

ROBERTS JOHNS & HEMPHILL, PLLC

MEMORANDUM

TO: Canterwood STEP System Association
FROM: Mark R. Roberts
DATE: May 16, 2011

FACTS

In 1988, the Lorigon Corp. (the predecessor to the Canterwood STEP System Association) contracted with the City of Gig Harbor for the City to provide access to the City's sewer system. The preambles of the 1992 and 2004 Utility Extension Agreements contain the following recital:

WHEREAS, the Owner [the STEP Association] desires to connect to the City sewer utility system, hereinafter referred to as "the utility" and is willing to allow connection only upon certain terms and conditions in accordance with Title 13 of the Gig Harbor Municipal Code, as now enacted or hereinafter amended."¹

With respect to service charges, those Agreements also provide as follows:

In addition to the charges for connection, the Owner agrees to pay for utility service rendered according to the rates for services applicable to properties outside the city limits as such rates exist, which is presently at 150% the rate charged to customers inside city limits, or as they may be hereafter amended or modified.²

QUESTION PRESENTED

May the City charge unequal (higher) rates for out-of-City residents versus in-City residents?

The short answer is the City can discriminate between in-city and out-of-city ratepayers and thereby charge the STEP Association a higher rate.

¹ The 1988 Utility Extension Agreement contains a slightly different but functionally identical recital.

² The 1988 Utility Extension Agreements again contains a slightly different but functionally identical provision.

ANALYSIS

Washington State does not regulate municipal sewer systems. Washington's Utilities and Transportation Commission (WUTC) regulates "water systems" which are defined as structures "used for or in connection with or to facilitate the . . . diversion, carriage, apportionment or measurement of water for . . . municipal, domestic or other beneficial uses for hire." RCW 80.04.010. A sewer system seems to fit within this definition.

Cities operating "water systems" are subject to the WUTC's regulatory authority. *Fisk v. City of Kirkland*, 154 Wn.2d 891, 895, 194 P.3d 984 (2008). It therefore does not seem a stretch to conclude that this authority extends to the City's sewer system. However, we contacted the WUTC directly and were advised that neither the WUTC nor any other state agency regulates sewer system rates, whether or not owned or operated by a municipality.

Apparently this has not gone unnoticed. There is a bill under consideration in the current legislative session in Olympia that will, if adopted, bring sewer systems within the WUTC's regulatory jurisdiction. However, if that authority is granted, it will only apply to new sewer systems and not the pre-existing systems. Cities are therefore free to charge sewer service rates in accordance with their own ordinances. Here, the City of Gig Harbor has adopted an ordinance that allows for unequal rates based on geographic location.

We assume that the City set its current in-city sewer rates in accordance with the schedule contained in Gig Harbor Municipal Code 13.32.025. GHMC 13.32.030 provides that "Sewer service extended outside the city limits shall be charged at 1.5 times the city rates established in this chapter." Thus, the City is empowered to charge the STEP Association rates exceeding those charged to its customers within city limits. The sewer rates are also consistent with the terms of the Utility Extension Agreements which permit a discriminatory rate to be charged. Although the rates appear to be excessive, at least the City has limited itself to a 150% rate cap rather than the discretion to arbitrarily specify the rates.

Unfortunately, nothing prohibits the City from charging the STEP Association the higher rate. However, the STEP Association should confirm that the City has followed its own ordinances regarding the criteria and information used to establish the rate amount and also confirm that the City is not charging more than 150% of the in-city rates.