicated that they could acquire use of rights-of-way by franchise agreements. However, unlike statutes governing other local governments, Title 57 RCW did not expressly grant water/sewer districts right-of-way use without a franchise agreement. The Court stated: “We presume that this difference means something.” *King County* at ¶ 54 (noting that it is an “elementary rule” that where the Legislature uses certain language in one instance and not in another, the legislative intent is different).

In *Associated Press*, the Court observed that the Legislature did not specifically include institutional legislative bodies in the definition of an agency for purposes of the Public Records Act, RCW 42.56. In the absence of such an inclusion, the Court concluded that institutional legislative bodies are not subject to the PRA. *Associated Press* at *6-7.

Here, the Legislature has specifically conferred authority upon certain governments to tax other governments, evidencing the Legislature’s clear understanding that it must expressly authorize such taxation-related authority to its local governments to tax other political subdivisions of the State. The Legislature plainly knew precisely how to authorize governments to tax other governments when it wanted to do so. *King County* at ¶ 34. *See also, Associated Press* at *6 (Legislature knew how to include institutional bodies in statutory definition when it wanted to do so).

The examples of legislative authorization for a government to tax another are legion. Thus, counties may levy the utility tax on other counties. RCW 36.94.100. The Legislature included municipalities in the definition of businesses to which the state's B&O tax applies. RCW 82.04.030. The Legislature authorized local governments to apply the sales tax to other governments. RCW 82.08.010(3); RCW 82.14.020(2). Cities have had the express authority to tax PUD electric service revenues since 1941. RCW 54.28.070. Perhaps the most obvious example of this point is found in the *state* public utility tax, Ch. 82.16 RCW. There, the State expressly applied its utility tax to water/sewer districts. RCW 82.16.010(7) (definition of "public service business."). The Legislature's denial of this authority to cities to levy utility taxes on other governments "means something."

And, as noted in the Districts' opening brief at 19-20 and reply brief at 7-9, cities have repeatedly been *denied* such tax authority by the Legislature, further reinforcing this point. But WSAMA, nonetheless, hopes that this Court will buy its effort to read *Algona* out of Washington law. WSAMA br. at 14-16. *Algona* was decided 35 years ago. Cities have since sought express authority to levy taxes against other governments like water/sewer districts. They were repeatedly *denied* that authority by the Legislature. Moreover, as noted in the Districts' opening brief at 20 and reply brief at 7-8, in the one instance where the Legislature *temporarily*

allowed Renton this authority, the legislative history makes clear that the Legislature itself understood the cities lacked such taxing power. CP 1471.

This legislative history is significant, contrary to WSAMA's view. WSAMA br. at 14-16. The dicta in *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007) does not explain the fact that Renton felt compelled in 2010, three years after that decision, to obtain such temporary express authority to levy a tax on a Title 57 RCW water/sewer district, nor the Legislature's decision to sunset that authority. Ch. 35.13B RCW. If the Renton legislation was an attempt to avoid "uncertainty," why wouldn't the Legislature have conferred that authority on *all* cities and why sunset such good public policy? Sunsetting the legislation only restored uncertainty. Division III's decision in *City of Wenatchee v. Chelan Cty. Pub. Util. Dist. No. 1*, 181 Wn. App. 326, 325 P.3d 419 (2014) does not even address the cities' efforts in the Legislature to secure such authority, nor does it explain the cities' legislative efforts either. *Algona* remains good law. The *Algona* court's broad analysis is seemingly contrary to *Burns* and *Wenatchee* – an "uncertainty." Yet, the cities did not act. The cities' failure to seek legislative authorization is more a reflection of their *repeated rejection* by the Legislature. They chose not to seek yet again what they had been consistently denied.

The City has *conceded*, as it must, that legislative authorization to tax must be *express*, resp. br. at 9 (“The legislature’s delegation of tax authority must be express...”), but it glides over the need for express legislative authorization to tax other governments, claiming that RCW 35A.82.020 is such an “express” authorization, despite the absence of *any* language in that statute addressing taxation authority regarding other governments. Resp. br. at 8-12. But its statutory analysis of RCW 35A.82.020 is not only completely at odds with the authorities referenced *supra*, it also actually contradicts its later concession that governments may not tax other governments’ “governmental” services under the governmental immunity doctrine. Resp. br. at 12-16. Under its ostensible statutory analysis, RCW 35A.82.020 authorizes it to impose excise taxes on “all places and kinds of business...and any lawful activity.” Resp. br. at 10. Such a broad conception of its taxing power – predicated upon the alleged legislative intent to “confer the greatest power of local self-government,” as the City claims, resp. br. at 10 – would not stop at proprietary services of other governments, but would extend to governmental services, too. A city could impose excise taxes on educational services provided by school districts, airports and cargo services of port districts, jails and landfill services or major sewage treatment services like King County’s Brightwater

facility, provided by counties, just to name a few such instances, *without restraint* and without limitation as to rate.

Not only should this Court reject the City's unsupported construction of its taxing authority as to other governments,⁵ it should not open the door to such an expansion of local government taxing power in the absence of hearing *expressly* from the Legislature, the branch of government entrusted by our Constitution with such authority. Ultimately, as this Court essentially opined both in *King County* and *Associated Press*, this type of decision is a matter for the Legislature. The Legislature has selectively chosen to grant such taxing authority in certain instances to certain local governments. *It has not granted such authority to cities to levy utility taxes on other governments.* This Court should honor the Legislature's determination of tax policy. WASWD br. at 3.

(2) The Governmental Immunity Doctrine Remains Viable in Washington and It Applies Here to the Services the Districts Provide Exempting Them from the City's Utility Tax

If this Court agrees with the City that the Legislature extended taxing authority to cities to levy taxes upon other political subdivisions of the State such as the Districts, then the Court must address whether the governmental immunity doctrine applies here. Only if the Court disagrees

⁵ This Court eschews statutory interpretation leading to absurd results. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

with the Districts that the doctrine applies to governments as such must it then decide if that doctrine draws a distinction between taxation of what are “governmental” or “proprietary” services. And it must then also address whether the sewer and water services the Districts provide are “governmental” or “proprietary” in nature.

(a) The Governmental Immunity Doctrine Applies to the Taxation of Governments as Such and Does Not Draw a Distinction as to the Nature of the Services They Provide

None of the *amici* contend that the governmental immunity doctrine does not apply in Washington. The City *nowhere* denies the existence of that doctrine. *Nowhere* in its brief does WSAMA deny that Washington recognizes the governmental immunity doctrine.

Algona is Washington’s principal case on the application of the governmental immunity doctrine.⁶ *Nowhere* in that opinion did this Court confine the doctrine’s application to “governmental” services, however that concept was defined. Rather, the proper analysis of the doctrine is that it applies to *governments*, as such.

Algona specifically overruled *City of Bellevue v. Patterson*, 16 Wn. App. 386, 556 P.2d 944 (1976), *review denied*, 89 Wn.2d 1004 (1977), a

⁶ This Court’s decision in *Burns* touched upon the doctrine in *dicta*, as mentioned in the Districts’ opening brief at 23-24 and reply brief at 14. Nothing in that case suggested that the immunity doctrine, recognized nearly universally in the United States, 16 Eugene McQuillin, *Municipal Corporations* (3d ed.) § 44:72 n.3, is inapplicable in Washington.

case in which the city purported to impose utility taxes on a sewer district and a water and sewer district on the authority of RCW 35A.82.020, just as the City seeks to accomplish here. Moreover, the *Algona* court relied on *Salt River Proj. Agricultural Improvement and Power District v. City of Phoenix*, 631 P.2d 553 (Ariz. App. 1981), a case that held the doctrine applied to the district, as such. The specific holding there was that merely because the district sold surplus electricity it generated in the course of its irrigation/reclamation government activities to third parties, that did not detract from its status as a non-taxable government. Finally, AGO 1990 No. 3 plainly understood the doctrine to apply to governments as such, characterizing *Algona* as follows: “...our Supreme Court held that absent express statutory authority to do so, a municipality may not levy a tax on the state or another municipality.”

Both the City and WSAMA want this Court to ignore the status of the Districts as *governments*.⁷ Neither spends significant time in their briefing discussing the Districts’ status as political subdivisions of the State. Critically, as outlined in the Districts’ opening brief at 4-7, the Districts are

⁷ Historically, the cities and water/sewer districts have been at odds over the provision of such services. The Cities have aggressively sought to “assume” such services within their municipal boundaries. See RCW 35.13A. The water/sewer districts have resisted. See, e.g., *King County Water Dist. No. 54 v. King County Boundary Review Bd.*, 87 Wn.2d 536, 554 P.2d 1060 (1976). The decision of a city to assume a water/sewer district is now subject to referendum. RCW 35.13A.115. Simply put, the cities have denigrated the status of Title 57 RCW districts as “real” governments.

governments authorized by the Legislature. They are created by the people. They have elected commissioners who are answerable to their voters. They provide a significant array of services, not confined to sewer and water services alone. They have all the earmarks of governments. They are *not* merely utility businesses in the guise of governments. The City does not even address this critical point and *concedes* that the Districts are governments. Resp. br. at 8 n.5.

This concession is important. By the terms of its own ordinance, the City's utility tax applies to the *business* of providing water/sewer services. FWRC § 3.10.040 (9-10). It is measured by the gross income derived from "the business engaged in." FWRC § 3.10.020. Indeed, the statutory predicate for such taxing authority is the licensure of *businesses*. RCW 35A.82.020; FWRC § 3.10.030; AGO 2018 No. 7. The Districts have statutory authority to operate as political subdivisions of the State. They are *governments* created by the Legislature, not businesses.

Moreover, as explained in the Districts' reply brief in detail at 11-12, the governmental immunity doctrine applies to governments as such, not their operations. Indeed, our Constitution's ban on the levying of property taxes on other governments, Wash. Const. art. VII, § 1, is but one aspect of the broader governmental immunity doctrine. That provision confirms that the doctrine applies to governments, not their particular

services. There is no “proprietary” exception to article VII, § 1. As noted in the Districts’ reply brief, *Algona* itself applied the immunity doctrine to governments. It *rejected* Algona’s attempt to limit the doctrine’s reach to governmental, as opposed to proprietary services. Reply br. at 12 n.11.

The core rationale of the governmental immunity doctrine expressed in cases like *City of Portland v. Multnomah County*, 296 Pac. 48, 49 (Or. 1931), is that such taxation does not benefit the public and it is unseemly for one arm of the sovereign to tax another arm of the sovereign, (“It would be analogous to taking money out of one pocket and putting it into another.”).⁸ The doctrine applies here to prohibit a city from taxing other governments like water/sewer districts. It would be no different if the City attempted to tax King County for services it provides, or the State itself. Under the governmental immunity doctrine, the City may not tax the Districts because they are governments.

(b) The Services the Districts Provide to Their Electorate Are Governmental in Nature

If, however, the Court concludes that the governmental immunity doctrine does not absolutely bar the taxation of one government by another

⁸ Indeed, the sole rationale for the City’s tax is revenue. The Districts’ charges are an attractive revenue stream to be tapped by the City. The Districts’ electorate suffers with higher utility costs, however, when the Districts must pass through the utility taxes as a “cost of service.” RCW 57.08.081(2).

government, as such, then it must decide whether the wide array of services provided by the Districts are “governmental” or “proprietary” in nature.

As noted *supra*, nothing in *Algona* indicates that the doctrine is confined to “governmental” services. Division III concluded in *Wenatchee* that the doctrine was so limited. But the court’s analysis there was flawed, as the Districts have already discussed in great detail in their briefing to date.

If the Court, nevertheless, believes that Division III was correct in limiting the doctrine to “governmental” services, then it must analyze whether the specific services the Districts provide are actually taxable as “proprietary” services.

But Washington law on the governmental/proprietary distinction is often poorly analyzed and contradictory, as Judge Fearing’s *Wenatchee* concurrence amply documents. This Court attempted to provide a definition of “governmental” services in *Wash. State Major League Baseball Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 687, 202 P.3d 924 (2009), that looked to the “sovereign” nature of the powers exercised, differentiating between “private or sovereign acts.” The Court ultimately focused on “whether the act is for the common good or whether it is for the specific benefit or profit of the corporate entity.” At the root of this analysis is the analogy of proprietary

services to business-like activities. A proprietary function thus involves “business-like activities that are normally performed by private enterprise.” *Steifel v. City of Kent*, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006).⁹

Echoing the City, WSAMA asserts that the Districts are asking this Court to overturn “controlling” precedent establishing that sewer and water services are proprietary in nature. WSAMA br. at 7-10. WSAMA misunderstands the Districts’ argument, perhaps intentionally because it is *WSAMA*, like the City, that hopes to not only overturn *Algona* but, should the Court reach the issue, the *numerous* cases indicating that sewer services are governmental in nature. Since *Algona*, this Court has never held that the doctrine is confined to “governmental” services, as the City has argued. If the Court believes that distinction applies in the governmental immunity doctrine context, then it must address whether water/sewer services are governmental, and Washington law on that question is, quite frankly, a hash, as Judge Fearing’s *Wenatchee* concurrence only confirms. 181 Wn.2d at 351-56. The City’s ordinances *nowhere* define “governmental” as opposed

⁹ The trial court acknowledged that there are six different tests in Washington law for differentiating a “governmental” from a “proprietary” service., CP 1528-29, as Judge Fearing noted in his *Wenatchee* concurrence. 181 Wn. App. at 352-53. The trial court focused on *billing*: “Proprietary function is seen in the provision of water and sewer services to benefit directly billed customers who requested the services and governmental function is seen in the provision of services that protect the health, safety and welfare of the general public.” CP 1527. The court overlooked the fact that people coming to King County’s transfer station in *Algona* were billed for such a service. The trial court also declined to address how these “definitions” applied to the Districts.

to “proprietary” services. And any ambiguity in those taxing ordinances must be resolved *against the City*. *Arborwood*, 151 Wn.2d at 367.¹⁰

No court has ever addressed the array of specific functions associated with the provision of water/sewer services by the Districts, for example. Certainly Division III did not do so in *Wenatchee* when discussing the water services provided by Chelan County PUD No. 1. As for water, the Districts acquire water, pipe it to facilities that ensure its potability, sometimes fluoridate it, and then pipe it to homes, businesses and public facilities for their use. They address conservation of water use and “gray water,” the used water remaining after its electorate uses the water, both government functions. Any court consideration of water has largely been as undifferentiated “water services.”

Similarly, the Districts pipe sewage from homes, businesses, and public facilities to treatment plants, they operate treatment plants to address the public health implications of raw sewage, and they pipe treated sewage to locations for its safe disposal. Again, court assessment of the functions relating to “sewage services” is generally undifferentiated.

With regard to sewer services, the cases cited by WSAMA in its brief at 5 for the allegation that water/sewer utility services have been

¹⁰ The Districts have also argued that this lack of definition contributes to the unconstitutional vagueness of the City’s tax. App. br. at 44-49; reply br. at 29-31.

treated as governmental services “for over 100 years” are *directly belied* by the *numerous* cases which have held sewer services to be governmental in nature. *E.g.*, *Town of Steilacoom v. Thompson*, 69 Wn.2d 705, 709, 419 P.2d 989 (1966);¹¹ *State ex rel. Church v. Superior Court for King County*, 40 Wn.2d 90, 91, 240 P.2d 1208 (1952); *Snavely v. City of Goldendale*, 10 Wn.2d 453, 457, 117 P.2d 221 (1941) (municipalities have right to condemn in furtherance of their governmental function of disposing of garbage and sewage). *See also*, AGO 1949-51 No. 246 (“the activities of a sewer district are governmental rather than proprietary...”).¹² Citing *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985), a case in which this Court held that the operation of a sewer system was a police power or governmental function, in accordance with *Town of Steilacoom* and *Church*, the *Arborwood* court observed that “a municipality operates a sewerage system under its governmental function.” 150 Wn.2d at 370-71.

¹¹ Justice Hale stated there: “Sanitary sewers and sewage treatment facilities are, by their very nature, both public necessities and conveniences.” *Id.* at 709.

¹² The Districts decried the apparent willingness of the City to treat services as “governmental” or “proprietary,” depending entirely upon the type of situation in which the issue arose such as tort liability, eminent domain, or taxation. Reply br. at 23. WSAMA *agrees*: “Since the governmental/proprietary distinction is based upon the nature of the function at issue, this court has correctly refused to find that the same function is governmental in one context and proprietary in another.” WSAMA br. at 18. Thus, the Districts’ citation to eminent domain authority from this Court ruling that sewer services are governmental in nature should be determinative. It is also noteworthy that this distinction often arose in the governmental liability context before the abolition of sovereign immunity. RCW 4.92.090; RCW 4.96.010. With the abolition of sovereign immunity by the Legislature, that distinction retains little practical significance.

WSAMA *nowhere analyzes* the direct analogy of large-scale solid waste services to sewer services. It mentions in passing that “disposal of solid waste is a governmental function,” WSAMA br. at 7, but neglects to say *why* such a service is, in any rational fashion, more “governmental” than disposal of sewage (which includes disposal of organic solid waste, i.e. sludge). It doesn’t because it can’t. Aspects of such services, which are directly analogous to the Districts’ sewage-related services, have been held to be governmental services. *Carlson v. City of Spokane*, 73 Wn.2d 76, 81, 436 P.2d 454 (1968) (collection and hauling of solid waste, which is analogous to the piping of liquid waste and hauling of sludge); *Algona* (solid waste transfer station, which is analogous to a waste treatment plant). Indeed, the *Carlson* court cited with approval authorities *equating* the safe disposal of inorganic waste with that of organic waste, noting that *both* are a governmental function. 73 Wn.2d at 81 n.2. And, in general terms, activities designed to address public health are, in any event, governmental in nature. *Hagerman v. City of Seattle*, 189 Wash. 694, 699, 66 P.2d 1152 (1937) (“The safeguarding of public health is almost uniformly held to be a government function...”).

The City appears content to rely upon the trial court’s attachment of significance to the fact that the Districts bill their residents for water/sewer services. Resp. br. at 1-2 (noting that the tax was only levied on services to

“billed customers.”). WSAMA does not disagree anywhere in its brief. But billing for services does not automatically make a service “proprietary,” as this Court determined in *Teter* as to billing for sewer services. Solid waste services are governmental, after *Carlson* and *Algona*, but there is no question that those services are also billed to residential and commercial users. As noted *supra*, courts have not analyzed the different aspects inherent in water/sewer “services.” There are few, if any, commercial companies supplanting the role of governments in Washington in providing water plants where water is fluoridated or sewage treatment plants where the harmful aspects of human waste are addressed.

As noted in the Districts opening brief at 40-42, were this Court to agree with the City, the Districts and the other Title 57 RCW districts would be compelled to distort their billing practices to attach particular rates to particular types of services that are “governmental” in order to avoid excess taxation by cities.¹³ That would be a mess. It is not an idle concern. After *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008) and *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012), the Legislature enacted Ch. 70.315 RCW. Title 57 RCW water/sewer districts may allocate a portion of their rates to fire suppression. They will do so as

¹³ The City asserts that it can tax the Districts’ revenue regardless of whether that revenue sustains “governmental” or “proprietary” functions. Resp. br. at 46-47.

to other “governmental” services, but only after years of litigation across the state to identify what services are actually “governmental.”

That sewer services are governmental in nature only makes practical sense. The operation of a municipal sewage treatment plant, as just one aspect of the Districts’ sewer-related services, is not a commercial-type enterprise; there are no commercial counterparts to such operations. Their sanitary purpose is a public one – public health. And they are operated to satisfy a further public policy imperative – to maintain the environmental integrity of Washington lands and fresh and salt waters.¹⁴ Clearly, the sewer services the Districts provide on behalf of their electorate are “governmental” in nature.

It is no different as to water-related services. There is no doubt that providing water for fire flow or hydrants are governmental services. *Lane*, 164 Wn.2d at 875; *Bonney Lake*, 173 Wn.2d at 584. And the rationale for this Court’s decision in *Parkland Light & Water Co. v. Tacoma-Pierce Cty. Bd. of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004) as to fluoridation of water was that the board of health’s regulation detracted from the *governmental*

¹⁴ It is critical to note that the interest of ratepayers is to remove sewage from their homes and businesses. The *public* interest is in the sanitary removal, treatment, and disposal of the waste. The individual pipes these property owners install to connect their property to the public sewer main accomplishes the individual purpose of the customers. Lakehaven/Midway’s waste water systems, by contrast, collect and transport the waste water to treatment plants, where it can be made safe to discharge to the natural environment. They fulfill the public or governmental objective.

authority of water districts. Indeed, water fluoridation is a governmental function. *Kaul v. City of Chehalis*, 45 Wn.2d 616, 621, 277 P.2d 352 (1954). WSAMA has no real answer to these authorities.

More critically, both our State and the City have adopted a clear public policy that water and sewer pipes, water plants, and sewage treatment plants are not the type of services in 2020 Washington that are provided by private businesses. As noted in the Districts' opening brief at 35-37, water/sewer services are crucial to *governmental services* planning under the Growth Management Act, RCW 36.70C, and have been treated in that context as governmental services by the City itself. And the amici briefs of RHAWA, WASWD, and Alderwood make clear the legal and practical reasons why these services are governmental in nature.

RHAWA only confirms that the City may be among the first of many cities that will tax government-provided water/sewer services, if this Court were to agree with the City's effort here. RHAWA br. at 3. There is *no limit* to the rate those cities will levy. *Id.* at 4-5. Both of these facts make it starkly clear that the authorization to tax other governments is one for the Legislature. And any tax will be passed on by landlords to tenants, both commercial and residential, given the now prevalent practice of apartment buildings employing sub-metering so that tenants pay utility services directly. *Id.* at 3-6.

The WASWD brief demonstrates that any authorization to cities to tax water/sewer districts will fundamentally disrupt decades of franchise agreements painstakingly negotiated by cities and such districts. WASWD br. at 1-2, 16-21. In this case, the City had franchise agreements not only with the Districts, but also with the City of Tacoma. The City unilaterally, and without any authority in its Ordinance, decided to vitiate its relationship with the Districts (but not Tacoma). Indeed, because water/sewer districts (like Lakehaven, for example) may lie within multiple cities, district ratepayers may pay multiple, different tax rates.

Finally, the Alderwood brief only confirms the point the Districts have made based on planning, GMA, and practicality/reality that water/sewer services are not a “discretionary” choice on the part of District electors, unlike cellular phones or cable TV hook ups. Rather, both sewer and water services are essential to the public good. Water/sewer services are essential for modern life and are generally not provided by private businesses. Indeed, as Judge Fearing noted, 97% of sewer services and 85% of water services are provided by government. 181 Wn. App. at 353 n.2.

Ultimately, sewer and water services in 2020 Washington State are governmental services. The necessary piping infrastructure for both services and large scale sewage treatment plants, in particular, have no analog in the private commercial setting. The services provided by the

Districts, which are true governments, are plainly for the *public good*, whether analyzed from the standpoint of public safety or public health and sanitation. This Court should hold that the Districts' services are governmental in nature, if it reaches that issue.

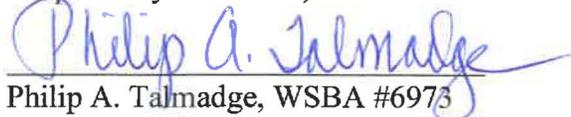
D. CONCLUSION

The City lacks express statutory authority to apply its utility tax to the Districts when the Legislature denied cities such authority. This Court should hold that the Districts are immune from the City's utility tax under the governmental immunity doctrine because that doctrine applies to both proprietary and governmental services or because the water/sewer services the Districts provide are governmental in nature. Alternatively, the City's tax violates the Districts' constitutional rights under the Washington and United States Constitution. The Court should hold that the City's tax is unconstitutionally vague and/or violates article I, § 12.

The Court should reverse the trial court's order and direct the trial court to grant summary judgment to the Districts. Costs on appeal should be awarded to the Districts.

DATED this ~~27th~~ day of December, 2019.

Respectfully submitted,



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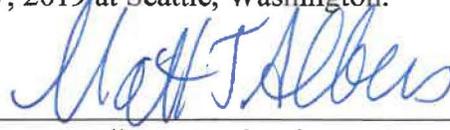
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 27, 2019, at Seattle, Washington.



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