IN THE SUPREME COURT OF THE STATE OF OREGON

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

JOINT BRIEF OF *AMICUS CURIAE* CLACKAMAS RIVER WATER and SPECIAL DISTRICTS ASSOCIATION OF OREGON

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

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

October 2014

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I. STATEMENT OF *AMICUS* INTEREST.

A. Clackamas River Water ("CRW").

CRW is a domestic water supply district formed pursuant to ORS chapter 264 "for the purpose of supplying inhabitants of the district with water for domestic purposes." ORS 264.110. CRW's territory overlaps with the territories of other local governments, including Oregon City. As such, CRW has a real and immediate interest in the scope of a city's authority to exact payments from another unit of local government that operates within the city's territory. In particular, this case implicates other "fees" or assessments that may be adopted by cities (such as the right of way "fee" adopted by Oregon City pursuant to Oregon City Code, Chapter 13.34 and Resolution 13-26) and imposed on other units of local government for operation within a city's boundaries.

B. Special Districts Association of Oregon ("SDAO").

SDAO is an Oregon nonprofit corporation representing the interests of Oregon special districts, which include at least 927 local public bodies. Special districts provide a very wide variety of services, including fire and rescue, water supply, irrigation, drainage, parks and recreation, ports, roads, soil and water conservation, hospitals and health, transit, public utilities, and many others. The territories of SDAO's special district members often overlap with those of other local governments, including cities. As such, SDAO's members will be

directly impacted by this court's resolution of the question of a city's authority to exact payments from other local governments.

II. SUMMARY OF ARGUMENT.

Amici CRW and SDAO agree with Petitioner Rogue Valley Sewer Services' position that the Court of Appeals erred when it concluded that a city has inherent home rule authority to regulate and tax another government entity. CRW and SDAO submit this brief to emphasize the point that this is not a "home rule" case. As explained below, this court's precedents establish that the regulation and taxation of another government entity is an "extramural" or "extramunicipal" activity that is not within the scope of a city's inherent, home rule powers and therefore must be authorized expressly by state statute in order to be enforceable. Under a proper analysis of the "franchise fee" at issue in this case, the Court of Appeals should have found that the regulation or taxation of another government entity operating within the city's boundaries is outside the scope of home rule power and was invalid as to Petitioner Rogue Valley Sewer Services because no statute authorized it. CRW and SDAO respectfully urge this court to reverse the Court of Appeals' decision for that reason.

III. ARGUMENT.

A. The jurisdictional landscape: Special districts, like cities, are units of local government.

Oregonians have formed hundreds of special districts throughout the state to provide numerous types of services. *Amicus* CRW, for example, is a

domestic water supply district formed pursuant to ORS chapter 264 "for the purpose of supplying inhabitants of the district with water for domestic purposes." ORS 264.110. Petitioner Rogue Valley Sewer Services ("Rogue Valley") is a sanitary authority formed pursuant to ORS chapter 450 "for the purpose of providing sanitation facilities and services." ORS 450.009. Oregon law provides for many other types of special districts, from library districts to weather modification districts. *See* ORS 198.010 (listing 26 different districts considered to be "special districts" for purposes of ORS chapter 198).

Special districts, like cities, are considered to be units of local government. *See* ORS 174.116(1)(a) (a statutory reference to "local government" as provided in ORS 174.108 to 174.118 "means all cities, counties and local service districts located in this state * * *"); ORS 190.003 (cities and districts included in definition of unit of local government for purposes of intergovernmental agreements). As such, many special districts—like cities—are responsible for exercising governmental powers and delivering municipal services to their inhabitants. *See, e.g.,* ORS 264.240 ("A domestic water supply district created under this chapter may exercise the power of eminent domain both inside and outside of its boundaries[.]"); ORS 264.300 (granting to water districts the authority to assess, levy, and collect taxes); *Elmore v. Aloha Sanitary Serv.*, 256 Or 267, 269, 473 P2d 130, 132 (1970) (sanitary authority's

disposal of waste and sewage within a heavily populated area is a "compelling exercise" of the "function[s] of organized government").

The territory of special districts and cities frequently adjoin or overlap. This case presents the example of the overlap between Petitioner Rogue Valley's district and the city limits of Respondent City of Phoenix. Historically, cities and special districts—overlapping and otherwise—have used intergovernmental agreements adopted pursuant to ORS chapter 190 to provide specified services and to govern their relationships for the provision of those services. For example, Petitioner Rogue Valley and Respondent City of Phoenix were parties to an intergovernmental agreement relating to the provision of sewer services to city residents before the city territory was annexed into the Rogue Valley district. ER-7. Similarly, *Amicus* CRW is a party to intergovernmental agreements with the City of Oregon City, an example of which is included in the appendix. APP-1 - APP-8.

This case poses the question of whether, or to what extent, a city may abandon the collaborative approach to governance reflected in ORS chapter 190 and unilaterally exercise authority over another governmental entity such as a special district by imposing fees for operation within the city's boundaries.

B. The "home rule" power of cities does not include the power to regulate other governmental entities.

The Court of Appeals analyzed Rogue Valley's claim under the rubric of "home rule," the powers granted to cities under Article XI, section 2, and

Article IV, section 1(5), of the Oregon Constitution.[1] Opinion at 8-9 (ER 34-35). The foundation of the court's analysis is this conclusion: "Where a city's charter broadly confers all authority not denied by state or federal law—as the city's charter did here—it confers on the city the power to impose local taxes and to regulate matters subject to municipal regulation." Opinion at 8 (ER-34), citing *AT&T Communications v. City of Eugene*, 177 Or App 379, 389, 35 P3d 1029 (2001), *rev den*, 334 Or 491 (2002), and *Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624, 634, 4 P3d 748, rev den, 331 Or 429 (2000). Without questioning whether the activities of another governmental entity actually are "subject to municipal regulation," the court determined that the only question in this case was "whether the city was prohibited from imposing the fee by state or federal law." Opinion at 9 (ER 35). The remainder of the Court of Appeals' opinion is focused on whether various statutes contain such a prohibition, concluding with the holding that they do not. Opinion at 9-20 (ER 35-46).

The flaw in the Court of Appeals' analysis is its mistaken assumption that the activities of other government entities are proper subjects of municipal

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[1] As this court has noted, "home rule" is not a constitutional term. *City of La Grande v. Pub. Employes Ret. Bd.*, 281 Or 137, 140 n 2, 576 P2d 1204 (1978), *on reh'g*, 284 Or 173 (1978). Nevertheless, the term is commonly attributed to the authority granted to cities under Article XI, section 2, and Article IV, section 1(5), of the Oregon Constitution.

regulation or taxation[2] and therefore fall within the scope of home rule. This court's precedents have drawn a line between "intramural" actions by cities that by their nature are within home rule authority, and "extramural" actions by cities that are permissible only if expressly authorized by statute. Falling squarely within the category of extramural actions that are outside the scope of cities' inherent home rule authority are the regulation and taxation of other governmental entities. With an understanding of the distinction between intramural and extramural actions, it becomes evident that this is not a home rule case after all.

The basis for the distinction between intramural and extramural activities can be found in the purpose of the home rule amendments, Article XI, section 2, and Article IV, section 1(5), of the Oregon Constitution. This court has stated that, with respect to local government authority, the purpose of the amendments is "to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the amendments." *City of La Grande v. Pub. Employes Ret. Bd.*, 281 Or 137, 142, 576 P2d 1204 (1978) *on reh'g*, 284 Or 173 (1978). Extramural activities are

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[2] *Amici* CRW and SDAO concur with Rogue Valley's argument that the imposition of fees for general operation within a city's boundaries is a "tax."

fairly described as activities that are not necessary to preserve, or which conflict with, self-governance.

"Extramural," in this context, has two distinct forms under this court's precedents. The first form is spatial, referring to coercive extraterritorial actions. *See DeFazio v. Washington Pub. Power Supply Sys.*, 296 Or 550, 582-83, 679 P2d 1316 (1984) (A city lacks authority to "assert coercive authority over persons or property outside its boundaries."). The spatial form of extramural activity, characterized by an attempt to regulate activities outside the city's boundaries, is not present in this case.

The second form of extramural activities is non-spatial, and includes attempts to regulate or tax other government entities. Rather than being "extraterritorial," these actions are best described as "extramunicipal." The late Orval Etter, a former University of Oregon professor who in his time was the state's preeminent scholar on the topic of municipal home rule, explained the distinction between "extraterritorial" and "extramunicipal" extramural actions:

> "The powers that the constitution offers the voters of a city or county through the home rule amendments are intramural—powers exercisable only within the boundaries of the city or county. If the power is exercisable outside those boundaries, the power is extramural and, in order to be valid, must come from the state legislature. *State v. Port of Astoria*, 79 Or 1, 154 P 399 (1916).
>
> Similarly, if a power of a city or county bears on another government, the power is extramural in a nonspatial sense—extramunicipal or extraquasi-

> municipal—and must be expressly given by the state legislature."

Orval Etter, "City Structure—Powers and Limitations," in *Oregon Local Government Law* 2-1 (Oregon Law Institute, 1991) (APP-9 - APP-13).

This court's precedents support Professor Etter's conclusion that extramunicipal powers, like extraterritorial powers, must be expressly granted by the legislature. Four years after the home rule amendments to the Oregon Constitution were adopted, this court held that the City of Portland could not unilaterally impose the care and maintenance of a public bridge upon Multnomah County. *Kiernan v. City of Portland*, 57 Or 454, 462-63, 111 P 379 (1910). The City of Portland had amended its charter to provide for construction of the Broadway Bridge. *Id.* at 457-58. The charter amendment further provided that, "upon completion of the bridge the executive board shall surrender and deliver the possession thereof to the county court of Multnomah county." *Id.* at 462. This court found that the compulsory transfer provision was invalid: "it is beyond the power of the city to impose the care and maintenance of a public bridge upon Multnomah County without the county authorities shall [sic] consent thereto." *Id.* at 463. Professor Etter observed: "Here was the first ruling that home rule does not enable a city to change a power or duty of a governmental entity other than the city." *Municipal Home Rule* 103 (University of Oregon, 1991) (APP-19).

Five years later, in *West Linn v. Tufts*, 75 Or 304, 307-09, 146 P 986 (1915), this court again held that a city lacked the inherent authority to regulate another government. The City of West Linn had amended its charter to require Clackamas County to turn over to the city road taxes that the county had levied within city limits. *Id.* at 306. This court rejected West Linn's attempt to require the county to turn over the money, reasoning:

> "To permit any limited number of citizens to organize themselves into a municipal corporation, arrogating in any degree independent powers and demanding contribution 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. If the [City] of its own motion may demand funds raised by the county as road taxes, with equal authority it may exact contributions from any other money in the county treasury, no matter from what source it is derived."

Id. at 308. This court quoted from *State ex rel. Anderson v. Port of Tillamook*, 62 Or 332, 124 P 637 (1912), a case in which this court invalidated a port's attempt to annex territory outside its boundaries, to draw an analogy between the City of West Linn's attempted regulation of another government and a municipal corporation's extramural act of annexing territory outside its boundaries. *Tufts*, 75 Or at 308 ("By a parity of reasoning, if a self-constituted municipality in one instance can assume authority over the exercise of the taxing power vested in the state, and so vitally essential to its existence, the like assumption may be enlarged ad libitum to the subversion of state

government."). This court's decision in *Tufts* therefore indicates that impermissible extramural activity includes both extraterritorial activity and extramunicipal activity. *See* Orval Etter, Municipal Home Rule 194 (University of Oregon, 1991) (discussing the *Tufts* decision and noting that "[b]ecause the 'extra' aspect of the power lacked a spatial dimension, 'extramunicipal' is here a term preferable to 'extramural '") (APP-25).

In 1988, this court again held that a city lacks inherent authority over other units of government. In *City of Eugene v. Roberts*, 305 Or 641, 649-50, 756 P2d 630 (1988), the City of Eugene argued that it had the authority, pursuant to its home rule powers, to compel the county clerk and the Secretary of State to conduct a vote on an advisory question presented by the City. *Id.* at 649. This court disagreed, noting:

> "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 649-50. The analysis set out in the *Roberts* decision highlights the Court of Appeals' fundamental error in this case, which was to assume that the regulation of another governmental entity should be analyzed as a home rule case in the first place.

This court's conclusion that home rule is not implicated by a city's attempt to exert its will onto another unit of government accords with the conclusions of Professor Terrance Sandalo in "The Limits of Municipal Power Under Home Rule: A Role for the Courts," 48 *Minn L Rev* 643 (1963-64). Professor Sandalo wrote that "the existence of home rule power is irrelevant to the issues posed by attempted municipal regulation of other governmental agencies." *Id.* at 682 n 154. Because home rule authority does not grant a municipality the authority to regulate another government entity, "the prevailing rule * * * is that, absent legislative authorization, one agency of local government does not have power to regulate the activities of another." *Id.* at 699. *See also* Or Op Atty Gen, 1985 WL 200049, OP-5863 (1985) (finding that "if a power of a city bears directly on another government, the power has extramural characteristics and ordinarily must be authorized by the state legislature" and that "regulation of other governmental units is not within home-rule prerogatives").

C. The Oregon legislature has not permitted cities to impose fees on sanitary or domestic water service districts for the location of district infrastructure in a city's right of way.

By failing to appreciate that the regulation or taxation of another unit of government is an extramural or extramunicipal activity, the Court of Appeals mistakenly identified the dispositive question in this case as whether the city was prohibited from imposing the fee by state or federal law. In fact, the

dispositive question is whether the state legislature has expressly granted cities the power to engage in those activities. *See Roberts*, 305 Or at 644-49 (analyzing as statutory questions whether the city's proposed advisory question qualified for the ballot and whether the County Clerk was required to conduct a vote on those advisory question); *State v. Port of Astoria*, 79 Or 1, 154 P 399 (1916) (a city's extramural activities must be authorized by statute). The only statutes permitting cities to charge fees in connection with the location of utility infrastructure in rights of way are ORS 221.420 and ORS 221.450.[3] Those statutes expressly limit their application to specific types of service providers—

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[3] ORS 221.420(2)(a) provides:

> "(2) Subject to ORS 758.025, a city may:
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> "(a) Determine 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 221.450 provides, in relevant part:

> "Except as provided in ORS 221.655, the city council or other governing body of every incorporated city may levy and collect a privilege tax from Oregon Community Power and from every electric cooperative, people's utility district, privately owned public utility, telecommunications carrier as defined in ORS 133.721 or heating company. * * *"

private public utilities, electric cooperatives, people's utility districts or heating companies, or Oregon Community Power—none of which is a sanitary district (or a domestic water district). Accordingly, this court should hold that the City of Phoenix lacked the authority to impose a "franchise fee" on Rogue Valley.

It bears noting that *Amici* CRW and SDAO are not taking the position that a city may never charge another unit of local government for the cost of its services. CRW, for example, routinely pays Oregon City's standard permit fees, including the cost of city staff time, for construction activities within the city's rights of way. Such permit fees are distinguishable from "franchise" or other fees or assessments that generally target a government entity's operations and maintenance of public infrastructure within a city's boundaries. Through intergovernmental agreements, such as the example included in the appendix to this brief, cities and districts also may collaborate to allocate costs for services between them. For purposes of this case, the court need only follow its own precedents to the conclusion that generalized regulation, taxation or imposition of "franchise" or other similar fees imposed on another governmental entity, simply because it operates within a city, fall outside the power of a city.

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IV. CONCLUSION.

This court should reverse the Court of Appeals' decision, which erroneously holds that a city has the inherent authority to regulate another unit of local government in the absence of statutory authorization.

Respectfully submitted this 2nd day of October, 2014

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 3,205 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 October 2, 2014, I caused to be electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* CLACKAMAS RIVER WATER AND SPECIAL DISTRICTS ASSOCIATION OF OREGON** with the Appellate Court Administrator by using the court's efiling system.

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