



CITY OF KIRKLAND
Department of Finance & Administration
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MEMORANDUM

To: David Ramsay, City Manager

From: Tracey Dunlap, Director of Finance and Administration
Daryl Grigsby, Director of Public Works
Robin Jenkinson, City Attorney

Date: October 16, 2009

Subject: Fire Hydrant Issue

RECOMMENDATION

Approve resolution authorizing use of the Contingency Reserve Fund (\$188,262) to pay fire hydrant costs in 2009-2010 (Kirkland water utility cost of \$185,493 and Bellevue 2010 billing of \$2,769). Also included in the resolution is a housekeeping authorization formalizing use of the reserve for services related to the proposed cable franchise transfer by Verizon (\$54,750 approved at the September 1 City Council meeting).

BACKGROUND DISCUSSION

In October 2008, the Washington State Supreme Court ruled that fire hydrant costs are a general government function and should be paid out of general tax revenues (Lane v. City of Seattle – Attachment 1). The City of Seattle began to pay Seattle Public Utilities for fire hydrants from their general fund and raised utility taxes on SPU to cover for the general funds expended for the hydrants. This ruling has far-reaching consequences for all water providers throughout Washington in that water rate-making standards (as defined in the American Water Works Association M1 Manual) specifically include fire protection costs as part of water rates. Currently, the only direction that exists on how this ruling should be implemented is found in court documents related to Lane v. City of Seattle. Water utilities across Washington are grappling with how to comply with this ruling, especially given the limitations on general fund resources due to economic conditions and the absence of clear guidance on the specifics of how to apply the ruling to a wide variety of rate-setting approaches.

As part of the City of Kirkland's 2008 audit completed in June 2009 by the State Auditor's Office (SAO), the following exit item was highlighted for follow-up by the City:

Fire Hydrant Costs

Through 2008, the City of Kirkland included the cost of maintaining and operating fire hydrants in its charges to water utility customers. The costs were reported in City's Water Fund. A similar practice by another city was the subject of litigation over the past several years. During that time the City of Kirkland continued to pay fire hydrant costs in its Water Fund.

In October 2008, the Washington State Supreme Court ruled that fire hydrant costs are a general government function and should be paid out of general tax revenues. Therefore, the City does not have specific authority to fund these costs directly out of fees to water customers.

The City indicates it spent approximately \$67,375 maintaining fire hydrants in 2008. This amount does not include depreciation on the larger mains required to support the fire hydrants. The City estimates total costs, including depreciation would be one and a half percent of a water system's costs.

The City indicates they continue to pay for the maintenance and replacement of fire hydrants in the Water Fund. However, the City expects to address the issue as part of the mid-biennial budget process in fall 2009. In addition, the City anticipates charges to the general fund related to fire hydrants to be imposed effective January 2010.

We recommend the City ensure that fire hydrant costs are funded with general tax revenues. We further recommend the City review rate studies performed by cities or perform its own rate study to determine the total costs of maintaining and operating fire hydrants.

Recommended Action for 2009-2010

The City of Kirkland has already adopted its water rates for 2009 and 2010. Given the SAO guidance above, the staff recommendation is to transfer the costs of fire hydrant maintenance and related costs from the Contingency Reserve Fund, which is available "to meet any municipal expense, the necessity or extent of which could not have been reasonable foreseen at the time of adopting the biennial budget". Attachment 2 identifies the costs of hydrant maintenance and replacement for 2009 and 2010. The current Contingency Reserve Fund balance is \$2.325 million and the hydrant cost for 2009-2010 totals \$185,493. These funds would be transferred to the water utility, increasing the operating fund balance, which would be taken into consideration when the water rates are updated for 2011-2012.

Recommended Action for 2011-2012

There has been much discussion surrounding whether the term "fire hydrants" was intended to mean the total cost of "fire protection", which can include a portion of the storage and transmission/distribution facilities of the water utility. To date, very few jurisdictions have implemented this change beyond the City of Seattle. The City of Bellevue took the approach that the full "fire protection" element of their rates should be charged as a general government expense and, in addition to charging its general fund, has billed surrounding cities for the share of fire protection serving outside Bellevue's city limits. As a result, Bellevue has billed Kirkland for the 8 Bellevue hydrants and related infrastructure serving within the Kirkland city limits (\$2,769 in 2010). Staff recommends adding this amount to the use of the Contingency Reserve Fund for 2010.

Kirkland has been approached by Northshore Utility District (NUD) to discuss approaches to addressing the fire protection services they provide in the Kirkland city limits. This issue becomes even more significant if annexation occurs. In preliminary discussions, NUD has suggested that we could modify the franchise agreement to increase the franchise fee paid by the District to offset the amount of the fire protection costs paid by Kirkland for consideration of

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the following changes: (1) extended notice of future service area takeover (increasing the non-assumption timeframe) and (2) protection of citizens from possible double taxation in the future (in the event that the City has the capability in the future to impose a utility tax on the District, that the tax would replace the current franchise fee). The District would then reduce the water rate to customers within the City by our fire protection payments and pass on the franchise fee increase, resulting in no new net cost to the ratepayers and minimizing the overall impact on both parties.

To further pursue this approach, Kirkland would need to update its rate study to refine what portion of the rates is related to fire hydrants and then determine whether to implement the change in a manner similar to that pursued by Seattle – reducing rates by the amount of the general fund payment for fire hydrants and raising the utility tax rate on the water utility to generate sufficient revenues to make the general fund payment. Once Kirkland determined its approach to implementing the change, NUD would implement a revised franchise fee and reduce rates accordingly. NUD has also suggested that the District and City pursue jointly filing for declaratory judgment by the Court confirming the acceptability of the final method selected.

Consistent with the SAO recommendation, staff recommends that the planned water utility rate update in 2010 (for 2011-2012) address the broader question of fire hydrant costs and strategies for implementation. As in prior years, the City plans to engage a consultant for this rate update and, by mid-2010, there may be more definitive guidance on implementing the court ruling, including more clarity on the definition of fire hydrant costs.

Conclusion

In summary, staff is recommending two strategies to address this court ruling:

- A near-term strategy of funding the fire hydrant costs in 2009-2010 (including the Bellevue billing) using the Contingency Reserve Fund (\$188,262), recognizing that the City has already adopted its 2010 rates and the funds will be restricted to use in the Water utility.
- A longer-term strategy of updating the water rate analysis in 2010 (for the 2011-2012 rates) and determining an approach for funding the new general fund cost for fire hydrants. In addition, negotiate a revised franchise fee agreement with NUD to address fire protection services provided by the District.

Finally, staff has approached the Association of Washington Cities about pursuing a legislative clarification to address this issue which will negatively impact cities across the state, recognizing that Washington would become the only state we are aware of where such restrictions are in place. We are also recommending addition of a potential legislative fix to the City's legislative agenda.

[Note: The resolution also contains a housekeeping authorization formalizing use of the reserve for legal counsel and consulting assistance related to the proposed transfer by Verizon of its cable franchise agreement with the City (\$54,750 approved at the September 1 City Council meeting).]

H

Supreme Court of Washington,
En Banc.

Arthur T. LANE, Kenneth Gorohoff and Walter L. Williams, individually and on behalf of the class of all persons similarly situated, Respondents/Cross-Appellants,

v.

The CITY OF SEATTLE, Respondent/Cross-Respondent,

King County Fire District No. 2; King County Fire District No. 4 (a.k.a. Shoreline Fire Department); North Highline Fire District No. 11; King County Fire District No. 16 (a.k.a. Northshore Fire Department); King County Fire District No. 20; The City of Shoreline, a Washington municipal corporation; and King County, a Washington municipal corporation, Respondents,

The City of Burien, a Washington municipal corporation; The City of Lake Forest Park, a Washington municipal corporation, Appellants.

No. 80204-1.

Argued Feb. 28, 2008.

Decided Oct. 16, 2008.

Background: Municipal water utility sued other municipalities and fire districts for payment for hydrants. Ratepayers brought class action and sued the utility for hydrant payments made by ratepayers for three-year period and sued municipality for raising taxes on water utility to cover cost of hydrant payments. Each party moved for summary judgment. The Superior Court, King County, [Michael S. Spearman, J.](#), ruled that utility could not charge ratepayers for hydrants, municipal tax on utility was valid, utility had to repay ratepayers, other municipalities had to pay for their share of hydrant costs, and fire districts had no obligation to pay. Ratepayers, municipality, and other municipalities appealed.

Holdings: The Supreme Court, en banc, J.M. Johnson, J., held that:

- (1) charge imposed by utility on ratepayers to pay for hydrants was an illegal tax;
- (2) ratepayer had standing to challenge municipality's increased tax on water utility;
- (3) municipality's tax on public water utility to pay for

fire hydrants was constitutional;

- (4) ratepayer was entitled to statutory interest on repayment of illegal hydrant charge; and
- (5) charge imposed on surrounding municipalities was valid fee.

Affirmed in part and reversed in part.

West Headnotes

[1] Municipal Corporations 268 57

[268](#) Municipal Corporations

[268II](#) Governmental Powers and Functions in General

[268k57](#) k. Powers and Functions of Local Government in General. [Most Cited Cases](#)
Governments are treated differently by the courts depending on if they are acting as governments or as businesses.

[2] Municipal Corporations 268 63.1

[268](#) Municipal Corporations

[268II](#) Governmental Powers and Functions in General

[268k63](#) Judicial Supervision

[268k63.1](#) k. In General. [Most Cited Cases](#)
Supreme Court reviews most government decisions to determine whether they had a rational basis and occasionally use this standard to strike down a government decision.

[3] Municipal Corporations 268 63.5

[268](#) Municipal Corporations

[268II](#) Governmental Powers and Functions in General

[268k63](#) Judicial Supervision

[268k63.5](#) k. Discretion. [Most Cited Cases](#)
Supreme Court reviews business decisions made by a governmental unit under the business judgment rule and infrequently reverse a business decision.

[4] Taxation 371 2002

[371](#) Taxation

[371I](#) In General

[371k2002](#) k. Distinguishing “Tax” and “License” or “Fee”. [Most Cited Cases](#)

There is a three-factor test to decide whether a governmental charge is a tax or a fee, and no single factor determines the matter: (1) the purpose of the charge, (2) where the money raised is spent, and (4) whether people pay the cost because they use the service.

[5](#) Waters and Water Courses [405](#)  [203\(9\)](#)

[405](#) Waters and Water Courses

[405IX](#) Public Water Supply

[405IX\(A\)](#) Domestic and Municipal Purposes

[405k203](#) Water Rents and Other Charges

[405k203\(9\)](#) k. Hydrant Rentals. [Most](#)

[Cited Cases](#)

Charge imposed by municipal water utility on taxpayers to pay for the cost of fire hydrants was an invalid tax; purpose of the charge was to increase revenue, the money went to a hydrant fund, but ratepayers paid the same fixed amount whether they used the hydrants or not. [West's RCWA Const. Art. 7, § 5.](#)

[6](#) Action [13](#) 

[13](#) Action

[13I](#) Grounds and Conditions Precedent

[13k13](#) k. Persons Entitled to Sue. [Most Cited](#)

[Cases](#)

[Courts](#) [106](#) 

[106](#) Courts

[106I](#) Nature, Extent, and Exercise of Jurisdiction in General

[106k39](#) k. Determination of Questions of Jurisdiction in General. [Most Cited Cases](#)

Without jurisdiction, a court cannot hear a case, even if every party concedes standing.

[7](#) Waters and Water Courses [405](#)  [203\(12\)](#)

[405](#) Waters and Water Courses

[405IX](#) Public Water Supply

[405IX\(A\)](#) Domestic and Municipal Purposes

[405k203](#) Water Rents and Other Charges

[405k203\(12\)](#) k. Review by Courts and

Injunction Against Enforcement. [Most Cited Cases](#)

Ratepayer had standing to challenge municipality's increased tax on water utility, even though ratepayer did not pay the tax directly; water utility increased its rates to pay for the tax charge by municipality, and ratepayer had to pay the higher rates in order for utility to pay the higher taxes.

[8](#) Action [13](#) 

[13](#) Action

[13I](#) Grounds and Conditions Precedent

[13k13](#) k. Persons Entitled to Sue. [Most Cited](#)

[Cases](#)

To have standing, a party must be in a law's zone of interest and must suffer some harm.

[9](#) Municipal Corporations [268](#)  [957\(4\)](#)

[268](#) Municipal Corporations

[268XIII](#) Fiscal Matters

[268XIII\(D\)](#) Taxes and Other Revenue, and Application Thereof

[268k957](#) Constitutional Requirements and Restrictions

[268k957\(4\)](#) k. Submission to Voters, and Levy, Assessment, and Collection. [Most Cited](#)

[Cases](#)

[Taxation](#) [371](#) 

[371](#) Taxation

[371III](#) Property Taxes

[371III\(B\)](#) Laws and Regulation

[371III\(B\)3](#) Constitutional Requirements and

Restrictions

[371k2100](#) k. In General. [Most Cited](#)

[Cases](#)

Municipality's tax on public water utility to pay for fire hydrants was constitutional; municipality explicitly said it was taxing utility, the tax was properly adopted, and tax expressly stated it was subject to referendum. [West's RCWA Const. Art. 7, § 5](#); [West's RCWA 35.21.710, 82.16.010\(4\)](#).

[10](#) Municipal Corporations [268](#)  [1002](#)

[268](#) Municipal Corporations

[268XV](#) Claims Against Corporation

[268k1002](#) k. Interest. [Most Cited Cases](#)

Municipal Corporations 268 ↪ 1016

268 Municipal Corporations

268XVI Actions

268k1016 k. Capacity to Sue or Be Sued in General. Most Cited Cases

Governments cannot be sued for money without their consent, and local governments cannot be sued for interest without the state's consent.

[11] Waters and Water Courses 405 ↪ 184.1

405 Waters and Water Courses

405IX Public Water Supply

405IX(A) Domestic and Municipal Purposes

405k184 Water or Waterworks Companies

405k184.1 k. In General. Most Cited

Cases

Ratepayer who paid improper charge for city hydrants was entitled to interest on the amount paid at the statutory rate, where governing statute waived immunity and permitted suit against water companies for "all" loss damage, or injury, which included interest on the amount of the award. West's RCWA 80.04.440.

[12] Waters and Water Courses 405 ↪ 203(9)

405 Waters and Water Courses

405IX Public Water Supply

405IX(A) Domestic and Municipal Purposes

405k203 Water Rents and Other Charges

405k203(9) k. Hydrant Rentals. Most

Cited Cases

Charge imposed by municipality on surrounding municipalities that required municipal water utility to provide hydrants to them was a valid fee to cover their fair share of the costs of the hydrants; there was a direct relationship between the costs charged and the service provided. West's RCWA 43.09.210.

**978 Michael Paul Ruark, Attorney at Law, Bellevue, WA, Brian Richard Paige, Itron Inc., Liberty Lake, WA, for Appellants.

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City of Shoreline Attorney, Shoreline, WA, Kinnon William Williams, Joseph Halder Marshall, Williams & Williams, PSC, Bothell, WA, for Respondents.

David Florian Jurca, Jennifer Suzanne Divine, Connie K. Haslam, Helsell Fetterman LLP, Seattle, WA, for Respondents/Cross-Appellants.

Brian K. Snure, Snure Law Office PSC, Des Moines, WA, for Amicus Curiae on behalf of Washington Fire Commissioner's Association.

J.M. JOHNSON, J.

*879 ¶ 1 In this case we must decide who will pay for fire hydrants in the city of Seattle and its suburbs. Seattle Public Utility (SPU) used to pay for them, *880 passing the cost along to its ratepayers. The ratepayers object and want Seattle to foot the bill. If Seattle has to pay for its hydrants, it wants Lake Forest Park to pay for the hydrants in Lake Forest Park. Lake Forest Park, in turn, wants fire districts in Lake Forest Park to pay. The fire districts want someone, anyone, else to pay. On top of all that, the ratepayers want interest on improper past hydrant payments they recover and want Seattle's new tax on SPU declared illegal. Finally, the fire districts claim they are no longer even parties to the litigation.

¶ 2 We affirm the trial court on most issues. The court correctly held that providing fire hydrants is a government responsibility**979 for which a government must pay, that Seattle's new tax on SPU is constitutional, and that municipality Lake Forest Park must pay for hydrants within its boundary. The trial court erred only when it failed to give the claiming ratepayers the statutory interest rate on the invalid hydrant fees.

I

¶ 3 For years, SPU paid for hydrants by charging its water ratepayers a flat hydrant fee added to their water charges. In 2003, this court held that Seattle City Light could not charge its ratepayers for streetlights. Providing streetlights is a government function, and the court held that a municipal government must pay out of the city's general fund. Okeson v. City of Seattle, 150 Wash.2d 540, 78 P.3d 1279 (2003). Recognizing the legal equivalence between hydrants and street-

lights expressed in that decision (and argued by the city), Seattle had SPU stop charging ratepayers for hydrants. Instead, Seattle began to pay for the hydrants out of its general fund. To make up the cost, Seattle raised taxes on SPU, which led SPU to raise rates on water ratepayers to make up the difference.

¶ 4 SPU also provides local hydrants to areas outside the city of Seattle and concluded that those municipal governments should pay their share. SPU sent a bill for hydrants *881 to Lake Forest Park, Burien, and to local fire districts, all of which refused to pay. SPU then sued Lake Forest Park and Burien for payment and later joined the fire districts.

¶ 5 Meanwhile, a class made up of ratepayers (“Lane et al.,” as representatives, hereinafter “Lane”) sued SPU for hydrant payments made by ratepayers for the preceding three years. The statute of limitations limits that claim to three years. RCW 4.16.080(6). Lane also sued Seattle to enjoin the newly raised city taxes on SPU, which had resulted in SPU’s raising its rates on ratepayers.

¶ 6 After a lengthy pretrial process, each party moved for summary judgment. The trial judge held (1) SPU could not charge ratepayers to pay for hydrants; (2) Seattle’s tax on SPU was valid; (3) SPU had to pay back the Lane ratepayers, but only at one percent interest; (4) Lake Forest Park and Burien had to pay Seattle for their share of the hydrant costs; and (5) the fire districts had no obligation to pay. Each of these rulings has been challenged. We granted direct review.

¶ 7 After review, but before oral argument, Burien decided it had spent too much money litigating and withdrew. Thus, Burien was the only party originally stating a claim against the fire districts. Without an opposing party appealing their judgment, the fire districts are no longer parties, and we do not reach the issue between Burien and the fire districts. The remaining issues are resolved below.

II

A. SPU Cannot Charge Ratepayers for Hydrants, which Are a General Government Responsibility

¶ 8 “No tax shall be levied except in pursuance of law;

and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied,” WASH. CONST. art. VII, § 5. If providing hydrants is a government function, and if charging ratepayers for those hydrants is a tax, not a fee, the charge violates this part of the constitution.*882 Seattle imposed a “charge” rather than a tax, which it was not authorized by law to impose.

[1][2][3] ¶ 9 We treat governments differently if they are acting as governments or as businesses. *Okeson*, 150 Wash.2d at 549, 78 P.3d 1279. We review most government decisions to determine whether they had a rational basis and occasionally use this standard to strike down a government decision. E.g., *Associated Grocers, Inc. v. State*, 114 Wash.2d 182, 187-88, 787 P.2d 22 (1990); *O’Meara v. Wash. State Bd. Against Discrimination*, 58 Wash.2d 793, 799, 365 P.2d 1 (1961); *In re Hendrickson*, 12 Wash.2d 600, 612, 123 P.2d 322 (1942). In contrast, we review business decisions under the business judgment rule and infrequently reverse a business decision. See *Scott v. Trans-System, Inc.*, 148 Wash.2d 701, 709, 64 P.3d 1 (2003). We must first decide if providing **980 hydrants is a government responsibility or a proprietary responsibility.

¶ 10 It is conceded that *Okeson* decides that question. We held that streetlights are a government function and strongly suggested that providing hydrants is the same. We confirm that holding today.

[4] ¶ 11 The next step is deciding whether charging ratepayers to pay for hydrants was a tax or a fee, since a city must be authorized by statute to impose a tax but has broader power to impose a fee. *Okeson*, 150 Wash.2d at 550, 78 P.3d 1279. We have created a three-factor test to decide whether a charge is a tax or a fee; no single factor determines the matter. *Covell v. City of Seattle*, 127 Wash.2d 874, 879, 905 P.2d 324 (1995). The three factors are the purpose of the cost, where the money raised is spent, and whether people pay the cost because they use the service. *Id.*

¶ 12 Our decision here directly follows our decision in *Okeson*. There, the purpose of the cost was to increase revenue for the city and not to regulate the installed streetlights, indicating a tax. *Okeson*, 150 Wash.2d at 553, 78 P.3d 1279. The money did go into a streetlight fund, which made it more like a fee. *Id.* But ratepayers bore the same streetlight cost no matter

how much electricity they used, leaning *883 toward tax. *Id.* at 554, 78 P.3d 1279. Since all citizens may use and benefit from lighted areas, we held the charge to be an invalid tax. *Id.*

[5] ¶ 13 Here, the purpose of charging ratepayers a hydrant charge is also to increase revenue for the city and not to regulate hydrants or water usage, indicating a tax. The money goes to a hydrant fund, making it more like a fee. But, ratepayers pay the same fixed hydrant cost whether they use hydrants or not, indicating a tax. All benefit by having water available to put out fires. Moreover, we had expressly discussed fire hydrants as an example of government services in *Okeson*. Seattle had argued that the *Okeson* streetlights were just like hydrants, and SPU had always charged ratepayers for hydrants. The hydrant issue was not before us, but the argument of Seattle and implication of our decision were clear: for purposes of deciding a tax or fee, hydrants are very much like streetlights. *Id.* at 552, 78 P.3d 1279. As in *Okeson*, the charge here is a tax.

¶ 14 Lake Forest Park tries to distinguish *Okeson*. It points out that water companies within cities must, by statute, provide hydrants (RCW 80.28.010), but no similar law requires electric companies to provide streetlights. This is not determinative. After all, state law requires police to report accidents (RCW 46.52.070) and school districts to educate special education children (RCW 28A.155.040), but these laws do not justify taxing such transactions.

¶ 15 Lake Forest Park also claims a relationship between hydrant charges and user benefit by pointing out that houses near hydrants may have lower insurance rates. This might be more persuasive if SPU charged a different cost based on proximity to hydrants. The direct benefit of a hydrant system is enhanced fire suppression, which is a shared benefit, and the record shows no differential.

¶ 16 Amici also point to three cases where Washington courts upheld charges on customers when first connecting to waterworks. *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 980 P.2d 1234 (1999); *884 *Hillis Homes, Inc. v. Pub. Util. Dist. No. 1*, 105 Wash.2d 288, 714 P.2d 1163 (1986); *Irvin Water Dist. No. 6 v. Jackson P'ship*, 109 Wash.App. 113, 34 P.3d 840 (2001). These cases are inapposite. One-time connection fees are different from monthly hydrant

charges. Connection fees capture start-up costs for new customers, which are costs of the waterlines for water service. Hydrant fees capture the costs of hydrants, which are government costs.

¶ 17 Finally, Lake Forest Park says, “the heights of irony will be scaled if SPU can purchase art for its facilities and recover the cost in rates ... but cannot recover the cost of complying with lawful regulations.” Br. of Appellant Lake Forest Park at 9-10. This makes a mountain out of an irony molehill. The question is not whether there will be art and hydrants, but who must pay for them. Art for public facilities is a business expense (sometimes imposed by statute or ordinance). **981 Hydrants, like streetlights, are a government expense for which a government must pay.

¶ 18 Thus, charges for hydrants are taxes, not fees. Since “[n]o tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” WASH. CONST. art. VII, § 5. Since Seattle did not declare the charge to be a tax until 2005 or state a lawful object of a tax or statutory authority, the imposition was unconstitutional. See *Okeson*, 150 Wash.2d at 556, 78 P.3d 1279.

B. Lane Has Standing To Challenge Seattle's Tax and SPU's Rate Increases, but Those Increases Are Not Invalid

¶ 19 Seattle recognized the legal similarity between streetlights and hydrants, and so, in 2003, began paying for hydrants out of the general fund. To pay, Seattle either had to raise tax revenue or take funds from other services. The city council decided to raise revenue. It did so by raising the tax rate on SPU from 10 to 14 percent. Since it wholly controls SPU, it had SPU make up the difference by raising rates on customers. This situation has a similar result for nearly every party involved as if SPU just charged *885 ratepayers for hydrants, with two exceptions: for residents of other areas, their local government will repay the charges; for Seattle ratepayers, the tax charge is now subject to referendum or political efforts to change, including election of council members opposing the tax. Lane still objects. This issue raises two subissues: whether Lane has standing and whether the tax is legal.

1. *Lane Has Standing To Challenge Seattle's Tax on SPU*

[6] ¶ 20 Seattle challenged Lane's standing to challenge the tax at trial but has dropped the argument here. However, standing is a matter of our jurisdiction. Without jurisdiction, we cannot hear a case, even if every party concedes standing. *High Tide Seafoods v. State*, 106 Wash.2d 695, 702, 725 P.2d 411 (1986).^{FN1}

^{FN1}. This rule is in flux. Compare *Branson v. Port of Seattle*, 152 Wash.2d 862, 879-80 & n. 10, 101 P.3d 67 (2004) (Chambers, J., concurring) (a case may be heard even if a party lacks standing, as long as the issue is one of great public interest and well briefed), with *High Tide*, 106 Wash.2d at 702, 725 P.2d 411 (unanimously holding, “[i]f a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it.”). This case does not lend itself to deciding whether standing is jurisdictional in Washington, since neither party briefed the matter. And in any event, even if we are not required to raise the issue, we certainly have the discretion to. *In re Recall of West*, 156 Wash.2d 244, 248, 126 P.3d 798 (2006).

[7][8] ¶ 21 To have standing, a party must be in a law's zone of interest and must suffer some harm. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 186, 157 P.3d 847 (2007). Lane obviously has suffered harm; if his argument is right, he must pay more in taxes than is legally allowed. His zone of interest argument, though, is on shakier ground because he does not directly pay the tax. After all, he is complaining about Seattle's tax on the water utility SPU. If Lane has standing at all, it is only as a taxpayer interested in making his government follow the law.

¶ 22 Lane points us to [RCW 80.04.440](#), which allows any person harmed by a public utility's unlawful acts to bring suit. Even though Lane's challenge is to Seattle's tax on SPU and not to SPU's illegal acts, he rests on ^{*886}[RCW 7.24.020](#), allowing for declaratory judgments of laws directly affecting a party.

¶ 23 The standing issue here was analyzed in our decision in *Nelson*. There, we held that a car buyer has standing to challenge a tax applied directly to his dealer and seller because the buyer ultimately paid the

tax. *Nelson*, 160 Wash.2d at 186, 157 P.3d 847. In the same way, the tax on SPU is passed on to Lane directly, and so he is within the interest zone of [RCW 80.04.440](#). He has standing to challenge the tax and rate increase.

2. *Seattle's Tax and SPU's Rate Increases Are Constitutional*

¶ 24 Lane complains that Seattle is frustrating the holding in *Okeson*. He argues that raising taxes on SPU and passing the increases along to ratepayers is just the same as SPU charging ratepayers for **hydrants**.^{**982} The problem with the argument is that *Okeson* did not go so far as **Lane** would take it.

[9] ¶ 25 We voided the charge in *Okeson* because Seattle did not adopt the charge as a lawfully authorized tax, violating [article VII, section 5 of the state constitution](#), and because a tax would have exceeded the six percent statutory limit. Either reason was sufficient to support our holding in its entirety. *Okeson*, 150 Wash.2d at 556-57, 78 P.3d 1279. We simply held that if Seattle wanted to charge Seattle City Light ratepayers for streetlights, it would have to comply with statutes in enacting the tax (with the attendant possibility of a referendum, [WASH. CONST. art. II, § 1\(b\)](#)). Such tax, if adopted, would be subject to the applicable statutes and a six percent total cap.

¶ 26 Seattle has complied here. It explicitly said it was taxing SPU, the tax was properly adopted, and the tax expressly stated it was subject to referendum. Also, the six percent limit referenced in *Okeson* does not apply to taxes on businesses providing water. [RCW 35.21.710](#); [RCW 82.16.010](#)(4). Seattle has statutory authority to impose this tax on SPU ([RCW 35.22.280](#)(32)).

^{*887} ¶ 27 Lane's whole argument rests on our constitution's requirement that “[n]o tax shall be levied except in pursuance of law;...” [WASH. CONST. art. VII, § 5](#). He argues that imposing a tax with the same effect as SPU's charging ratepayers for hydrants is contrary to the law announced in *Okeson*.

¶ 28 This argument fails for the same reason as above. The law is not that Seattle must charge for hydrants to a broad range of taxpayers. Instead, it is simply that cities must have statutory authority to impose taxes and must enact them properly as “taxes.” This tax

meets both requirements. The tax and the resulting rate raise are lawful.

C. SPU Must Pay the Statutory Interest Rate on Back Payments

¶ 29 SPU illegally charged ratepayers for hydrant costs before 2005, so it had to refund the charges for three years as allowed by the applicable statute of limitations. Lane wants his payments to be with interest; Seattle opposes. The trial court gave Lane interest at one percent. Lane appealed, saying he is entitled to more. Seattle says he is entitled to none (or, at most, one percent).

[10] ¶ 30 Governments cannot be sued for money without their consent. [Architectural Woods, Inc. v. State](#), 92 Wash.2d 521, 526, 598 P.2d 1372 (1979). More to the point, local governments cannot be sued for interest without the State's consent. [Our Lady of Lourdes Hosp. v. Franklin County](#), 120 Wash.2d 439, 455-56, 842 P.2d 956 (1993). But absent sovereign immunity, parties must pay 12 percent interest on judicial awards from the time of judgment to the time of payment. [RCW 4.56.110\(4\)](#); [RCW 19.52.020](#). They must also pay 12 percent on the time from the injury to the judgment if the damages are liquidated, that is, if it is "possible to compute the amount with exactness, without reliance on opinion or discretion." [Prier v. Refrigeration Eng'g Co.](#), 74 Wash.2d 25, 32, 442 P.2d 621 (1968); [RCW 19.52.020](#). The damages here are clearly liquidated because they are based only on the amounts customers wrongly *888 paid. So if SPU is not immune from judgment, it must pay 12 percent interest on both the pre- and postjudgment award.

[11] ¶ 31 Lane offers three reasons why he should be awarded statutory interest on his refund payments from SPU, and if he is correct on any of them, he receives interest at the judgment rate. His best argument is that a statute waives immunity for claims against government-run utilities, allowing interest on part of those claims.

¶ 32 [RCW 80.04.440](#) allows people to sue water companies for "all loss, damage or injury" resulting from an illegal act. On its face, "all loss" includes interest. Depriving a party of money for a time deprives him of its productive use during that time. "Justice delayed is justice denied" is literally true for money. If a losing party has wrongfully kept another's

money at 12 percent interest for six years before giving it back, it is the same as taking the lost value. "All loss, damage or injury" includes interest on money improperly taken or withheld.

**983 ¶ 33 Seattle argues that the statute does not include the word "interest." Neither does it expressly include "medical bills" or "lost work time" or "profits," but the phrase "all loss, damage or injury" has been held to include those. *See, e.g., Nat'l Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light*, 94 Wash.App. 163, 168, 175, 972 P.2d 481 (1999). Seattle says we would have to infer state consent to interest payments from the statute. However, "all loss, damage or injury" is clear, broad, and inclusive. We have no authority to judicially amend the broad statute to read "all loss (except interest)."

¶ 34 The trial court seems to have split the difference and held the statute waived immunity for interest, but not for interest at the judgment rate. Instead, the trial court gave one percent interest because the monthly amounts were so small that a reasonable investor could have placed the money only in a low interest account. We reject this approach for two reasons.

*889 ¶ 35 First, [RCW 80.04.440](#) says nothing about a reasonably prudent investor. It consents to suit for all "loss, damage or injury" and does not exempt from those losses the usual judgment interest. Second, any reasonably prudent investor test invites complex factual questions about investment returns. The legislature has decided the number by setting the statutory rate of 12 percent, [RCW 4.56.110\(4\)](#); [RCW 19.52.020](#) (set for all judgments), and we have no reason to deviate from it. "All loss" includes interest at the judgment rate. SPU must pay back the payments at the statutory rate.

D. Lake Forest Park Is Liable for Hydrant Payments

¶ 36 If Seattle must pay for hydrants located in Seattle, it asks Lake Forest Park to pay for those hydrants located in Lake Forest Park. Seattle argues, and the trial court held, that [RCW 43.09.210](#) makes the cities liable. The statute reads: "All service rendered by ... one department ... to another, shall be paid for at its true and full value by the department ... receiving the same,..." [RCW 43.09.210](#). This law applies to services that one government body provides for another, including when one city provides another city with

services.^{FN2} Cf. *State v. Grays Harbor County*, 98 Wash.2d 606, 608, 656 P.2d 1084 (1983) (“The word ‘department’ plainly refers to an administrative division or branch of government,....”). Since SPU provided a service to Lake Forest Park, Lake Forest Park is liable for SPU's cost.

FN2. Otherwise, resident taxpayers of the providing city would be paying for services to others.

[121] ¶ 37 Moreover, SPU provided the hydrants because Lake Forest Park required it to do so by ordinance. LAKE FOREST PARK MUN.CODE 15.04.015(A)(3). Since providing hydrants is governmental, *see above*, Lake Forest Park also consented to pay for the hydrants when it passed this requirement. True, Lake Forest Park passed the ordinance before *Okeson*, but this does not avoid its liability.

*890 ¶ 38 Lake Forest Park would apply the three-part test from *Covell* to argue that Seattle would be imposing a tax on another city, which it cannot do. The *Covell* factors are the purpose of the cost: where the money raised is allocated and whether the cities pay the cost because they use the service. 127 Wash.2d at 879, 905 P.2d 324.

¶ 39 The purpose of charging Lake Forest Park for hydrants is clearly to raise money, indicating a tax. There is no evidence that the funds are segregated, also leaning toward a tax. But, most importantly, here there is a direct relationship between the costs charged and the service provided. Lake Forest Park requires SPU to provide hydrants, and SPU is charging just for the costs of the hydrants required by Lake Forest Park. We hold that the hydrant charge to Lake Forest Park is not a tax, but rather a cost of providing a government service, which Lake Forest Park must pay.

¶ 40 Lake Forest Park argues that if we require it to pay for hydrants, cities may extend their utility services to other jurisdictions without consent and then charge the cost. This possibility is speculative (and improbable). SPU will not likely install fire hydrants where uninvited. Right-of-way problems alone would block this eventuality. SPU operates in Lake Forest Park only with that city's permission, and it is providing a service only Lake Forest Park required.

**984 ¶ 41 Lake Forest Park also argues that even if it has to pay for hydrants, it should have to pay only for costs before January 1, 2005. On that day, Seattle's tax on SPU started. Under Lake Forest Park's theory, since Seattle already recovered the costs of hydrants starting in 2005, it would get a windfall if Lake Forest Park also had to pay. We reject this argument. RCW 43.09.210 draws no distinction that would exempt pre-2005 charges.

¶ 42 RCW 43.09.210 requires Lake Forest Park to pay for the hydrants within its boundary.

*891 III

¶ 43 In summary, we hold that (1) providing hydrants is a government responsibility for which the general government of the area must pay; (2) charging every SPU ratepayer a flat hydrant fee amounted to an improper tax; (3) the ratepayers may recover past improper hydrant fees, together with interest at the judgment rate; (4) Seattle's new tax on SPU is legal; and (5) Lake Forest Park must pay for the hydrants within its boundary.

WE CONCUR: [ALEXANDER](#), C.J., [C. JOHNSON](#), [MADSEN](#), [SANDERS](#), [CHAMBERS](#), [OWENS](#), [FAIRHURST](#) and [STEPHENS](#), JJ.
Wash., 2008.
Lane v. City of Seattle
164 Wash.2d 875, 194 P.3d 977

END OF DOCUMENT

2009 YE Est Water Operating Expense

Water Expense			Total Maintenance & Operational Costs	Fire Hydrant Maintenance & Operational Costs
	Cascade Water Alliance -- water	3,615,694		
	Cascade Water Alliance -- RCFCs from above	263,873		
	Water Depreciation	995,206		
	Water contrib to GIS	50,000		
	Maint of Facilities	36,336	5.0%	
	Maint of Wa Main	208,069	28.7%	
	Maint of Services	146,468	20.2%	
	Maint of Meters	63,960	8.8%	
IFAS Org Key	411-251-3456*	Maint of Hydrants	14.1%	102,325
		Water Patching	4.7%	
		Jt Facilities	15.6%	
	Const Wa Main	9,349	1.3%	
	Const Wa Svsc	3,087	0.4%	
IFAS Org Key	411-254-3493*	Const Wa Hydrants	1.2%	8,755
	Cascade Water Alliance -- RCFCs from above	263,873		
	Water Depreciation	995,206		
	Water contrib to GIS	50,000		
	Alloc of Supervision	589,292		
	Alloc of Debt Service	706,989		
	Alloc of Admin. Costs	1,425,004		
	Alloc of Customer Billing	261,243		
	Alloc of Reimbursable Work	0		
Total Water Expense		9,941,488		111,080
Less :	Fire Hydrant Rental received from Fire Department			(4,000)
Total net cost of fire hydrant maintenance and operations included in water rate calculation				107,080

2010 Water Operating Expense Budget

Water Expense				Total	Fire Hydrant
				Maintenance & Operational Costs	Maintenance & Operational Costs
		Cascade Water Alliance -- water	3,885,209		
		Cascade Water Alliance -- RCFCs from above	850,000		
		Water Depreciation	1,138,728		
		Water contrib to GIS	50,000		
		Maint of Facilities	32,056	3.2%	
		Maint of Wa Main	308,524	30.7%	
		Maint of Services	212,186	21.1%	
IFAS Org Key		Maint of Meters	66,204	6.6%	
	411-251-3456*	Maint of Hydrants	67,043	6.7%	67,043
		Water Patching	86,998	8.7%	
		Jt Facilities	164,313	16.4%	
		Const Wa Main	43,841	4.4%	
IFAS Org Key		Const Wa Svsc	7,284	0.7%	
	411-254-3493*	Const Wa Hydrants	15,370	1.5%	15,370
		Alloc of Supervision	654,285		
		Alloc of Debt Service	475,134		
		Alloc of Admin. Costs	1,622,297		
		Alloc of Customer Billing	266,361		
		Alloc of Reimbursable Work	0		
Total Water Expense			9,945,832		82,413
Less :		Fire Hydrant Rental received from Fire Department			(4,000)
Total net cost of fire hydrant maintenance and operations included in water rate calculation					78,413

FISCAL NOTE

CITY OF KIRKLAND

Source of Request							
Tracey Dunlap, Director of Finance and Administration							
Description of Request							
Request funding of \$188,262 from the Contingency Reserve Fund to pay for fire hydrant costs in 2009-2010. The total includes: Kirkland water utility cost of \$185,493 (\$107,080 in 2009 and \$78,413 in 2010) and Bellevue's 2010 billing of \$2,769.							
Legality/City Policy Basis							
In October 2008, the Washington State Supreme Court ruled that fire hydrant costs are a general government function and should be paid out of general tax revenues. As part of the 2008 Audit, the State Auditors Office recommended that fire hydrant costs be funded with general tax revenues not the water utility. Staff recommends the use of the Contingency Reserve Fund, which is available to meet any municipal expense, the necessity or extent of which could not have been reasonably foreseen at the time of adopting the biennial budget.							
Fiscal Impact							
One-time use of \$188,262 of the Contingency Reserve Fund. The reserve is able to fully fund this request.							
Recommended Funding Source(s)							
Reserve	Description	2010 Est End Balance	Prior Auth. 2009-10 Uses	Prior Auth. 2009-10 Additions	Amount This Request	Revised 2010 End Balance	2010 Target
	Contingency Reserve	2,324,515	54,750	0	188,262	2,081,503	4,915,571
	Prior 2009 Authorized Uses of \$54,750 for funding legal counsel and financial consultant assistance related to the proposed transfer by Verizon of its cable franchise agreement with the City to Frontier Communications.						
Revenue/Exp Savings							
Other Source							
Other Information							

Prepared By	Sri Krishnan, Acting Financial Planning Manager	Date	October 20, 2009
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RESOLUTION R-4783

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND AUTHORIZING THE TRANSFER OF FUNDS FROM THE CONTINGENCY RESERVE FUND TO THE GENERAL FUND TO PAY FIRE HYDRANT COSTS IN 2009-2010 AND FOR PROFESSIONAL SERVICES RELATED TO THE PROPOSED TRANSFER BY VERIZON.

WHEREAS, the City has unforeseen general fund expenses for the costs of hydrant maintenance and replacement for 2009 and 2010; and

WHEREAS, the City also has unforeseen general fund expenses for the cost of legal and financial consultant assistance needed related to the proposed transfer by Verizon of its cable franchise agreement with the City to Frontier Communications; and

WHEREAS, under RCW 35A.146, the City may, by resolution or ordinance adopted by a vote of the majority of the entire City Council, authorize the transfer of funds from the contingency fund to the appropriate operating fund;

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. Funds in the amount of \$188,262 shall be transferred from the Contingency Reserve Fund to the general fund for the purpose of paying fire hydrant costs in 2009-2010.

Section 2. Funds in the amount of \$54,750 shall be transferred from the Contingency Reserve Fund to the general fund for the purpose of paying for legal counsel and financial consultant assistance needed related to the proposed transfer by Verizon of its cable franchise agreement with the City to Frontier Communications.

Passed by majority vote of the Kirkland City Council in open meeting this ____ day of _____, 2009.

Signed in authentication thereof this ____ day of _____, 20.

MAYOR

Attest:

City Clerk