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
Court of Appeals No. A148968
Supreme Court No. S062277

CITY OF CENTRAL POINT'S *AMICUS CURIAE* BRIEF ON THE MERITS

On 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

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INTRODUCTION

The central issue on review is the extent of control that a city may exercise over a sanitary authority in the specific context of fees for use of city rights of way. At first blush, the court's disposition of this case appears to depend on the preliminary determination regarding what question this case presents. The parties offer two very different questions. The City of Phoenix asks: Pursuant to its home-rule authority, may a city charge a sanitary authority for using and occupying city rights of way, in the absence of any statutory prohibition? The sanitary authority Rogue Valley Sewer Services (RVS) asks: Pursuant to a proffered "intergovernmental taxation principle," is a city prohibited from charging a sanitary authority a fee for using and occupying city rights of way, in the absence of express statutory authority? Upon further examination, the resolution of this case is not as simple as choosing which question to ask and answer.

Instead, as a threshold matter, RVS's assertions on review require this court to answer the following question: Does Oregon law provide a broad principle prohibiting intergovernmental taxation? If the court answers that question in the negative, then this court applies a home-rule analysis. If the court concludes that Oregon law broadly prohibits intergovernmental taxation, the court must then address a second threshold question: Is a sanitary authority

a unit of local government coequal to a city with respect to city rights of way? Again, if the court answers that question in the negative, then this court applies a home-rule analysis.

RVS argues, in the alternative, that, even under a home-rule analysis, a city may not impose a fee for use of city rights of way because such fees are preempted by state law. That argument is unavailing because the statutes that RVS cites for the purported prohibition do not expressly prohibit fees imposed on sanitary authorities for use of city rights of way, and implied preemption is inapposite to a home-rule analysis.

For the reasons amplified below, Central Point, as *amicus curiae*, contends that (1) Oregon law does not provide a broad principle prohibiting intergovernmental taxation; (2) a sanitary authority organized under ORS Chapter 450 is not a unit of local government coequal to a city with respect to access, use, and occupation of city rights of way; and (3) a home-rule analysis applies to this case. Pursuant to its home-rule authority, a city may charge a sanitary authority for using and occupying city rights of way, in the absence of any statutory prohibition. City fees for use and occupation of city rights of way are not prohibited by statute; and city and state law can operate concurrently. Accordingly, this court should affirm a city's home-rule authority to impose and collect fees for use and occupation of a city's rights of way.

In the event that this court determines that RVS preserved the issue of whether the amount of the fee was reasonable, Central Point also offers briefing on issues related to the reasonableness of fees for use of city rights of way.

I. OREGON LAW DOES NOT PROVIDE A BROAD PRINCIPLE PROHIBITING INTERGOVERNMENTAL TAXATION.

The Court of Appeals did not err in rejecting RVS's proposed principle that one governmental entity may not tax another governmental entity without express statutory authority because, as the Court of Appeals correctly concluded, that proposed "principle" is not supported in Oregon law. [1]

RVS's cited cases do not stand for the broad principle that RVS urges. The Court of Appeals correctly rejected RVS's invocation of and reliance on *Portland v. Multnomah County*, 135 Or 469, 296 P 48 (1931), and *Cent. Lincoln P.U.D. v. State Tax Com.*, 221 Or 398, 351 P2d 694 (1960), for the "broad principle" that one municipal corporation may not impose fees, taxes, or regulations upon another municipal corporation. *Rogue Valley Sewer Services v. City of Phoenix*, 262 Or App 183, 189, ___ P3d ___, *rev allowed*, 355 Or 879 (2014). The Court of Appeals noted that the analysis and outcome in *Portland v. Multnomah County*, "was derived from a narrow, common-law rule (which

[1] Central Point does not concede that a charge for the use of rights of way is a tax; however, even if it could be construed as a tax, Central Point contends it is authorized to charge such a tax absent an express statutory prohibition.

was also codified in the state tax code) that public property held for public use is exempt from taxation." *Rogue Valley Sewer Services*, 262 Or App at 189. Similarly, the court concluded that *Cent. Lincoln P.U.D.* is inapposite because that case "involved the *state's* authority to levy a corporate excise tax against a people's utility district (PUD)." *Rogue Valley Sewer Services*, 262 Or App at 189 (emphasis in original). Accordingly, as the Court of Appeals observed, *Cent. Lincoln P.U.D.* did not address the question of whether a city may tax a public service provider. Instead, the court stated, generally, that public property in public use is exempt from state taxation. *Id.*

On review, RVS reprises the intergovernmental taxation argument that it proposed in the Court of Appeals. That argument must fail on review for the same reasons it failed on appeal.

II. A SANITARY AUTHORITY ORGANIZED UNDER ORS CHAPTER 450 IS NOT A UNIT OF LOCAL GOVERNMENT COEQUAL TO A CITY.

Cities and sanitary authorities are not "coequal branches of government." RVS has not established, as it contends, that it is a "coequal unit of local government," or a "sister government" with respect to a city for purposes of the city's assessment of a fee for use and occupation of a city's rights of way. Even if this court determines that Oregon law contains a broad principle that one unit of government may not tax another unit of government without express

statutory authority, RVS's asserted analysis is, nevertheless, unavailing because cities and sanitary authorities are not "coequal branches of government" with respect to city property.

RVS contends that a governmental entity's ability to impose a tax depends on the nature of the property assessed--that is, with respect to private property, taxation is the rule and exemption is the exception; and that, conversely, with respect to public property, "'exemption is the rule and taxation the exception.'" Petitioner's Brief (PB) 12 (quoting *Portland v. Multnomah County*, 135 Or at 471).

Under RVS's proposed analysis, the dispositive inquiry relates to the nature of the property assessed, not the nature of the entity that owns or holds the property. [2] However, under the cases cited, the prohibition on intergovernmental taxation relates only to public property held for public use--meaning that the property must be public and the entity holding the property must also be public. RVS's argument then begs the question: What is the nature of a sanitary authority?

RVS is a sanitary authority organized under ORS 450.705 to 450.989 (statutes governing sanitary authorities). As such, RVS's nature as an entity--

[2] RVS does not contend that, as an entity, *it* is somehow "public property held for public use."

including its characteristics, powers, and limitations--are defined by statute.

RVS's major premise is that "The City of Phoenix and [RVS] are each a sovereign units of "local government" and "public bodies" on "equal footing" with each other. The Court of Appeals rejected that premise, concluding that "[t]he mere fact that RVS is organized as a sanitary authority under ORS chapter 450 does not serve to circumscribe the city's authority as a home-rule municipality." 262 Or App at 188. While the Court of Appeals' conclusion was, respectfully, conclusory, RVS's assertion that it stands on equal ground with the city with respect to an assessment of fees for the use of city rights of way is legally unsupported.[3]

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[3] In *Rogue Valley Sewer Services*, the Court of Appeals, in parenthetical dicta, observed that "[t]he city does not dispute that RVS does not fit within the definition of 'public utility'" and that

> "[u]nder ORS 757.005(1)(b), the definition of 'public utility' excludes '[a]ny plant owned or operated by a municipality.' RVS, as a sanitary authority, qualifies as a 'municipality' for purposes of the definition of 'public utility' in ORS chapter 757. *See* ORS 756.010(4) ('As used in ORS chapters 756, 757, 758 and 759 * * * "[m]unicipality" means any city, municipal corporation or quasi-municipal corporation.'); ORS 198.605 ('Local service districts, as defined by ORS 174.116, are municipal corporations.'); ORS 174.116(2)(r) ('Subject to ORS 174.108, as used in the statutes of this state "local service district" means * * * [a] sanitary authority, water authority or joint water and sanitary authority organized under ORS 450.600 to 450.989.')."

262 Or App at 198 n 6 (emphasis added).

In drawing an analogy between a sanitary authority and a port, RVS invokes *Straw v. Harris*, 54 Or 424, 103 P 777 (1909), in which this court determined that the incorporation of a port authority did not interfere with cities' home-rule authority because the legislation empowering the formation of a port only affected the cities' powers "to the extent that [city charters and ordinances] may be in conflict or inconsistent with the general object and purpose for which the port may be organized." *Id.* at 435; *see also Wasco*

With respect, the Court of Appeals was incorrect. ORS 757.005(1)(b) is inapposite because RVS does not own or operate a "plant." Instead, RVS operates only wastewater transportation systems--that is, sewage pipes. *Compare* ORS 757.005(1)(a)(A) (including "plant or equipment" in the definition of "public utility"); *with* ORS 757.005(1)(b)(A) (excluding only "[a]ny *plant* owned or operated by a municipality" from the definition of "public utility") (emphasis added). *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) (explaining that, in construing statutes, a court generally presumes "use of a term in one section and not in another section of the same statute indicates a purposeful omission"). RVS deposits sewage waste at the City of Medford's Regional Water Reclamation Facility, which may or may not be a "plant owned or operated by a municipality" for purposes of ORS 757.005(1)(b).

Ultimately, whether RVS is a "municipality" for purposes of Chapter 757 has little bearing on whether a city and sanitary authority are "coequal" with respect to the use and operation of city rights of way. *See also Emerald PUD v. Pacific Power & Light Co.*, 302 Or 256, 265-66, 729 P2d 552 (1986) ("'[M]unicipality' and 'municipalities' have no fixed meanings and that their meanings depend upon the context in which they are used."); *Springfield Utility Board v. Emerald PUD*, 339 Or 631, 125 P3d 740 (2005) (explaining that the import of a "municipal" label must considered in the context of the statutory framework for state regulation of that type of entity).

County PUD v. Kelly, 171 Or 691, 698-99, 137 P2d 295 (1943) (analyzing the relative nature and powers of a PUD based upon the purpose of those service districts).

Applying that principle to this case, any conflict between a city's home-rule authority provided for in its charter and the powers of a sanitary authority provided by statute must be analyzed in light of "the general object and purpose" for which a sanitary authority is organized. When viewed in that light, there is no conflict between a city exercising its traditional home-rule authority to charge a sanitary authority a fee for the use of city rights of way.

Sanitary districts are formed "for the purpose of providing sanitation facilities and services." ORS 450.009. Similarly, sanitary authorities are formed for the purpose of providing sanitation services in "areas of the state where the population is rapidly expanding" and sewage disposal issues "can best be solved through the cooperative and integrated effort and support of unincorporated and incorporated areas. It is the purpose of ORS 450.600 to 450.989 to provide a means whereby such cooperation and integration can be achieved." ORS 450.705(1).

The legislature has empowered sanitary authorities, "for the protection of the health, safety and general welfare of the authority," to "adopt and enforce all necessary and proper regulations or ordinances for * * * [, *inter alia*, t]he

control of sewage disposal and drainage[; t]he storage, collection, transportation and disposal of solid wastes * * *[; t]he cleanliness of roads and streets in the authority[; and t]he control of mosquitoes and other insects"). ORS 450.810. To be sure, a sanitary authority is granted by statute some of the traditional powers of a municipality. ORS 450.815. However, those powers are only imparted for the specific purpose for which the sanitary authority was formed. *See, e.g.*, ORS 450.837(1) (providing that "[w]ater authorities and sanitary authorities are municipalities *for the purposes of administering and enforcing the plumbing code*" (emphasis added)). Accordingly, a sanitary authority's powers--and the limits of those powers in relationship to other units of government--must be viewed in the context of a sanitary authority's purpose. Significantly, the legislature did not empower a sanitary authority to occupy city property, except by consent and compliance with conditions of consent.

A sanitary authority is subordinate to state, county, and city authority. RVS argues that home-rule authority does not provide a city the power to regulate a sanitary authority because there is no hierarchy among local governmental entities. RVS cites no authority supporting its position, and RVS is wrong. RVS's reliance on *West Linn v. Tufts*, 75 Or 304, 146 P 986 (1915), is misplaced. PB 32. In *West Linn*, the court recognized a hierarchy between the county and city levels of government with respect to taxes for county roads.

Id. Similarly, here, a sanitary authority is necessarily subordinate to the city in which it operates, at the very least, with respect to the use of the city's rights of way.

In Chapter 450 the legislature acknowledged the pragmatic need for that hierarchy by qualifying and conditioning sanitary districts' and sanitary authorities' power. The formation of a sanitary authority requires county and city approval. *See* ORS 450.787(1) ("If any part of the proposed sanitary authority is within a city, the resolution [of initiation of formation of a sanitary authority] shall be accompanied by a certified copy of a resolution of the governing body of the city approving the resolution that initiates formation of the sanitary authority."); ORS 450.787(2) ("the county governing body or boundary commission shall determine that provision of sewage disposal or drainage services to the area within the proposed sanitary authority can best be achieved by creation of a sanitary authority"). The operation and maintenance of the sanitary authority sewage infrastructure is conditioned on consent from other local authorities. *See* ORS 450.075(10) ("A sanitary district may * * * [l]ay its sewers and drains in any public street 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."); ORS 450.815(7) ("For the purpose of carrying out the powers granted to the authority under other provisions of ORS 450.600 to 450.989 and in addition thereto, the authority may * * * [l]ay 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."). Accordingly, a sanitary authority is subordinate to state, county, and city authority with respect to public rights of way.

As noted, ORS 450.815(7) provides that a sanitary authority must obtain the city's consent as a precondition to occupying city property, and a sanitary authority must comply with any conditions of consent. The Court of Appeals observed that the language of ORS 450.815(7) "suggests that 'conditions of consent' are ones imposed *before* the sanitary authority lays its sewers and drains"; therefore, ORS 450.815(7) may not provide express statutory authority for the imposition of fees for use *after* a sanitary authority occupies city rights of way. *Rogue Valley Sewer Services*, 262 Or App at 195 (emphasis added). Nevertheless, as the court also observed, "nothing in that statute is inconsistent with a city subsequently charging fees to address the effects of the sanitary authority's continued use of the rights-of-way after the initial consent is given."

Id. The court also emphasized the important observation that ORS 450.815 "sets out the limits of a *sanitary authority's powers*, not those of a city." *Id.* (emphasis in original). Accordingly, and again, a sanitary authority's powers are limited to its purposes and, as such, are subordinate to a city's more general powers, including the authority to manage and control city rights of way.

As RVS emphasizes, citizens may elect to transfer the municipal authority to *provide sewer services* from the city to a sanitary authority. However, under ORS 450.787, the city must approve the transfer of its obligation to provide sanitation services to the city's citizens. In transferring the obligations and concomitant powers of *providing sanitary services* within a city, the city, and the people of the city, in no way cede control and authority over city rights of way generally and, specifically, the authority to charge fees for the use and occupation of those rights of way.

In sum, in relationship to a sanitary authority, a city retains all of the general governmental powers of a municipality, including the power to assess franchise fees and privileges taxes for use of its rights of way. By its nature, which is confined by its limited purpose, a sanitary authority is not a "coequal unit of government" in relationship to a city. Instead, a sanitary authority is necessarily subordinate to a city and, as pertinent here, a sanitary authority is subordinate to a city in relationship to city rights of way. A city may charge a

sanitary authority fees for use of city rights of way, and may condition a sanitary authority's access to and use of city rights of way on payment of those fees.

III. A HOME-RULE ANALYSIS APPLIES TO THIS CASE; PURSUANT TO ITS HOME-RULE AUTHORITY, A CITY MAY CHARGE A SANITARY AUTHORITY FOR USE AND OCCUPATION OF CITY RIGHTS OF WAY.

The Court of Appeals correctly derived the applicable analysis from *LaGrande/Astoria v. PERB*, 281 Or 137, 142, 576 P2d 1204, *adh'd to on recons*, 284 Or 173 (1978):

> "'[T]he validity of local action depends, first, on whether it is authorized by the local charter or by a statute, * * *; second, on whether it contravenes state or federal law.' *See also AT&T Communications v. City of Eugene*, 177 Or App 379, 389, 35 P3d 1029 (2001), *rev den*, 334 Or 491 (2002) ('Whether a city has the authority to impose a tax * * * depends on two issues: First, whether the charter of the city confers the authority to impose the tax; and second, whether that authority has been preempted by state or federal law.')."

Rogue Valley Sewer Services, 262 Or App at 188. *See also Gunderson, LLC v. City of Portland*, 352 Or 648, 659, 290 P3d 803 (2012) (reiterating rule that "home-rule municipalities possess authority to enact substantive policies, even in areas regulated by state law, so long as the local enactment is not 'incompatible' with state law"); *Jarvill v. City of Eugene*, 289 Or 157, 169, 613 P2d 1, *cert den*, 449 US 1013, 101 SCt 572, 66 Led 2d 472 (1980) (holding that, under the home-rule provisions of the Oregon Constitution, cities do not

need legislative authorization to impose taxes).

Under the *LaGrande/Astoria* analysis, implied preemption (also known as field preemption) is inapposite; instead, only conflict preemption applies, thus, the relevant inquiry is whether the local law "cannot operate concurrently" with state law because the local law is "incompatible" with state regulation. *Id.* The Court of Appeals correctly applied that inquiry and concluded that a city's imposition of a franchise fee or privilege tax for a sanitary authority's use of city rights of way can operate concurrently with state regulation.

A city may tax another public entity for use of city rights of way. RVS contends that "the traditional home rule analysis is inapplicable when addressing a city's regulation of public rather than private interests." PB 19. RVS's argument in that regard is a bit confounding. RVS invokes the "principle" 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." PB 23. RVS fails to "connect the dots." That is, RVS failed to explain how or why the court should consider RVS to be "public property." Indeed, it is unclear if RVS contends that RVS is public property and, thus, is generally exempt from taxation.

RVS criticizes the Court of Appeals for "not grappl[ing]" with the intergovernmental taxation analysis in this context. The Court of Appeals

concluded that there is no general prohibition on intergovernmental taxation, therefore, that court did not need to assess whether or how such an analysis could comport with a home-rule analysis. In all events, it may very well be that the Court of Appeals implicitly reasoned that RVS's proposed analysis is inapposite simply because RVS is not "public property held for public use."

RVS's argument may be that the city rights of way are public property held for public use and, because RVS is another public entity occupying the rights of way, the city may not impose a tax on RVS for its use of public property. First, that analysis simply does not follow from the cases that RVS cites. Second, RVS's argument also does not comport with traditional usage and cities' authority over the use of city property. That is, cities have inherent, home-rule authority to impose a fee upon another entity that occupies a city right of way, regardless of the nature (public or private) of the entity that occupies or uses the right of way. The fee at issue here is not a tax on income or property; instead, it is a fee for use of city property.

ORS 221.420 and ORS 221.450 do not preempt a city's authority to regulate the use and occupation of city rights of way. In the alternative to its argument that a home-rule analysis is inappropriate in these circumstances, RVS argues that, even under a home-rule analysis, ORS 221.420 and ORS 221.450 preempt a city's home-rule authority to impose a franchise fee or

privilege tax on a sanitary authority. In so arguing, RVS asserts:

> "The construct of ORS 221.420 and 221.450 is a comprehensive scheme designed to provide the exclusive bases 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 in this case] cannot meaningfully operate consistently with those statutes."

PB 42. That argument is unavailing for a number of reasons.

First, and most importantly, implied preemption is inapposite under the home-rule analysis. *See Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 474, 228 P3d 650, *rev den*, 348 Or 524 (2010) ("Under *LaGrande/Astoria*, * * * the occupation of a field of regulation by the state has no necessary preemptive effect * * *. Instead, a local law is preempted only to the extent that it 'cannot operate concurrently' with state law, *i.e.*, the operation of local law makes it impossible to comply with a state statute."). RVS does not and cannot assert that a city's franchise fee "cannot operate concurrently" with the provisions of ORS 221.420 and 221.450. Instead, RVS's preemption argument is premised solely on its assertion that, in enacting ORS 221.420 and 221.450, the legislature intended to "occupy the field." Not only is that an incorrect inquiry under *LaGrande/Astoria*, it is also based on an incorrect construction of ORS 221.420 and 221.450.

RVS's reasoning proceeds as follows: (1) ORS 221.420 and 221.450 provide the exclusive basis for the assessment of franchise fees and privilege

taxes by a city upon service providers that use and occupy city rights of way; (2) ORS 221.420 and 221.450 do not apply to sanitary authorities, because sanitary authorities are not enumerated therein; therefore, (3) there is no statutory basis for a city to seek a fee from a sanitary authority for use and occupation of a city's rights of way; thus, (4) cities lack authority to impose a franchise fee or privilege tax on a sanitary authority.

Central Point accepts that ORS 221.420 and 221.450 do not expressly apply to sanitary authorities. Central Point also accepts, *arguendo*, that there is no statutory basis for a city to seek a fee from a sanitary authority for use and occupation of city rights of way. Central Point disputes that ORS 221.420 and 221.450 provide the only basis for authority to assess franchise fees. A city may assess such fees under its home-rule authority. Accordingly, the absence of express statutory authority is not determinative of the validity of an imposed fee.

Nevertheless, in the event that this court may be persuaded by RVS's preemption argument with respect to ORS 221.420 and 221.450, Central Point also disputes RVS's construction of those provisions.

ORS 221.420 and ORS 221.450 are not comprehensive or exclusive. In arguing that ORS 221.420 and 221.450 provide an exclusive list of utility service providers that a city may charge for the use of city rights of way, RVS

implicitly invokes a rule of statutory construction--*viz.*, *expressio unis est exclusion alterius*, "the expression of one is the exclusion of others." RVS argues that, because the legislature chose to enumerate entities subject to franchise fees and privilege taxes, the legislature intended to exempt all other service providers from similar fees.

The *expressio unis* rule is a rule of dubious usefulness, especially when used as a rule of deduction. For example, given your honor's self-governing authority to choose what to eat for lunch, if a waiter told you that you may order soup and salad, it does not logically follow that you may not also, or instead, order a sandwich.

The *expressio unis* rule is even less useful when there is no evidence that a list of enumerated items was intended to be exhaustive. Here, RVS has identified no such evidence. Finally, the *expressio unis* rule is least useful when there is evidence that the legislature did not intend an enumerated list to be exhaustive. *See MEC Oregon Racing, Inc. v. Oregon Racing Comm.*, 233 Or App 9, 20, 225 P3d 61 (2009), *rev den*, 348 Or 280 (2010) (a rule of permissible negative inference "gives way to other, more direct, and contrary evidence of legislative intent"); *Colby v. Gunson*, 224 Or App 666, 671, 199 P3d 350 (2008) (explaining that the *expressio unis* guide to legislative intent "corroborates, rather than supplies, meaning to a statute"); *State ex rel City of*

Powers v. Coos County Airport, 201 Or App 222, 234, 119 P3d 225 (2005), *rev den*, 341 Or 197 (2006) (*expressio unis est exclusion alterius* is to be applied with caution). Here, there is evidence that the legislature did not intend the lists of entities enumerated in ORS 221.420 and 221.450 to be exhaustive.

In enacting ORS 221.420 and 221.450, the legislature recognized cities' independent authority, granted by municipal charters, to regulate use of municipally owned rights of way, and to impose charges for that use. ORS 221.415 provides:

> "Recognizing the independent basis of legislative authority granted to cities in this state by municipal charters, the Legislative Assembly intends by ORS 221.415, 221.420, 221.450 and 261.305 to reaffirm the authority of cities to regulate use of municipally owned rights of way and to impose charges upon publicly owned suppliers of electrical energy, as well as privately owned suppliers for the use of such rights of way."

RVS contends that ORS 221.415 is of "limited usefulness" in this context because that language only "reaffirms" the authority that cities have over electrical utilities. It is not apparent why a city's authority to charge a fee for the use and occupation of city rights of way would be limited by the nature of the service provided--*i.e.*, electricity versus wastewater disposal. Central Point perceives no reason why any distinction based on the nature of services provided should affect the city's authority to charge a service provider for the use and occupation of city rights of way.

The absence of sanitary authorities in the enumerated list in ORS 221.420

and 221.450 is not dispositive evidence that the legislature intended to exempt sanitary authorities from "the authority of cities to regulate use of municipally owned rights of way and to impose charges * * * for the use of such rights of way." Indeed, sanitary authorities share many of the same characteristics with those entities specifically enumerated in ORS 221.420 and 221.450, including electric cooperatives, people's utility districts, privately owned public utilities, and heating companies. Central Point emphasizes that that list includes publically owned service providers. The listed utilities--and sanitary authorities--provide essential services to citizens and require an infrastructure within a city to deliver those services, including occupation of city owned (and private) property and rights of way. *See* ORS 450.815(4) (providing sanitary authority the power to acquire "real and personal property and rights of way"); ORS 450.815(7) (providing sanitary authority the power to use and occupy public rights of way, subject to consent and conditions of "of the proper city, county or state authorities"). In its proffered construction of ORS 221.420 and 221.450, RVS has failed to present evidence that the legislature intended—expressly or impliedly--to exempt sanitary authorities from fees for use of city rights of way.

RVS argues that, in amending ORS 221.420 and ORS 221.450, the legislature acknowledged limits on intergovernmental taxation in the utility

franchise context. RVS cites the Staff Measure Analysis for House Bill (HB) 3021 (1987), which stated:

> "Traditionally, cities have imposed and collected franchise fees and/or privilege taxes on all (publically and privately owned) utilities which serve their municipalities. State law, however, does not specifically include 'publically owned' utilities within this grant of authority."

PB 25 (quoting HB 3021 (1987) Staff Measure Analysis). RVS emphasized the final sentence in that quote. However, the preceding sentence demonstrates that, in enacting HB 3021, the legislature simply codified cities' traditional, preexisting authority to impose such taxes and fees on both publically and privately owned utilities. Contrary to RVS's assertion, HB 3021 was not necessary to provide cities with authority to impose taxes and fees, because that they already possessed that authority. As the Measure Analysis states, the legislature amended those statutes simply to codify and clarify the state of the existing common law.[4] Accordingly, instead of acknowledging limits, that quoted legislative history demonstrates that the legislature acknowledged the city's traditional authority to impose fees like the one in this case.

A city fee can operate concurrently with ORS 221.420 and 221.450. As explained, the proper inquiry is whether a fee imposed on a sanitary authority

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[4] RVS acknowledges that the legislature sometimes codifies common law principles. *See* PB at 13, 21 (arguing that the legislature simply codified the preexisting common-law prohibition on intergovernmental taxation).

can operate concurrently with the provisions and limitations in ORS 221.420 and 221.450. It can. A city's assessment of a franchise fee or privilege tax on an entity specifically listed ORS 221.420 and 221.450 in no way conflicts with a city assessing a similar fee on a sanitary authority. Indeed, other service providers may argue that a city's failure to impose similar taxes on all similarly situated service providers violates Article I, section 32, of the Oregon Constitution, which requires that taxation be uniform on the same class of subjects. *See, e.g.*, *City of Eugene v Comcast of Oregon II, Inc.*, 263 Or App 116, ___ P3d ___ (2014) (service provider so argued).[5]

IV. REASONABLENESS OF FEES FOR USE OF CITY RIGHTS OF WAY

Although RVS's challenge to the reasonableness of the franchise fee may have been unpreserved, that issue is certain to arise again in other cases. Accordingly, Central Point submits briefing on the subject of purported restrictions on the amount of a fee that a city may impose on a service provider for use of city rights of way.

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[5] In addition to its interest in preserving its home-rule authority over the management of city rights of way, Central Point is also interested in maintaining the authority to establish equity among franchised service providers, including sharing the cost of maintaining city rights of way, and uniformly controlling the construction methods and practices used by franchised service providers operating within the city.

A fee for "use" and "occupation" need only be tied to that use; how or where a city spends the revenue generated by those fees is immaterial to whether a city has the authority to assess a fee for use. RVS implies that a franchise fee or privilege tax is invalid if it is not "rationally related to a legitimate governmental purpose other than revenue generation," and that "[a] city may not charge fees that are unreasonable or that materially exceed the expense of regulation associated with that fee." PB 3, 8. RVS cites no authority for either of those assertions. To be sure, certain laws, regulations, and policies may require or encourage a city to "earmark" certain revenue sources for specific uses. RVS has identified no such law or regulation that could compel that type of restriction here. In the absence of a direct prohibition, there is no reason why a city may not charge a service provider a fee that exceeds the cost of maintaining the right of way. *See Jarvill*, 289 Or 169 (holding that a city may determine and select the appropriate means to raise revenue "in order to provide governmental services," so long as revenue raising measures serve a "legitimate public purpose").

In conditioning a sanitary authority's powers, the legislature recognized that cities retained authority to deny, grant, and/or condition a sanitary authority's request to use and occupy city rights of way. *See, e.g., Whitbeck v. Funk*, 140 Or 70, 74, 12 P2d 1019 (1932) (explaining that "[a] franchise confers

the right to exercise powers or to do and perform acts which, without such a grant, the person to whom it is granted could not do or perform"). This court has held that, pursuant to its home-rule authority, a city may impose privilege taxes on a service provider, based simply on conferring the privilege of providing services within a city. *See US West Communications v. City of Eugene*, 336 Or 181, 81 P3d 702 (2003) (holding that a city may impose a privilege tax on telecommunication carriers that exceeds a statutory limit in ORS 221.515 on fees for use of rights of way, where the tax was not tied to that use); *see also AT&T Communications v. City of Eugene*, 177 Or App 379, 35 P3d 1029 (2001), *rev den*, 334 Or 491 (2002) (holding that city may impose fees that exceed a statutory cap on fees for use of rights of way, to recover for general privilege of operating within the city). A sanitary authority is not empowered by statute to occupy city property without first obtaining a city's consent and complying with the conditions of that consent. If a city may charge of fee based solely on a service provider's operation within city limits, regardless of whether the service provider uses or occupies public property, certainly a city may charge a fee for use of city property, even if that fee is not directly tied to the city's cost in maintaining its property.

Potential fees are not limitless. RVS implies that, if this court affirms the Court of Appeals decision in this case, cities will be free to levy unlimited fees.

That "slippery slope" argument does not go far. As a general matter, municipalities' actions, including assessing fees and taxes, must benefit the citizens of that municipality. *See, e.g.*, *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291, 306, 308, 711 P2d 119 (1985) (explaining that, in the context of negotiating franchise fees, a municipality must act for the public's general welfare). Ultimately, if a city charges excessive fees, or fees that are not in the public's interest, city counselors and managers are subject to political recourse.

A sanitary authority's decision to pass the cost of fees and taxes on to customers does not amount to city rate-setting or conscripting a sanitary authority's services to collect "stealth" taxes. RVS asserts that ORS 450.840(2) requires it to pass on increased operating expenses to its customers, the city's citizens and constituents. PB 6. That statute provides that the geographic area that is served by the authority must bear the cost of service--as opposed to other geographic areas served by the same sanitary authority bearing that cost. For example, RVS serves Phoenix and Central Point. ORS 450.840(2) provides that Phoenix residents must bear the cost of RVS's service in Phoenix; RVS may not charge higher rates in Central Point to cover costs of service incurred in Phoenix. *Compare* ORS 450.840(1) (The cost of construction of a sewage disposal system, including treatment plants and trunk or lateral sewers, or a

drainage system shall be *borne by the area directly benefited by the system*.") *and* ORS 450.840(2) ("The cost of operation and maintenance of sewage disposal systems and drainage systems shall be *borne by the area directly benefited by the system*.") *with* ORS 450. 840(3) ("The costs and expenses of the authority which are not chargeable * * * *to any particular area within the authority* such as overall planning, expenses of the board, conduct of elections and hearings and mosquito and other insect control shall be borne by the entire authority in the manner provided in ORS 450.885(1)(a)."). ORS 450.840(2) does not mandate that RVS pass an increased operation cost directly on to its customers, although, as a practical matter, most functional, sustainable businesses pass overhead costs on to customers. ORS 450.840 simply states that the geographic area served by the authority must pay for the service.

Relatedly, the fact that one city that is served by a sanitary authority may charge a higher fee than another city served by the same sanitary authority in no way invalidates either city's fee. Neither city is "subsidizing" the other because sanitary authorities' service rates are based on the cost of service to the area served.

It is inaccurate to characterize a fee or tax that is assessed to a service provider for that provider's use and occupation of city property as a "stealth tax," "illegal subsidization regime," or "conscription." A city, as the public

property owner and manager, has the power to set the terms and conditions of use of the property, including collecting fees for use and occupation. A fee imposed on a service provider that actually uses and occupies city property, is a fee for the use of that property. How or where the city then spends the money collected from those fees is immaterial to the issue of whether the city has the authority to impose the fee in the first instance.

CONCLUSION

The legislature may wish to take up the task of harmonizing and clarifying the statutory scheme with respect to utility service providers' use of public rights of way. Any future legislative action should not impinge on cities' authority to manage and control use of city property. Oregon cities are diverse, and proper local management requires flexibility.

This court's task is to apply current law to the facts of this case. For all of the reasons explained above a home-rule analysis applies to this case. Applying that analysis, this court should affirm a city's home-rule authority to

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impose a fee on a sanitary authority for use and occupation of the city's rights of way.

Respectfully submitted this 6th day of November, 2014.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is approximately 6118 words.

I 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 FILING AND SERVICE

I certify that on November 6, 2014, I caused to be electronically filed the foregoing **CITY OF CENTRAL POINT'S *AMICUS CURIAE* BRIEF ON THE MERITS** with the Appellate Court Administrator by using the court's e-Filing system.

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