IN THE SUPREME COURT OF THE STATE OF OREGON

ROGUE VALLEY SEWER SERVICES, an Oregon municipality, Petitioner on Review, v. CITY OF PHOENIX, an Oregon municipality, Respondent on Review.	Jackson County Circuit Court Case No. 103450-E-2 CA No. A148968 SC No. S062277

PETITIONER'S BRIEF ON THE MERITS AND EXCERPT OF RECORD

Review of the Decision of the Court of Appeals
on appeal from a judgment of the Circuit Court for Jackson County,
Honorable G. Philip Arnold, Judge.

Court of Appeals Opinion Filed: April 9, 2014
Before Judges: Armstrong, Duncan and Brewer
Author of Opinion: Armstrong, P.J.

September 2014

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

I. LEGAL QUESTIONS AND PROPOSED RULES OF LAW

The questions presented on review and the proposed rules of law are nearly identical in form and substance to those presented in Petitioner Rogue Valley Sewer Services' ("Petitioner" or "Rogue Valley") Petition for Review:

1. Given this Court's long-held view that states and cities may not tax another unit of government unless there is a clear legislative declaration of its intention to do so, how does the Home Rule doctrine—which presumes a city act is valid unless it contravenes state or federal law—operate in the context of a city imposing a tax or fee on another unit of government?

Proposed Rule: The Home Rule doctrine does not apply in the context of a government-to-government transaction as it applies when a city regulates private interests. Whereas the latter presumes a city tax or fee is valid unless it contravenes federal or state law, the former requires the city to have unmistakable, express statutory authority before imposing taxes or fees on another unit of government.

2. If the Home Rule doctrine applies in a government-to-government transaction, do ORS 221.420 and ORS 221.450 encompass the full authority a city holds for charging fees to use its rights of way?

Proposed Rule: ORS 221.420 and ORS 221.450 are part of the Oregon legislature's comprehensive, statewide regulation of utilities and, therefore, govern

all charges a city may impose on a publicly-owned utility to compensate the city for use of the right of way for purposes other than travel.

3. Both parties' summary judgment briefs addressed the issue of whether the amount of the fee imposed by Respondent City of Phoenix ("Respondent" or "City") was reasonable, and the trial court issued a General Judgment that expressly stated it was resolving all claims between the parties and that "[t]he claims included the authority to impose a franchise fee ***and*** the amount of the franchise fee itself." Did the Court of Appeals err when it determined that the trial court ruled only on the authority to impose a tax or fee on Rogue Valley and that—because Petitioner did not seek a declaration from the trial court on whether the tax or fee was reasonable—neither the parties nor the trial court addressed the reasonableness of the amount of the tax or fee itself?

Proposed Rule: The Court of Appeals errs in ruling that the issue of the reasonableness of a tax or fee is not preserved when both Parties briefed the issue at summary judgment and the trial court expressly ruled on the issue in its General Judgment.

II. NATURE OF ACTION AND RELIEF SOUGHT

In this case, Rogue Valley seeks declaratory relief invalidating the City's 2010 ordinance ("Ordinance") that would exact a 5% franchise fee ("Franchise

Fee") from Rogue Valley, a sister local government. Rogue Valley also seeks an injunction prohibiting the City from enforcing the ordinance. At the Jackson County Circuit Court ("Trial Court") and before the Court of Appeals, the City has relied on Article XI, section 2 of the Oregon Constitution (the "Home Rule" provisions) as the basis of its authority to impose the Franchise Fee.

The Trial Court denied Rogue Valley's motion for summary judgment and granted the City's cross-motion for summary judgment, ruling as follows: "The City of Phoenix, Oregon has the authority under its home rule charter to impose a franchise fee on sewer operations provided by Rogue Valley Sewer Services. The City may impose the fee specified in its ordinance under this authority." By granting summary judgment, the Trial Court also impliedly ruled that there are no material questions of fact as to whether a 5% fee is reasonable and rationally related to a legitimate government purpose other than revenue generation.

On appeal, the Court of Appeals affirmed the Trial Court's rulings. With respect to the City's authority to impose the Franchise Fee, the Court concluded that the City could impose the Franchise Fee under its Home Rule authority, that no state law preempts the Ordinance enacting the Franchise Fee, and that "[t]he mere fact that [Rogue Valley] is organized as a sanitary authority under ORS chapter 450 does not serve to circumscribe the city's authority as a home-rule municipality."

Rogue Valley seeks reversal of the Court of Appeals' decision affirming the Trial Court's rulings. Specifically, Rogue Valley seeks a determination by this Court that a city's Home Rule authority does not apply in the context of regulating other public entities in the same manner that it applies in the context of regulating private interests, and that the City lacks express, unmistakable statutory authority to impose the Franchise Fee on other units of local government like Rogue Valley. In the alternative, if this Court determines the City has authority to impose taxes or fees on other public entities under its Home Rule authority, Rogue Valley seeks a determination by this Court that the City's Ordinance is inconsistent with state statute, and that the Trial Court could not find in favor of the City on summary judgment with respect to the amount of the Franchise Fee because material facts regarding the reasonableness of the Franchise Fee remain in dispute.

III. FACTS MATERIAL TO THIS REVIEW

Rogue Valley is a sanitary authority organized and operated pursuant to ORS Chapter 450 ("Sanitary Authority"). Rogue Valley began providing sewer services to the City and its residents in 2004 pursuant to an intergovernmental agreement under ORS Chapter 190, which established, among other things, how rates would be charged and what services would be provided. ER-11; ER-12. Pursuant to that agreement, Rogue Valley had the right, but not the obligation, to

use the City's sewer facilities in order to provide sewer services to the City and its residents. ER-12.

In 2006, the City Council referred a ballot measure that asked its citizens whether they wanted to annex the City to be included within the jurisdiction of Rogue Valley. If approved, the City would abdicate its obligation to provide sanitary sewer services and Rogue Valley would be obligated to provide sewer service within the City instead. ER-12. During the election process, the City did not in any way indicate to Rogue Valley or the City's electorate that a franchise fee may be imposed on Rogue Valley. ER-12. Rogue Valley approved the ballot measure, and, on May 16, 2006, the City's citizens voted in favor of the annexation. ER-12.

As a result of the election, the City stopped providing a core municipal service and Rogue Valley became obligated to provide sewer services to the residents of the City. ER-12. The City's residents became residents of Rogue Valley for the purpose of sewer services, able to vote for and participate on Rogue Valley's board, and able to vote on any Rogue Valley measures. ER-15.

On July 6, 2010, years after Rogue Valley had become obligated to provide sewer services in the City, the City adopted the Ordinance imposing the Franchise Fee on Rogue Valley for providing sewer services. ER-8. The Franchise Fee imposes a charge equal to 5% of Rogue Valley's gross revenue received from

residents living within the City for receipt of sewer services from Rogue Valley. ER-10. Based on an estimated number of 3,068 equivalent residential units in the City, Rogue Valley expected to receive a total of $614,827 in gross revenue from City residents in 2011 from its adopted rates and charges, resulting in a Franchise Fee of $30,741.36. ER-13. The Ordinance will require Rogue Valley to increase its rates in order to pay the added cost of the Franchise Fee. ER-13. Rogue Valley includes the Franchise Fee in rates to its customers because it is required to do so by statute. ORS 450.840(2) ("The cost of operation and maintenance of sewage disposal systems . . . shall be borne by the area directly benefited by such systems.").

On July 12, 2010, Rogue Valley filed a Complaint in the Trial Court seeking a declaratory judgment invalidating the Franchise Fee because it is not permitted by Oregon law. The parties filed cross-motions for summary judgment regarding the legality of the Franchise Fee. The Trial Court granted the City's motion, ruling as a matter of law that the City has authority pursuant to its Home Rule Charter to impose a franchise fee on Rogue Valley. ER-23.

Rogue Valley appealed the Trial Court's ruling to the Court of Appeals. The Court of Appeals affirmed, concluding more broadly that the City has Home Rule authority to impose any tax or fee it chooses, as long as no statutory provision exists directly prohibiting that tax or fee. Court of Appeals' Opinion ("Opinion")

at p.14, ER-40. The Court of Appeals further concluded that Rogue Valley's alternative argument regarding the amount of the fee had not been preserved for appeal. Opinion at p.20, ER-46.

IV. SUMMARY OF THE ARGUMENT

The Court of Appeals incorrectly ruled that the City may rely on its Home Rule authority to charge an across-the-board, five-percent "franchise fee" on sewer services provided by Rogue Valley. Specifically, the Court of Appeals erred by concluding that Rogue Valley's status as a local government has no impact on the City's authority as a Home Rule municipality. A city's Home Rule authority—indeed, even State authority—to exact taxes or fees from other local governments is not without limit. To collect taxes or fees from another public body such as Rogue Valley, a city must have express and unmistakable statutory authority. Nowhere has the Oregon legislature indicated any express intent to grant authority to a city to impose a tax or franchise fee on a Sanitary Authority like Rogue Valley.

Even if Home Rule authority were relevant for determining the scope of the City's authority – which it is not – a franchise fee is not authorized by the City's Home Rule Charter because it is inconsistent with the exhaustive statutory scheme that the Oregon legislature carefully prescribed governing a city's authority to impose taxes or fees on utility service providers. The Franchise Fee the City has

attempted to impose on Rogue Valley is, therefore, unlawful as outside the City's authority and must be struck down.

Assuming *arguendo* that the City has authority to exact any taxes or fees from Rogue Valley (which it does not), this case should be remanded for trial to resolve material questions of fact relating to the amount of the fee that may be imposed. A city may not charge fees that are unreasonable or that materially exceed the expense of the regulation associated with that fee. Rogue Valley submitted substantial evidence in the summary judgment record to show that the so-called "costs" upon which the City relies to justify its franchise fee are either negligible or non-existent, or are part of the normal operations of a city public works department and do not in any way result from Rogue Valley's operations within the City. The Trial Court erred in finding no material questions of disputed fact regarding the calculation and reasonableness of the fee, and the Court of Appeals erred when it concluded this issue had not been preserved for appeal.

V. ARGUMENT

Municipal authority in Oregon is not concentrated solely in the charters of the State's incorporated cities. Other units of local government exist throughout the state for specific purposes, most often for the purpose of providing important public services such as electricity, water, and, in the case of Rogue Valley, sanitary sewer services. These Special Districts are imbued with the rights and obligations

of traditional municipal corporations – they have the power of eminent domain, may levy and collect taxes, are governed by a board of publicly-elected officials, authorize the issuance of bonds, and determine changes in boundaries that define the extent of their geographical jurisdiction. *See, e.g.*, ORS 450.815 (setting forth the general powers of authority of a Sanitary Authority).

It is not uncommon for the territorial boundaries of different local governments to overlap. The most obvious example of such overlap is the fact that every city lies within the boundaries of a county. Similarly, Special Districts share common boundaries and a common constituency with cities and counties. In the present case, the City Council, Rogue Valley, and the City's voters all approved such an overlap through the annexation process.

This case presents an opportunity for this Court to determine the extent of control a city may exercise over another unit of local government in the specific context of taxes and fees. A city's authority to regulate <u>private interests</u> is not before this Court, and in light of decades of jurisprudence interpreting the Home Rule provisions of the Oregon Constitution, it is clear that the Home Rule provisions grant cities broad authority over private interests.[1] The case law is

[1] "Home Rule" is not a constitutional term and, instead, describes a city's authority under Article XI, section 2 of the Constitution, which provides:

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equally clear, however, that a city's authority to tax another unit of local government is extremely limited, and one unit of government (even the state) is prohibited from taxing another unit of government unless it has clear and unmistakable statutory authority to do so.

For the first time since the enactment of the Home Rule provisions more than 100 years ago, the Court of Appeals used a traditional Home Rule analysis to analyze intergovernmental taxation. In doing so, the Court ignored this Court's earlier proclamations limiting intergovernmental taxation, and ignored the clear legislative history recognizing those proclamations. The Court of Appeals therefore erred and Rogue Valley urges this Court to correct that error.

> Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon.

A. Oregon Law Is Well-Established and Prohibits Intergovernmental Taxation Without Express Statutory Authority.

Oregon courts have long held that public property is not taxable, "unless there is a clear legislative declaration" allowing that taxation. *City of Portland v. Multnomah County*, 135 Or 469, 471, 296 P 48 (1931).

This Court acknowledged the principle limiting intergovernmental taxation more than 85 years ago in *City of Portland v. Welch*, 126 Or 293, 269 P 868 (1928). At issue in *City of Portland v. Welch* was a county's attempt to assess and levy general taxes on real property belonging to and owned by the City of Portland. In analyzing a statute that created certain exemptions from taxation, this Court explained the limit on intergovernmental taxation:

> If property belonging to the state or to an agency of the state should be made the subject of taxation, the burden of the taxpayer would not thereby be diminished, but would be increased by such additional expense as would be incidental to its collection. Under our system of taxation public revenues are derived from the taxation of property privately owned, and, in the absence of an express legislative declaration to that effect, it is unreasonable to suppose that the Legislature intended that property belonging to the public should be taxed. No benefit to the public could arise from such taxation.

Id. at 296-97. Guided by that principle, this Court reviewed the tax statutes then in place and declared the county's tax to be unlawful because it found "nothing in the

language of our statute to indicate that the Legislature intended for the property in question to be taxed." *Id.* at 297.

The *City of Portland v. Welch* decision provides a clear standard, as well as a clear rationale underlying that standard. The standard is that public property may be taxed, but only where there is an express legislative declaration allowing that taxation. The rationale underlying that standard is that intergovernmental taxation is unreasonable, because those who carry the burden of paying the tax are the same individuals who benefit from the resulting tax revenue, but that the burden is larger than the benefit because there is additional expense required for collecting the tax. Intergovernmental taxation results in a net loss to the public rather than a net gain.

In a similar case a few years after the *City of Portland v. Welch* decision, this Court re-stated the standard that, where public corporations are involved, "exemption is the rule and taxation the exception. As to private ownership of property, the rule is reversed." *City of Portland v. Multnomah County*, 135 Or at 471 (quoting *City of Eugene v. Keeney*, 134 Or 393, 397, 293 P 924 (1930)). The Court also presented a more detailed explanation of the rationale behind the presumption that intergovernmental taxation is unreasonable:

> It would be analogous to taking money out of one pocket and putting it into another. * * * It may, therefore, be said that it is against public policy to tax such property when devoted to a public use. * * * All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the

> demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the constitution or a statute.

Id. at 472-73 (internal quotation marks and citation omitted).

At issue in *City of Portland v. Multnomah County* was a county's attempt to collect a property tax from a city for three parcels of land the city had recently acquired. The property was privately-owned when the property tax was assessed, but the county actually levied the tax and placed a lien on the property after ownership of the property transferred to the city. The Court noted that the moment the property changed from private to public ownership, all tax proceedings were arrested and no longer had any effect. *Id.* at 473.

Although the exemption the Court relied on in *City of Portland v. Multnomah County* involved application of a specific statute, the Court stated that the exempting statute was "merely declaratory of the common rule" that "unless there is a clear legislative declaration of its intention so to do, such property is not taxable." *Id.* at 471. Finding no express statutory authority allowing the county to

impose the tax, the court determined it was unlawful. Of particular note, the Court again reiterated the different standard that applies when public property is involved by distinguishing the facts before it – involving two public entities – from the facts in another case that led to a different outcome and which "had to do with real property under private ownership." *Id.* (discussing *Logan v. Luukinen et al.*, 113 Or 52, 231 P 184 (1924)).

The standard this Court applies limiting intergovernmental taxation does not exist only in the context of property taxes, nor is the standard altered depending on the entity imposing the tax. In *Central Lincoln People's Utility District v. Stewart*, 221 Or 398, 406, 351 P 2d 694 (1960) ("*Central Lincoln*"), this Court reiterated that the "intention to tax a municipality is not to be inferred, but must be clearly manifested by an affirmative legislative declaration." (Emphasis added). The *Central Lincoln* decision relied on the same well-established legal principles as *City of Portland v. Multnomah County* and cited to the same prior cases on which that case was decided. *See Id.* (citing, among other cases, *Portland v. Welch*).

In *Central Lincoln*, the tax at issue was an excise tax imposed by the state on a people's utility district.[2] Like the Franchise Fee at issue in this matter, rather than a tax on property, the tax was in the form of a charge of 4% on the net income

[2] People's utility districts are municipal entities formed under ORS Chapter 261.

of a corporation for the privilege of carrying on or doing business in the state. *Id.* at 400-01. The Court upheld the tax, but only because it first determined the legislature had expressed clear intent to include people's utility districts in the definition of "corporation" for purposes of the statute imposing the tax. *Id.* at 405.

The limit on intergovernmental taxation is clear enough that a modern-day trial court strictly adhered to that standard, and did so in the specific context of a charge imposed on a utility for the use of a city's rights of way. Citing *Central Lincoln*, and relying on the same precedent as that decision, the Columbia County Circuit Court rejected three cities' attempt to impose a franchise fee on a people's utility district where there was no express legislative authority for imposing such a fee. *Columbia River People's Utility District v. City of St. Helens et al*., Columbia County Circuit Court Case 85-2236, Opinion of the Trial Court (July 15, 1986), ER-1. At issue in that case were the provisions of ORS 221.420 (granting cities authority to impose franchise and license fees) and ORS 221.450 (granting cities authority to impose a privilege tax). Because neither of those statutes expressly subjected people's utility districts to such fees and taxes by a city, the court ruled that no such fees or taxes could be levied.[3]

[3] As discussed in more detail below, as a result of the trial court's decision, ORS 221.420 and ORS 221.450 were amended in 1987 and now expressly subject people's utility districts to franchise fees and privilege taxes. That change further

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This Court has yet to allow one public entity, including the state, to tax another public entity without first finding clear legislative authority allowing the tax. Neither the Court of Appeals nor the City has provided a rationale for departing from that well-established approach.

B. No Statute Provides Express Authority Subjecting a Sanitary Authority to a Tax or Fee Like the City's Franchise Fee.

Neither the City, the Trial Court, nor the Court of Appeals has identified any express statutory authority that would allow the City to impose the Franchise Fee on a Sanitary Authority like Rogue Valley. Instead, each relied on implied authority under the Home Rule provisions of the Oregon Constitution as the basis for imposing the tax.

The City argued to the Court of Appeals that it "needs no express authority" to impose the Franchise Fee on Rogue Valley. Respondent's Answering Brief ("Answering Brief) at p.13. Even so, the City relied on one statute as a possible source of authority for its taxation of Rogue Valley, ORS 450.815(7), which was the same argument it presented to the Trial Court. Answering Brief at p.11; ER-19. That statute is part of a list of the general powers of a Sanitary Authority and states that a Sanitary Authority may:

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cements a broad understanding by the courts and the Legislature that, with respect to public entities, taxation is the exception rather than the norm.

> Lay its sewers and drains in any public street, highway or road in the county, and for this purpose enter upon it and make all necessary and proper excavations, restoring it to its proper condition. However, the consent of the proper city, county or state authorities, as the case may be, shall first be obtained and the conditions of such consent complied with.

Based on this statutory provision, the City asserts that the Franchise Fee is a reasonable "condition" of its consent to Rogue Valley's use of its streets. As the City concedes, however, that statute "neither lists nor limits those 'consent conditions.'" Answering Brief at p.11. The statute therefore cannot be described as containing a "clear legislative declaration," or "unmistakable" authority as this Court requires. *See City of Portland v. Multnomah County*, 135 Or at 471. Instead, the City is merely inferring its authority to tax Rogue Valley under these statutes, which this Court has declared the City cannot do. *Central Lincoln*. 221 Or at 406.

One potential source of a city's authority to impose franchise fees is ORS 221.420, which allows cities to impose franchise fees on certain utilities. However, in its arguments to the Court of Appeals, the City acknowledged that ORS 221.420 is not applicable to the Franchise Fee. Answering Brief at pp. 9, 17. Indeed, ORS 221.420 cannot be described as containing express and unmistakable statutory authority to tax Rogue Valley.

ORS 221.420 identifies an exhaustive list of the types of entities on which a city may impose fees through franchise agreements or ordinances. That list does not include municipal Sanitary Authorities such as Rogue Valley:

> [A] city may [d]etermine by contract or prescribe by ordinance or otherwise, the terms and conditions, including payment of charges and fees, upon which any public utility, electric cooperative, people's utility district or heating company, or Oregon Community Power, may be permitted to occupy the streets, highways or other public property within such city and exclude or eject any public utility or heating company therefrom.

ORS 221.420(2)(a) (emphasis added). Because ORS 221.420(2) does not expressly identify Sanitary Authorities as the kind of utilities cities can regulate,[4] that statute does not contain unmistakable authority for the City to impose any fee or tax on Rogue Valley.

The Trial Court did not conduct its own analysis of the statutory bases the City relied on. Instead, the Trial Court merely adopted the "reasoning" in the City's briefs on summary judgment and further declared that the City "has the authority under its home rule charter to impose a franchise fee on sewer operations provided by Rogue Valley Sewer Services." ER-23 to ER-25.

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[4] Rogue Valley clearly does not fit the statutory reference in that statute to a public utility (ORS 757.005), an electric cooperative (ORS Chapter 62), people's utility district (ORS Chapter 261), heating company (ORS 221. 420(1)(f)), or Oregon Community Power (ORS 757.812 *et seq*.).

The Court of Appeals similarly declined to identify a specific statute containing express and unmistakable authority allowing the Franchise Fee to be imposed on Rogue Valley. Instead, the Court determined that "the question is not whether the city can identify an express statutory authorization for the franchise fee imposed on [Rogue Valley] for use of the city's rights-of-way – because the city's charter grants it all authority to the limit of municipal power – but whether the city was prohibited from imposing the fee by state or federal law." The Court of Appeals thus chose to analyze this issue using a Home Rule standard and analysis rather than the standard and analysis this Court uses when addressing intergovernmental taxation. As explained in more detail below, not only did the Court of Appeals err in its rejection of the intergovernmental standard, the traditional Home Rule analysis is inapplicable when addressing a city's regulation of public rather than private interests.

Because this Court requires cities to have express and unmistakable statutory authority to tax another unit of local government, and because no such authority has been identified, this Court must reverse the Court of Appeals decision.

C. The Court of Appeals Erred When It Concluded the City Does Not Require Express Statutory Authority for the Franchise Fee as Applied to Rogue Valley.

The Court of Appeals erred when it concluded the City "is not required to find express statutory authority for its ordinance," and instead applied a Home

Rule analysis to determine whether any statute expressly prohibits the ordinance under a Home Rule test. Opinion at p.14, ER-40.

The Court of Appeals began its analysis with the conclusion "[t]he mere fact that [Rogue Valley] is organized as a sanitary authority under ORS chapter 450 does not serve to circumscribe the city's authority as a home-rule municipality." Opinion at p.6, ER-32. The Court of Appeals thus rejected Rogue Valley's argument that this Court applies a different, specific standard and analysis to intergovernmental taxation than it applies to a city's regulation of private interests. The Court of Appeals did not cite to any independent authority as the basis for rejecting that argument and, instead, created new law by rejecting Rogue Valley's citations to this Court and concluding that neither *City of Portland v. Multnomah County* nor *Central Lincoln* "stand for the broad principle" limiting intergovernmental taxation. Opinion at p.6, ER-32. The Court of Appeals' inability to recognize the broad principle clearly stated in *City of Portland v. Multnomah County* and *Central Lincoln* represents a gross misreading of those cases.

In an effort to minimize the holding in *City of Portland v. Multnomah County*, the Court of Appeals acknowledged this Court's conclusion that the county could not collect taxes from the city, but the Court then stated the following:

> [T]he court did not derive that answer from a larger principle regarding one municipal corporation imposing fees, taxes, or regulations upon another municipal corporation; rather, it was derived from a narrow, common-law rule (which was also codified in the state tax code) that public property held for public use is exempt from taxation.

Opinion at p.6, ER-32. Notwithstanding the fact that there is no meaningful distinction between a "larger principle" and a "common-law rule" codified in statute as the Court of Appeals implied, there are two problems with the Court of Appeals' description of the holding in *City of Portland v. Multnomah County.*

First, this Court most certainly derived its answer in *City of Portland v. Multnomah County* from a larger principle regarding the limits on intergovernmental taxation. Before arriving at its conclusion that the statutes at issue had "no application to the real property in question," the Court first explained that there must be "a clear legislative declaration" subjecting public property to taxation. 135 Or at 471. In other words, the very reason for analyzing the statute was to search for a clear legislative declaration for authority to tax public property. The Court went on to explain the principle necessitating such a search, stating that, without clear legislative intent, "it is against public policy to tax such property when devoted to public use." *Id.* The Court of Appeals' decision in the present matter does not attempt to address this larger principle, opting instead to pretend that principle simply was not there.

Second, even if this Court derived its decision in *City of Portland v. Multnomah County* from a "narrow, common-law rule," the Court of Appeals acknowledged that the common law rule is "that public property held for public use is exempt from taxation." Opinion at p.6, ER-32. Yet, the Court of Appeals ended its analysis there and did not grapple with the impact of that common law rule, or with this Court's reliance on that common law rule in so many other decisions.

In an effort to then minimize this Court's holding in *Central Lincoln*, the Court of Appeals first pointed to a factual difference in that case, which was that the taxing body there was the state rather than a city. Opinion at p.6, ER-32. This is a distinction without a difference, because the larger principle this Court has established is that all public property is presumptively exempt from taxation, regardless of which entity is imposing the tax. This purported distinction is also not reasonable, because it would result in the state being more limited than cities in its ability to tax other local governments. There is no conceivable rationale for limiting the state from taxing municipal-level governments while giving cities *carte blanche* to exact whatever charges they want to from other municipal-level governments.

In contrast with the Court of Appeals' assertion, this Court has proclaimed that the property of <u>any</u> municipal corporation is exempt from taxation. *See City of*

Eugene v. Keeney, 134 Or at 397. In support of that broad principle stated in *City of Eugene v. Keeney,* the Court cited to the "cases collated in exhaustive note 3 A.L.R. 1439." *Id.* One case that would have appeared in that collation is *Black v. Sherwood*, 84 Va 906, 6 SE 484 (1888). The controversy in *Black v. Sherwood* was "over the claim of the city of Norfolk to assess and tax a lot of ground situation in the said city, and belonging to the county of Norfolk and city of Portsmouth." *Id.* at 484. Deciding that controversy in favor of the county avoiding taxation by the city, the Virginia Supreme Court of Appeals addressed both constitutional and statutory provisions regarding taxation. That court did exactly what this Court would later do in *City of Portland v. Multnomah County* and *Central Lincoln*, recognizing the broad principle drawn into the statutes: "whatever may be the reasons of the legislature, the property is exempted by the plain language of the law from taxation, and this is in accord with the ancient usage of the commonwealth." *Id.* at 485 (emphasis added). Thus, the principle remains that public property, regardless of which public entity owns it, is exempt from taxation, regardless of which entity imposes the tax, unless there is clear statutory authority to allow the tax.

The Court of Appeals' consideration of *Central Lincoln* also incorrectly describes that case, stating that the *Central Lincoln* Court declined to decide the question whether the state could tax a municipality. Opinion at p.6, ER-33. A

close reading of *Central Lincoln* reveals that the Court did not "decline" to answer that question. Rather, the Court declared the question was "not material" because it was already so clearly answered. Indeed, immediately after stating that the question was not before it, the Court went on to explain:

> in this connection it must be remembered that in the absence of any constitutional prohibition a state has the power to tax the property of its cities, counties, and their political subdivisions. The intention to tax a municipality is not to be inferred, but must be clearly manifested by an affirmative legislative declaration. Such intention affirmatively appears as to this plaintiff, the legislature including specifically people's utility districts in ORS 308.515, supra.

Central Lincoln, 221 Or at 406 (emphasis added). It would make no sense for the Court to "decline" to address an issue and then immediately address that issue as the Court of Appeals suggests.

The Court of Appeals' attempt to distinguish and minimize *City of Portland v. Multnomah County* and *Central Lincoln* is of no effect and does not undermine the existence of the presumption against intergovernmental taxation this Court consistently applies.

D. The Court of Appeals Erred When It Ignored the Legislature's Clear Acknowledgement of the Presumption Against Intergovernmental Taxation.

The Legislature has recognized in multiple ways the existence of the presumption against intergovernmental taxation.

1. The Legislature Has Amended Provisions of ORS Chapter 221 to Acknowledge the Limit on Intergovernmental Taxation

Perhaps the most striking example indicating the Legislature's belief that the existing law operates to limit intergovernmental taxation is the Legislature's amendments to ORS Chapter 221 during the 1987 legislative session. The legislative history of those statutory changes makes it clear that, prior to the changes, state statutes did not authorize cities to impose any such charges on publicly-owned (i.e., municipal) utilities.

Following the Columbia County Circuit Court's decision in *Columbia River PUD v. City of St. Helens*, the Legislature amended ORS 221.420 and ORS 221.450 to apply that statute to people's utility districts. Those amendments occurred through the passage of House Bill 3021 ("HB 3021") in 1987. According to the Staff Measure Analysis for HB 3021, the bill was necessary to provide cities with the authority to impose a franchise fee or privilege tax on a people's utility district:

> By legislative authority, cities have the right to regulate municipally owned rights of way and impose charges on electric utilities for the use of such rights of way. Traditionally cities have imposed and collected franchise fees and/or privilege taxes on all (publicly and privately owned) utilities which serve their municipalities. State law, however, does not specifically include "publicly owned" utilities within this grant of authority.

ER-5.[5] The Staff Measure Analysis goes on to state that HB 3021 would amend existing municipal authority to permit the collection of franchise fees and privilege taxes from people's utility districts.

Nothing in the legislative history indicates that the imposition of such fees and taxes on people's utility districts extended to the imposition of those fees and taxes on other publicly-owned utilities. Indeed, as the Court of Appeals acknowledges, the legislation was focused primarily on people's utility districts because that was the type of municipal entity that had been the subject of the Columbia County Circuit Court litigation. Opinion at pp. 18-19, ER-44 to ER-45. If at any time the Legislature intended to subject Sanitary Authorities to those statutes, it could easily have done so. But more importantly, if cities already had inherent authority to impose taxes on other local governments under Home Rule authority, as the Court of Appeals has concluded, the 1987 amendments would have been wholly unnecessary.

The Court of Appeals discounted the legislative history of ORS 221.420 and ORS 221.450. After reviewing that history, the Court noted the Legislature's changes to ORS 221.420 and ORS 221.450 related only to people's utility districts

[5] The quoted language appears in the Staff Measure Analysis prepared for the House Committee that considered the bill. Nearly identical language appears in the Staff Measure Analysis for the Senate Committee that also considered the bill.

and "do not suggest that the legislature intended to preempt a city's ability to charge fees for a sanitary authority's use of the city's rights-of-way." Opinion at p.19, ER-45. Of course, this conclusion derives from the Courts of Appeals' incorrect presumption that the City did not require express statutory authority. The Court of Appeals was therefore looking for indications that the Legislature had preempted the City from imposing taxes or fees on a Sanitary Authority instead of properly focusing on whether the changes expressed any intent to include other municipal entities in the list of utilities that could be taxed.

Implicit in the Court of Appeals' decision is that ORS 221.420 and ORS 221.450 lack express and unmistakable authority to impose a franchise fee or privilege tax on a Sanitary Authority. It is also noteworthy that, in discussing the legislative intent behind the 1987 amendments to ORS 221.420 and ORS 221.450, the Court of Appeals cited to the legislative policy in ORS 221.415, which was enacted as part of HB 3021. Opinion at p.19, ER-45. The Court places great weight on the language in that policy "reaffirming the independent authority of cities to regulate the use of their public rights-of-way." Opinion at p.19, ER-45. The Court of Appeals relies on that language as further evidence that cities have some inherent authority over all utilities, including other municipal entities. This Court has already cautioned against reading too much into that policy statement.

In *Springfield Utility Bd. v. Emerald PUD*, 339 Or 631, 646, 125 3d 740 (2005) , this Court rejected a city's argument based on ORS 221.415 "that cities already had the authority to exercise all the powers in ORS 221.420 against [people's utility districts] even before that statute had listed [people's utility districts] specifically." Instead, the Court concluded that the legislation enacting that policy, and modifying ORS 221.420 and ORS 221.450, made specific changes to cities' authority over a public entity that did not exist prior. Even if there is some meaning to be divined from ORS 221.415 regarding a city's authority over other units of government, the language of that statute undercuts the Court of Appeals' conclusion because the language only "reaffirms" the authority cities had over "suppliers of electrical energy," and is silent as to suppliers of other services like sewer services.

2. The Legislature Has Amended Other Statutes to Acknowledge the Limit on Intergovernmental Taxation and Regulation.

The legislature has further recognized limits on intergovernmental regulation by amending other statutes to bring specific public entities into the sphere of regulation by cities or the state. For example, as a companion change to the changes in ORS 221.420 and ORS 221.450 subjecting people's utility districts to franchise fees and privilege taxes, the Legislature amended ORS 261.305(14), a statute similar to ORS 450.815(7) spelling out the powers of a Sanitary Authority,

and provided that a people's utility district must obtain the "consent" of a city, which consent expressly includes payment of fees to a city:

> People's utility districts shall have power:
>
> * * *
>
> (14) To construct works across or along any street or public highway, or over any lands which are property of this state, or any subdivision thereof, and to have the same rights and privileges appertaining thereto as have been or may be granted to cities within the state, and to construct its works across and along any stream of water or watercourse. * * * *Any works across or along any city street shall be constructed only with the permission of the city governing body and upon compliance with applicable city regulations and payment of any fees called for under applicable franchise agreements, intergovernmental agreements under ORS chapter 190* or contracts providing for payment of such fees. The district shall restore any such street or highway to its former state as near as may be, and shall not use the same in a manner unnecessarily to impair its usefulness.

ORS 261.305(14) (emphasis added). Similarly, as discussed by this Court in *Central Lincoln*, the Legislature has expressly provided that people's utility districts are subject to certain state taxes. 221 Or at 402. The Legislature manifested its intent to tax people's utility districts in this manner by expressly including "people's utility districts" in the definition of "person, company, corporation or association" in ORS 308.505(8). If the reasoning the Court of Appeals provided in its Opinion were valid, the Legislature would not have needed

to specifically add "payment of any fees" to ORS 261.305(14) or to add "people's utility districts" to the list of entities subject to the tax statutes in ORS Chapter 308.

The fact that all local governments are on equal footing with each other is not unique to the area of taxation. In the context of condemnation proceedings, for example, a local government may have the broad power of eminent domain, but that power is limited when seeking to condemn other public property. As this Court stated: "It is a rule, however, of universal application, that the subsequent delegation of power to appropriate land which has once been appropriated [for public use] must be in express terms, or arise from necessary implication." *Little Nestucca Toll-Road Co. v. Tillamook County*, 31 Or 1, 48 P 465 (1897).

The rule set forth in *Little Nestucca Toll-Road Co. v. Tillamook County* is essentially the same principle applied in *City of Portland v. Multnomah County* and *Central Lincoln*, and public property cannot be condemned without clear statutory authority for doing so. Thus, where the Legislature has desired that an entity with condemnation authority be able to condemn other public property, it has had to create express statutory authority to achieve that desire. For example, ORS 267.225(2) provides mass transit districts with such condemnation authority: "For the purpose of providing a mass transit system, a [mass transit] district may commence a condemnation proceeding to acquire land . . . for [a] right of way . . .

over any public right of way already located, condemned or occupied . . . ." (Emphasis added).

E. The Court of Appeals Erred in Its Choice to Apply a Home Rule Analysis.

1. The Home Rule Provisions of the Constitution Do Not Confer Power on Cities to Regulate Other Units of Government.

The Court of Appeals' Opinion ignores the standard and analysis this Court applies in the context of intergovernmental taxation. Instead, the Court of Appeals chose to analyze the City's Franchise Fee using a Home Rule analysis. That choice reverses this Court's presumption against intergovernmental taxation in favor of a presumption that a city may impose any tax or fee it wants to as long as the Legislature has not expressly prohibited the city from doing so.

The Court of Appeals assumed that a city's authority under the Home Rule provisions of the Constitution applies equally to the regulation of another unit of government and to the regulation of a private entity. The Court of Appeals never explains the basis or rationale supporting that proposition. Nor could the Court have reasonably provided such an explanation or rationale in light of prior decisions by this Court.

The application of a Home Rule analysis is inappropriate in the context of a government-to-government interaction. Such an analysis seeks to create a hierarchy among governments that does not exist. It also results in allowing a city

to exercise authority beyond its jurisdiction. The Home Rule amendments did not confer on cities any power over other units of government, even where the territorial limits of the two governments overlap.

In *West Linn v. Tufts*, 75 Or 304, 305, 146 P 986 (1915), this Court struck down a city's attempt to force a county to turn over all revenue the county collected from a road tax levied on county roads within city limits. The city's charter in that case had been amended to require all revenue arising from road taxes levied on roads within the city to be turned over to the city. In rejecting the city's attempt to take control over revenue the county collected from within the city, this Court discussed the Home Rule provisions and stated the following:

> While the Constitution has empowered the legal voters of every city and town to enact and amend their municipal charters, subject to the Constitution and criminal laws of the state, it was never intended that the state should lose control over its municipalities in whatever form they existed, much less that it should at their command surrender to them or any of them any control of its sovereignty. As said by Mr. Justice King in *Straw v. Harris*, supra, "it would lead to sovereigntial suicide," expressing the view of the subject from the point of the state. On the other hand, to permit any limited number of citizens to organize themselves into a municipal corporation, arrogating in any degree independent powers and demanding contributions from the funds raised by the authority of the parent state, would be to recognize incipient secession, a result which has no sanction in any power short of successful revolution. <u>If the plaintiff of its own motion may demand funds raised by the county as road taxes, with equal authority it may exact</u>

> contributions from any other money in the county treasury, no matter from what source it is derived.

75 Or at 307-08 (emphasis added).

The principle underlying the Court's decision in *West Linn v. Tufts* is that there is only one sovereign – the people, organized as the State – and that the powers of any municipality formed from that sovereign power "do not rise higher than their source," or amount to the creation of "independent powers" that arise to the level of allowing the municipality to exact contributions from other units of government. *Id.* at 308. The Court chose very strong language, comparing an attempt by a city to regulate the county to secession and revolution.

The holding in *West Linn v. Tufts* confirms this Court's reluctance in other cases to establish a hierarchy or "pecking order" among local governments, or to allow a city to legislate extramurally. With respect to the former, the Court relied in part on its earlier holding in *Straw v. Harris*, 54 Or 424, 103 P 777 (1909). In *Straw v. Harris*, the Court addressed the validity of legislation allowing the creation of port districts. The Court concluded it was not contrary to the Home Rule provisions for a port district to be formed within a city's territory even though doing so would limit the authority the city had with respect to certain subject matters:

> The act under consideration by permitting the incorporation of ports does not thereby directly attempt to amend the charter of any city or town within the

> boundaries thereof. Under any view, it may only affect the charters and ordinances of such cities and towns to the extent that they may be in conflict or inconsistent with the general object and purpose for which the port may be organized. This the Constitution clearly intended to permit; that is to say, a general law thereunder is provided whereby the people within the municipality created under it may take such steps in support thereof as may be necessary, even though its success may require, on the part of the included municipalities, a surrender of some of the rights or privileges previously granted to or acquired by them.

54 Or at 435 (emphasis added).

In other words, this Court's decisions in *Straw v. Harris* confirms that the people of the state are authorized to organize into various municipalities, and doing so merely redistributes municipal authority, for example by transferring the control of wharves and docks from a city to a port district. When the people of the state decide to create a new municipality, it does not offend the Home Rule provisions to have two equally-sovereign municipal entities occupy the same geographic territory. The corollary to the people's creation of a new, overlapping municipal entity is that the pre-existing entity (for example, a city) may have to surrender certain rights consistent with the reallocation of power as directed by the people.[6]

[6] The fact that no hierarchy among local governments exists is also firmly grounded in the text of the Home Rule provisions. A city's Home Rule authority arises in part from the limit on the Legislature's ability to "enact, amend or repeal" a city charter as set forth in Article XI, section 2 of the Constitution. The limit in that constitutional provision applies equally to "any municipality, city or town."

(*continued on next page*)

Further, no decision by this Court applying Home Rule authority has declared that one unit of government has inherent power to regulate another. In fact, this Court on one occasion declared that a dispute between a city and county was not even a home rule case. In *City of Eugene v. Roberts*, 305 Or 641, 756 P 2d 630 (1988), the city brought suit against the county to compel the county election officials to place an advisory question on the ballot. This Court rejected the city's attempt to do so, stating:

> In its present posture, this is not a home rule case. The home rule provisions of the Oregon Constitution empower the voters of every city to enact and amend their municipal charter. While this power entitles city voters to prescribe (subject to certain limitations) their own form of municipal government, it does not by its terms empower city governments to conscript the services of county and state officials in the conduct of city business.

Id. at 649 (emphasis added). The Court went on to explain that Home Rule does not extend to the level of allowing a city to compel action by state and county officials and "[t]he source of any duty to comply with the City's request must be in state law." *Id.*

Based on the foregoing, the City's Home Rule authority provides no basis for the City's taxation or regulation of Rogue Valley. The people residing in the

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Nothing in Article XI, section 2 indicates that a city's authority under that limit on the Legislature elevates the city above another municipality or town.

City expressed their will, through the annexation process, to transfer the municipal authority of providing sewer services from the City to Rogue Valley. The City Council expressly approved the transfer of its obligations to operate a sanitary sewer system to Rogue Valley when it approved the annexation measure. ER-15. Similar to this Court's acknowledgement in *Straw v. Harris* addressing the creation of a port district within a city, the surrender of the City's rights and privileges relating to the provision of sewer services to a newly-formed municipal entity does not offend the Home Rule provisions of the Oregon Constitution. Once those rights and privileges were transferred to Rogue Valley, the City lost its ability to "exact contributions" from Rogue Valley's treasury, "no matter from what source it is derived," s*ee West Linn v. Tufts*, 75 Or at 308, or to compel any action by Rogue Valley other than those actions that are authorized by state law. *See City of Eugene v. Roberts*, 305 Or at 650.

2. A Home Rule Analysis Is Impractical in a Government-to-Government Context.

It is also noted that the process of applying a Home Rule analysis simply does not make sense in the context of a government-to-government interaction. First, this Court has already clearly established a separate standard and the appropriate analysis to be used in the context of intergovernmental taxation. *See*, *e.g. City of Portland v. Multnomah County* and *Central Lincoln*. No case applying a Home Rule analysis has altered that standard or analysis.

Second, this Court has candidly acknowledged that the extent of Home Rule authority involves a "tortured path of the law." *Seto v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 311 Or 456, 463, 814 P 2d 1060 (1991) ("*Seto v. TriMet*"). The case often cited for summarizing Home Rule authority, which the Court of Appeals' Opinion also relied most heavily on, is this Court's decision in *LaGrande/Astoria v. Public Employees Retirement Board*, 281 Or 137, 576 P 2d 1204 (1978) ("*LaGrande/Astoria*"). Even in that case, the Court acknowledged that it is impossible to reduce the effect of the Home Rule provisions of the Oregon Constitution to a single formula. *Id*. at 142.

Despite the tortured path of the law, Home Rule has been at issue in only two categories of cases: (1) those where the Legislature has enacted a rule of law that purportedly governs some process of local government, to which the city then objects; and (2) those where a city seeks to regulate a <u>private</u> interest in a manner that is potentially different than the manner in which the state regulates that same interest. Neither category of cases addresses the existence or extent of a city's inherent authority to regulate other public interests.

With respect to the first category of cases, this Court has reiterated:

> [T]he essential focus of the Home Rule provisions is that the "form and structure of local governments is protected from most state interference," * * * The *LaGrande/Astoria* case also held that "a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over

> contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local government's freedom to choose its own political form."

Seto v. TriMet, 281 Or at 463 (quoting *Mid–County Future Alternatives v. City of Portland*, 310 Or 152, 161, 795 P 2d 541 (1990) and *LaGrande/Astoria*, 310 Or at 161). The Court in *LaGrande/Astoria* initially described the purpose of the Home Rule provisions in this regard as being "concerned with the structural and organizational arrangements for the exercise of local self-government." 310 Or at 142-43.

The present matter is nothing like the first category of cases, because it does not involve an affirmative act of the Legislature that in any way interferes with the structure or organization of cities. Nor have the City or the Court of Appeals relied on this category of cases serving as the basis for applying a Home Rule analysis.

With respect to the second category of cases, this Court recently reiterated "home-rule municipalities possess authority to enact substantive policies, even in areas also regulated by state law, so long as the local enactment is not 'incompatible' with state law." *Gunderson, LLC v. City of Portland*, 352 Or 648, 659, 290 P 3d 803 (2012). In support of that restatement, this Court again relied on language in *LaGrande/Astoria* stating the following:

> In such cases, the first inquiry must be whether the local rule in truth is incompatible with the [state] legislative policy, either because both cannot operate concurrently

> or because the legislature meant its law to be exclusive. It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by statewide law unless that intention is apparent.

Id. (quoting *LaGrande/Astoria* 281 Or at 148-49). It is this category of cases to which the City and the Court of Appeals analogized, arguing that the City's Franchise Fee must be lawful unless it has been expressly prohibited from imposing the Franchise Fee by the Legislature. Opinion at p.9, ER-35.

But this category of cases, too, focuses on whether there is some competition between local and state legislative enactments. In contrast, the issue now before this Court is the extent of a city's inherent authority to tax another unit of government in the absence of any state legislative act. The Court of Appeals' choice to apply a Home Rule analysis is an entirely new approach for addressing that issue.

In support of applying a Home Rule analysis, the Court of Appeals relied on two decisions from this Court; *US West Communications v. City of Eugene*, 336 Or 181, 81 P 3d 702 (2003) and *Jarvill v. City of Eugene*, 289 Or 157, 613 P 2d 1 (1980). In *US West Communications v. City of Eugene*, this Court upheld a city's imposition of a 2% registration fee <u>in addition to</u> a franchise fee. The franchise fee at issue in that case was limited by ORS 221.515 to 7% of the telecommunications

carrier's revenues derived from "exchange services." The registration fee, in contrast, was based on non-exchange services revenue. The Court upheld the city's fee after applying a Home Rule analysis in which the Court determined not whether a statute authorized the registration fee, but whether a statute precluded imposition of such a fee. *Id* at 186. In *Jarvill v. City of Eugene*, the Court affirmed the city's general ability to assume the power to impose taxes. 289 Or at 169. Those cases both involved the imposition of taxes on private interests; neither addresses the inherent authority a city does or does not have to regulate other public interests, and, therefore, neither case is sufficient to support the Court of Appeals' conclusions.

3. Summary of the Inapplicability of a Home Rule Analysis in the Context of a Government-to-Government Interaction.

In summary, the Court of Appeals' Opinion unnecessarily introduces the Home Rule analysis into this dispute and is a departure from this Court's earlier decisions. In contravention to *West Linn v. Tufts* and *Straw v. Harris*, the Opinion seeks to create a hierarchy of local governments with cities at the top of the order. More alarmingly, the Court of Appeals' rationale would place city authority above even state authority, as a city tax on state-owned property would be presumptively valid if the Legislature has not affirmatively prevented the city from imposing such a tax. The Opinion also allows the City to do indirectly what this Court said in *West Linn v. Tufts* and *City of Eugene v. Roberts* that it cannot do directly – exact

contributions from the treasury of Rogue Valley or conscript the services of Rogue Valley by forcing Rogue Valley to collect tax revenue from City constituents on the City's behalf.

Because the Opinion ignores this Court's standard for analyzing intergovernmental taxation, and because the Court of Appeals incorrectly utilized a Home Rule analysis, this Court should correct that error by reversing the Court of Appeals' Opinion.

F. Even if a Traditional Home Rule Analysis is Appropriate, the Court of Appeals Erred by Concluding the City's Franchise Fee Is Not Contrary to State Law.

Although a Home Rule analysis is not the appropriate analysis to conduct in the context of intergovernmental taxation, if such an analysis is applied, the Court of Appeals erred when it concluded the Franchise Fee is not inconsistent with state law. The following argument is offered only as an alternative in the event this Court first determines: (1) cities do not require express statutory authority before imposing taxes and fees on other units of government; and (2) a Home Rule analysis is appropriate for analyzing such taxes and fees.

This Court has established a two-step analysis for determining whether a local enactment is preempted by state statue. First, a court examines the text of the statute that indicates a legislative intent to preempt. That intention is apparent if it is expressly or otherwise manifested in the language of the statute. *Boytano v.*

Fritz, 321 Or 489, 505-07, 900 P 2d 1030 (1995). Second, if there is no clear manifestation of preemption in the statute, the Court examines whether the local law "cannot operate concurrently" with the state law. *LaGrande/Astoria*, 281 Or at 148.

The construct of ORS 221.420 and 221.450 is a comprehensive scheme designed to provide the exclusive bases for city imposition of fees upon utility service providers for using public rights-of-way within the city. The Legislature has occupied the field with respect to fees or taxes a city may impose on utility service providers and the Franchise Fee cannot meaningfully operate consistently with those statutes.

In 1911, the legislature enacted the state's first statewide regulation of public utilities through what would eventually be codified as ORS 221.420 and ORS 221.450. Under that statutory scheme, "[i]f certain conditions are met, a city either may enter into a franchise agreement that determines the 'charges and fees upon which any public utility * * * may be permitted to occupy the streets, highways or other public property within such city,' ORS 221.420(2), or may impose a privilege tax 'for the [utility's] use of [the] streets, alleys or highways' within the city, ORS 221.450." *US West Communications, Inc., v. City of Eugene*, 336 Or at 183 n.1 (edits in original).

ORS 221.420 and ORS 221.450 must be read together. In other words, a qualifying utility has *two options*: negotiate all of the specific terms with a city through a franchise agreement or intergovernmental agreement before occupying the city's streets, or risk the city's unilateral decision to impose a five percent privilege tax. There is no other basis for a city to seek a fee from a utility for occupation of its streets.

The Legislature's enactment of HB 3021 confirms its understanding that the statutes operate in this manner. At an April 22, 1987 hearing for HB 3021, the House Environment and Energy Committee asked counsel for the cities directly, "Can you explain the difference between a franchise fee and a privilege tax?" The counsel for the cities, who played a key role in drafting the proposed amendments, stated:

> [I]n ORS 221.450 there is a . . . privilege tax whereby if . . . . [y]ou, as a private utility . . . don't sit down and negotiate a franchise regulation ordinance or agreement so that we're working together, then you're going to pay more. You're going to pay 5 percent. If you come in and get a franchise, [] you sit down at the table, which is what the legislature intended in passing . . . ORS 221.

ER-6 to ER-7. The cities and legislature, at the time of the 1987 amendment, and ever since, have understood ORS 221.420 to provide cities authority to "negotiate a franchise regulation ordinance or agreement" and that the alternative is the privilege tax.

The Franchise Fee is unmistakably the kind of charge the Legislature contemplated when it provided cities with authority to impose a "franchise fee" or "privilege tax" in ORS 221.420 and ORS 221.450. A "franchise fee" or "privilege tax" is a charge to a utility that "compensates cities and towns for the utilities' use of the right-of-way for purposes other than travel." *US West Communications v. City of Eugene*, 336 Or at 183 n.1; *Northwest Auto Co. v. Hurlburt*, 104 Or 398, 408, 207 P 161 (1922). The statutory text specifies that the "privilege tax" may be based on a percent of the utility's gross revenues. The only difference between the two charges is that a franchise fee arises out of a contractual relationship whereas a city can impose a privilege tax unilaterally.

As described in the City's Trial Court briefs and Answering Brief to the Court of Appeals, the Franchise Fee is a charge on Rogue Valley that compensates the City for Rogue Valley's use of the right-of-way for purposes other than travel, and it is based on a percentage of the gross revenues Rogue Valley earns within city limits. *See, e.g.,* Answering Brief at pp. 3, 5-6. Based on the City's own description and stated purpose for the Franchise Fee, the Franchise Fee is the type of fee encompassed by ORS 221.420 and ORS 221.450.[7] Because of the

[7] The Court of Appeals indicated that Rogue Valley may be correct that the Franchise Fee contains the characteristics of a privilege tax, but the Court did not make a final determination on that issue. Opinion at p.7, n.1.

Legislature's intention to occupy the field and preempt cities from imposition of fees on public utilities for use of rights of way outside of the scheme imposed by ORS 221.420 and ORS 221.450, the Court need go no further and can conclude that the Franchise Fee is *ultra vires*.

Even if this Court does not find that ORS 221.420 and ORS 221.450 provide clear manifestation of preemption, the local law as construed by the Court of Appeals conflicts with this comprehensive statutory structure governing city authority to charge a privilege tax.

First, the Legislature has clearly chosen to exclude Sanitary Authorities from the application of these statutes. As discussed in more detail above, when the Legislature has determined that specific entities other than "public utilities" should be subject to those statutes, it has freely amended those statutes. Most notably, the Legislature amended both statutes in 1987 to make people's utility districts subject to franchises fees and privilege taxes.

Not only is the legislative history silent with respect to the imposition of such fees and taxes on Sanitary Authorities, the evidence in the 1987 legislative record reveals the Legislature's intent was to apply the statute on a limited basis and that other entities would need to be added later if desired. For example, in the hearings leading up to the adoption of HB 3021, a Representative sitting on the House Committee on Environment and Energy inquired whether the bill would

apply to telephone cooperatives. House Environment and Energy Committee Hearing, Tape 123, Side B at 0000 (Apr. 22, 1987). At that time, ORS 221.420 and ORS 221.450 would not have applied to such telecommunications entities because they otherwise fell outside the definition of "public utility." In response, one of the key witnesses for the cities pushing the bill stated that it would not apply to those entities because the bill was a legislative fix only for a "current problem," which was the trial court's decision declaring people's utility districts fell outside the scope of the statute. *Id.* It was therefore understood by the Legislature that ORS 221.420 and ORS 221.450 intentionally omitted some utilities that would not be subject to franchise fees and privilege taxes. The Legislature has since made other additions to that statute to include heating companies and telecommunications carriers. At any time that the Legislature desired Sanitary Authorities to be subject to city franchise fees and privilege taxes, it could easily have included them in the statutes.

The Court of Appeals' ruling—if permitted to stand—renders the list of utility service providers in ORS 221.420(2)(a) mere surplusage and cracks open the comprehensive scheme established by the Oregon Legislature. Rather that permitting that conflict, the list of utility service providers in ORS 221.420(2)(a) should be construed as it is written—it is the exclusive list of utility service providers that a city may target for such charges.

Second, the Franchise Fee is inconsistent with ORS 221.420 and ORS 221.450 because it obliterates the single most significant protection offered to utilities in those statutes—the 5% cap on privilege taxes. In other words, not only does the Opinion render the enumerated list of taxable utility service providers mere surplusage in ORS 221.420 by inferring that Sanitary Authorities are taxable, it results in an outcome where there are no limits on that authority as applied to the entities that are not listed in the statute, and provides no incentive for Sanitary Authorities to negotiate a franchise fee.

To be clear, under the Court of Appeals' new reading of the statute, a city may unilaterally impose a fee on Sanitary Authorities (or any other non-enumerated municipal entity) for use of the public rights of way and that fee is not subject to the 5% limit of ORS 221.450 because Sanitary Authorities are not enumerated in that statute. The Court of Appeals' ruling so severely distorts the legislative scheme that cities are <u>for the first time</u> more limited in their ability to tax a private entity than they are for taxing a public entity. This is a major flaw in the Court of Appeals' reasoning. It is unreasonable to conclude that a Legislature that amended the statutes because it believed a city otherwise had <u>no</u> authority to tax a people's utility district was in fact amending the statute to make a people's utility district the only public entity protected by the 5% maximum charge.

In summary, through the enactment of ORS 221.420 and ORS 221.450, the Legislature has occupied the field with respect to the circumstances under which a city may tax or impose franchise fees or privilege taxes on utility service providers, thereby precluding cities from operating inconsistently with those statutes. The Franchise Fee cannot operate consistently with this overarching statutory scheme, and thus must be struck down despite the City's Home Rule status.

G. The Court of Appeals Erred When It Concluded Rogue Valley's Second Assignment of Error Was Not Preserved for Review.

Rogue Valley appealed the Trial Court's grant of summary judgment in favor of the City in light of the conflicting evidence in the record regarding the amount of the Franchise Fee and whether that amount is reasonable. Specifically, Rogue Valley asserted that a material question of fact remains regarding the City's actual costs and the amount Rogue Valley already reimburses the City for those costs. That argument was presented to the Trial Court as an alternative to Rogue Valley's primary contention that the City had no authority to enact the Franchise Fee in the first instance.

The City objected to Rogue Valley's assignment of error regarding the reasonableness of the fee primarily by arguing Rogue Valley failed to preserve this argument at the Trial Court. Answering Brief at p. 21. To preserve an issue, a party must provide the court an explanation of the party's position that is clear and

specific. *See State v. Wyatt*, 331 Or 335, 343, 15 P 3d 22 (2000). The purpose of this requirement is to ensure that the parties and the court are not taken by surprise or misled and that no party is denied the opportunity to counter an argument. *See Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or 487, 500, 982 P 2d 1117 (1999) (quoting *Davis v. O'Brien*, 320 Or 729, 737, 891 P 2d 1307 (1995)); *State v. Spears*, 223 Or App 675, 681, 196 P 3d 1037 (2008).

As the Court of Appeals acknowledged, the parties presented their positions on the reasonableness of the Franchise Fee to the Trial Court. Opinion at p.20, ER-46. The City was therefore not denied an opportunity to address any argument regarding the reasonableness of the fee. Indeed, the City initiated the dispute by raising the issue in its own motion for summary judgment. The City argued that the "fee imposed by the City on [Rogue Valley] represents a reasonable estimate of annual cost to the City of the many impacts of [Rogue Valley] identified in the Ordinance." ER-21. The City went on to argue that "[Rogue Valley] is expected to argue that [the estimate for the Franchise Fee] was extraordinary…." ER-22.

The Court of Appeals correctly acknowledged that, by arguing a claim, a defendant consents to inclusion of that claim in a complaint even if it is not pled therein. Opinion at p.21, ER-47, *citing Fraker v. Benton County Sheriff's Office*, 214 Or App 473, 483, 166 P 3d 1137 (2007) (allowing review of trial court's grant of summary judgment on an unpleaded negligence claim because defendant

"recognized" the claim, argued against it on summary judgment, and had full opportunity to address the claim at summary judgment hearing). The Court of Appeals nevertheless concluded that the parties did not try the issue by consent because, "neither party in its respective motions (nor in its respective claims or defenses) sought a declaration from the trial court on whether the amount of the fees was reasonable, should the court declare the ordinance to be a valid exercise of the city's authority." Opinion at p.22, ER-48.

The Court of Appeals erred because Rogue Valley specifically presented its argument about the reasonableness of the Franchise Fee as an alternative basis to strike down the Ordinance in addition to its primary claim that the City lacked any authority to impose the fee: "Even assuming that Phoenix had authority to impose a franchise fee upon RVS, which it does not, the Ordinance as worded is too broad, without any rational basis, and relies on an improper interpretation of Oregon statutes." ER-17. Similarly, as stated previously, the City's own motion for summary judgment presented arguments about the amount of the Franchise Fee.

The Court of Appeals also based its conclusion on the incorrect fact that "the trial court had not understood the parties to have asserted the claim on summary judgment." Opinion at p.22, ER-48. There can be no dispute that this separate issue was before the Trial Court. The Trial Court issued a General Judgment that expressly stated it was resolving all claims between the parties and that "[t]he

claims included the authority to impose a franchise fee ***and*** the amount of the franchise fee itself." ER-24 to ER-25.

Because the issue regarding the amount of the Franchise Fee was clearly before the Trial Court, all parties briefed that issue, and the Trial Court treated that issue as a separate claim in its General Judgment, there was no basis for the Court of Appeals to conclude that Petitioner's Second Assignment of Error was not properly preserved for appellate review. If this Court determines that the City has authority to impose the Franchise Fee, it should nevertheless remand the Court of Appeals' decision to determine whether material facts remain in dispute regarding the amount of the Franchise Fee Rogue Valley presented in its alternative arguments to the Trial Court.

VI. CONCLUSION

Based on the foregoing, Rogue Valley seeks reversal of the Court of Appeals' decision affirming the Trial Court's rulings. Specifically, Rogue Valley seeks a determination by this Court that a city's Home Rule authority does not apply in the context of regulating other public entities in the same manner that it applies in the context of regulating private interests, and that a city must have express, unmistakable statutory authority to impose a tax or fee on other units of government. Further, because no such statutory authority exists for the City to

impose its Franchise Fee on a Sanitary Authority like Rogue Valley, Rogue Valley seeks a declaration that the Franchise Fee is invalid.

In the alternative, if this Court determines the City has authority to impose taxes or fees on other public entities under its Home Rule authority, Rogue Valley seeks a determination by this Court that the City's Ordinance is inconsistent with state statute because the Franchise Fee is a privilege tax that is inconsistent with the comprehensive regulation of utilities the Legislature has enacted in part through the provisions of ORS 221.420 and ORS 221.450. Further, Rogue Valley seeks a declaration that the Trial Court could not find in favor of the City on summary judgment with respect to the amount of the Franchise Fee because material facts regarding the reasonableness of the Franchise Fee remain in dispute, and those facts were part of a claim addressed by the parties.

DATED: September 11, 2014.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I HEREBY CERTIFY (1) this brief complies with the word-count limitation as described in ORAP 5.05(2)(b); and (2) the word count of this brief as described in ORAP 5.05(2)(a) is 12,826 words as determined by Microsoft Word ™.

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I FURTHER CERTIFY that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF E-FILING AND SERVICE

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