

**SPECIAL CONNECTION FEES,
LATECOMER CHARGES AND LID WAIVERS;
SOME COMMENTS ON RCW 35.91.020 AND 35.92.025
AND PENDING SPOKANE LITIGATION**

by

Robert G. Beaumier, Jr.
Assistant City Attorney of Spokane

I. INTRODUCTION

This paper offers some introductory comments on three areas of recent interest in Spokane in the hope that broader exposure and study will follow. RCW 35.91.020 allows cities or other municipalities to contract with a developer to build extensions to city sewer or water lines, at developer expense, with the proviso that persons ("latecomers") thereafter connecting will have to pay the city a portion of the construction cost as a condition of connection. This "latecomer" connection charge is then reimbursed to the developer. RCW 35.92.025 allows a city to charge and recover, in a similar way, by a special connection charge, a fair portion of its cost to build a sewer or water extension. Somewhat different from these topics is the non-statutory "LID waiver," which is an instrument, in various forms, wherein a property owner waives his or her right to protest the formation of an LID proposal whenever it might be offered in the future. This enhances the LID formation and is thus another method to enable payment for a utility extension.

Not much case law directly addresses RCW 35.91.020 or RCW 35.92.025. I am not aware of any Washington appellate authority dealing with the enforceability of recorded waivers of the right to protest a sewer or water improvement district extracted as a condition to the utility system. Some interesting previous WSAMA articles related to the area are:

"Changes in Late-Comer Charges in Order to Comply with Boe v. Seattle, 66 Wn.2d 152 (1965)," by Gordon Crandall, Assistant Corporation Counsel of Seattle, WSAMA Proceedings, 5/12-13/66, pp. 57-64, Information Bulletin No. 287, Legal Notes (1966), pp. 57-64.

"Financing Water and Sewer Utility Extensions," by George M. Mack, Attorney, Roberts & Shefelman, WSAMA Proceedings, June 19-20, 1975, pp. 63-71; Information Bulletin No. 365, Legal Notes (1975), pp. 63-71.

"Recording of Notice of Late-Comer Water and Sewer Service Hook-up Charges (Ch. 72, Laws of 1977)," by Fred H. Andrews, City Attorney of Yakima, WSAMA Proceedings, November 4-5, 1977, pp. 36-45; Information Bulletin No. 385, Legal Notes (1978), pp. 36-45.

This is an incomplete list. George Mack's 1975 article gives an overview of eight sources of capital financing for utility extensions by way of offering some context for discussion:

1. Cash reserves of the utility
2. Revenue bonds
3. General obligation bonds
4. Local improvement/utility local improvement districts
5. Contracts
6. Developer reimbursement contracts under RCW 35.91.020
7. Revenues through a special rate
8. Special connection charges authorized under RCW 35.92.025

Mr. Mack's article offers some interesting commentary on some of the benefits and drawbacks of choices among the options available. For a future project, an updated comparative analysis of currently available options would be of considerable value.

II. DEVELOPER LATECOMER CONTRACTS; RCW 35.91.020

Originally enacted in 1959, RCW 35.91.020 was amended in 1965, 1967 and 1981. Pursuant to the statute, a city or other municipality may contract with property owners as follows:

1. Parties: Governing body of municipality and owners of real estate.
2. Subject Matter: Construct water or sewer facilities:
 - A. inside the municipality or within 10 miles of the city limits;
 - B. for connection to the public water or sewer system;
 - C. must serve the area in which the owner's real estate is located.
3. Reimbursement:
 - A. A charge is collected by the municipality to reimburse the owner from other real estate owners seeking to tap into the improvement who did not contribute to the original cost. The charge must be a fair pro rata share of the cost of construction of the water or sewer facility.
 - B. The time period of collection responsibility must be set forth (may not exceed 15 years).
 - C. Parties charged are not limited only to properties directly connecting to the improvement, but also users connecting in from other laterals or branches.
 - D. Municipality may adopt reasonable rules and regulations.
4. Independent of Other Statutes: The contract is enforceable, notwithstanding any other provisions of law.
5. Power to Use County Roads: To the extent required to perform the contract, the municipal purveyor is granted, essentially, a statutory franchise to install the improvement in county streets in the area to

be served, subject to reasonable county requirements established by resolution.

6. Recording Required: No property owner not a party to the contract is bound unless the contract is recorded with the auditor prior to tap or connection.
7. Application: Any facility not fully accepted as operational on or after June 10, 1959 may be the subject matter of the contract.

Shepard's, to date, yields only two cases on RCW 35.91.020: Steilacoom v. Thompson, 69 Wn.2d 705, 419 P.2d 989 (1966), and Brookens v. Yakima, 15 Wn. App. 464, 550 P.2d 30 (1976). In Steilacoom, the court unanimously approved an RCW 35.91.020 contract in fact of a third party challenge that the city was contracting its public powers primarily for private benefit. The court reviewed the impact of the development and concluded that sewers were a public necessity in general and, considering the danger of pollution and contamination from septic tanks in that community, the contract was upheld. The benefit to the private developer did not erase the public character of the sewer project.

Brookens involved a refusal by the city of Yakima to increase the water supply to extraterritorial customers. The refusal in that case was based upon the city's general (land use) plan, which proposed low density occupation for the extraterritorial area served. When plaintiff Brookens sought to increase density with a proposed 75-unit mobile home park, the city refused to provide increased water service.

The city's position was upheld on two principles:

1. In absence of a contract, a municipality cannot be compelled to supply water outside its limits (extending this principle to include an increased supply to an existing extraterritorial load).
2. There was no implied or express contract to serve the area unconditionally, as general purveyor. Here, Yakima had adopted a resolution to limit water service except upon compliance with the Yakima General Plan. As a contrast, RCW 35.91.020 was cited in a footnote as an example of where a city might contract to provide water service to a general "area."

Brookens suggests the wisdom of some limitation in an RCW 35.91.020 contract or ordinance as to a level of service or area to avoid possible challenge later, if there is a desire to control extraterritorial access to service or the level of service. One wonders, however, how the result in Brookens would be affected by statutes such as RCW Ch. 70.116 and WAC Ch. 248-56, which involve public purveyor agreements for territorial divisions. By way of final comment, provisions regarding independent enforceability in RCW 35.91.020 are interesting; e.g., county road access, subject to resolution (compare, shutoff access on public and private property in RCW 35.67.310). Additionally, it appears an extension under RCW 35.91.020 would not require boundary review board approval under RCW 36.93.090(5) because of the "stand alone" clause.

In summary, the general concept in RCW 35.91.020 has appellate approval. Specific issues (loan of credit; recording obligation; basis of computation; whether established charges or areas may be changed) await further definition. A sample

latecomer agreement developed by Spokane County is available upon request from the library of the Municipal Research and Services Center. Also available from the Municipal Research Center library is a Whitworth Water District policy developed on this issue (received in February, 1985).

III. EXTRATERRITORIAL SERVICE; RECORDING

Extraterritorial sewer service is authorized in RCW 35.67.310, which also includes powers relating to requiring a connection charge and developing an agreement and covenant running with the land:

"Every city or town may permit connections with any of its sewers, either directly or indirectly, from property beyond its limits, upon such terms, conditions and payments as may be prescribed by ordinance which may be required by the city or town to be evidenced by a written agreement"

RCW 35.67.310 does not specifically refer to special connection charges or mention a capital recovery purpose, but I have inferred this. Extraterritorial water service is authorized by 35.92.170-.180, without a distance limitation. RCW 35.91.020 limits developer-financed extraterritorial projects to 10 miles of municipal boundaries. RCW 35.92.025 mentions no territorial feature, so might be read with RCW 35.92.170-.180 to authorize extraterritorial special connection charges.

Recording a notice of connection charges on affected property is permitted in RCW 35.67.310. The statute envisions the terms of an ordinance adopted pursuant thereto would become embodied in a contract and, additionally, in a recorded covenant running with the land. The statute refers to the contract and covenant as permissive, and I do not read it to require a recorded covenant as a condition of enforcing an extraterritorial special connection charge against unconnected property. Rather, it appears the purpose is to enable the enforceability of accrued obligations against successors in title where a privity defense could arise. This conclusion is simply opinion, however.

By way of contrasting other distinctions, no ordinance is required under the RCW 35.91.020 developer contract provisions. No analogous provision reflecting an extraterritorial ordinance requirement exists in laws relating to water, Mr. Mack also notes. I observe, however, that RCW 35.67.331 permits combined water, sewer, or garbage facilities and, if water is included in the combination, RCW 35.67.340 provides that water statutes govern.

Besides RCW 35.67.310's permissive recording provisions, RCW 65.08.170-.180 requires recording of notices for charges under RCW 35.91.020, RCW 35.92.025, and charges to reimburse revenue bonds. In addition, RCW 35.91.020 states:

"The provisions of such [developer] contract shall not be effective as to any owner of real estate not a party thereto unless such contract has been recorded. . . ."

AGLO 1979 Opinion No. 41 (Appendix A, p. 143) says that a failure to record a notice under RCW 65.08.170 does not impair collectibility as a condition of connection because the statute does not specify any consequence of failure to comply.

To offer some comment, I note that the three statutes discussed all involve some kind of legislative body action: (1) a contract and covenant (based upon ordinance) in RCW 35.67.310; (2) a contract in RCW 35.91.020; and (3) some legislative body determination in RCW 35.92.025. None involves a special assessment or mandatory tax, but rather a contingent obligation. All involve a utility benefit to property which is the subject of contract in the sense of providing utility service access for a fee.

Recording, in the general context, makes sense where its purpose is to impose an accrued contractual obligation upon the land, surviving an ownership transfer where the purchaser is not otherwise obliged by contractual privity. This is consistent with the earlier comment on RCW 35.67.310. (I do not have an analysis of potential lending of credit problems; Terrace Heights, infra, skirted the issue as moot.) Recording under RCW 35.91.020, by comparison, does not make sense as a means of creating non-party privity under RCW 35.91.020. Perhaps, since the statute envisions a local government in function as the developer's collection agent, the recording implies a condition of collectibility back to the developer, and perhaps a developer forfeiture in absence of recording, though this stretches the language of RCW 35.91.020. Query whether the municipal collection agent would then be liable under its contract or by statutory inference? Under RCW 35.92.025, perhaps a benefit of compliance with RCW 65.08.170-180 would be avoidance of a general purveyor obligation for extraterritorial service discussed in Brookens, supra. But, so long as recording occurs before connection, it appears the statutory requirement is satisfied. Would extensive delay establish waiver however?

Although I find the statutory purpose a bit murky, perhaps the best course is to record a notice:

Pursuant to RCW 65.08.170 - .180, notice is given that the city of _____ has established a sewer (water) fee for the connection of the premises _____ to the public sewer (water) line located _____ of \$ _____ per _____, in addition to interest of _____%, subject further to all lawful limitations [NOTE: interest may be determined at the time of connection under RCW 35.92.025; it is not specifically mentioned in RCW 35.91.020]. Said charge is in addition to and not in lieu of any other applicable charges or fees.

One must be attentive, also, to cost computation restrictions of RCW 35.91.020 and RCW 35.92.025 (cf. Boe and Prisk, infra), which rely upon engineering data and council discretion. Cases such as Terrace Heights, infra, and RCW 35.67.310 raise an inference that special connection charges are part of a ratemaking endeavor, and may thus be charged, at least where not restrained by privity. The hope is one can design an area and connection fee successfully, record the notice, and collect the fees in a consistent, successful manner.

Although mentioned in RCW 35.67.310, it does not appear that recording has anything particularly related to extraterritorial enforceability. Philip Trautman's article, "Assessments in Washington," 40 Washington Law Review 100 at 125, notes:

"Municipal corporations cannot exercise powers beyond their limits, except such authority may be derived from a statute which expressly or impliedly permits it."

I believe, however, of necessity, the power to provide service must include the power to impose conditions and restrictions related thereto (taxation is a further issue). I also note RCW 70.116, the Public Water System Coordination Act of 1977, and WAC Ch. 248-56 as examples of legislative intent to expand municipal purveyor's extra-territorial responsibilities and controls.

IV. SPECIAL CONNECTION FEES; RCW 35.92.025

Special connection charges are revenue of the municipal utility system. The question of the pre-emptive effect this law may have on any pre-existing contractual or ratemaking powers is not clear. But, compliance also avoids an inquiry as to any other limits on that power. No developer contract is involved; the permissive statute is a grant of authority to the city to impose the special connection charge upon the property owner as a condition of connection. The requirements are:

1. The charge must be reasonable and determined by the legislative body. Presumably, this would be by resolution or ordinance; recall, for sewer the discussion of RCW 35.67.310, unless this requirement would be arguably displaced by RCW 35.67.340, in absence of a water ordinance requirement counterpart to RCW 35.67.310. [NOTE: RCW 35.67.310 embodies more than connection charges.]
2. The reasonableness is measured by the purpose: in order that the property owners bear their "... equitable share of the cost of such system ..."
3. By amendment in 1985, the legislature extended the authority of the statute to allow also the inclusion of interest charges upon the principal. These charges are: a) applied from the date of construction until connection, or for a period not to exceed 10 years (I read this: from the date of construction until connection, but not to exceed 10 years); b) the rate is what the city pays, but not to exceed 10% per year, and may be determined: c) either (i) at the time of construction or major rehabilitation of the utility system, or (ii) at the time of installation of the specific laterals or service mains; d) total interest cannot exceed total principal.

Like RCW 35.91.020, there is limited case law in Shepards on RCW 35.92.025. Boe v. Seattle, 66 Wn.2d 152, 401 P.2d 648 (1965), was a kind of Brookens v. Yakima fact pattern where an original single house sewer connection to the Seattle sewer system was first made. Later, a trailer park was developed on the property, with a private sewer system, and the developer sought to connect this larger discharge to the city's system. No Brookens increased service issue was raised, however. Seattle had required the property owner to sign a contract promising to pay, over time, a special connection charge based upon a Seattle ordinance. The supreme court accepted the property owner's challenge to the ordinance because it was established based upon current construction costs, not the original cost, as RCW 35.91.020 was read to require. Seattle was told to enact a new ordinance.

In Terrace Heights Sewer District v. Young, 3 Wn. App. 206, 473 P.2d 414 (1970), the municipality had contracted with a property owner to pay for extraterritorial sewer service. The terms provided that the property owner would pay half down and the remainder would be apportioned over 25 lots on a 10-year installment basis as a special connection charge, per "roof." A dispute arose over whether "roof" meant "four-plex," and the property owner sued, contending he had either

performed the contract or it was void as a lending of credit. The court of appeals declined to address the credit issue, holding the matter was a simple question of ratemaking which could not be contracted away, and further, that the special connection fee could always be amended. The court also upheld the municipality's interpretation of "roof" to mean 4 roofs for a four-plex. Terrace Heights did not involve RCW 35.92.025, and the case implies an interesting contrast to Boe's scrutiny of cost computing.

Prisk v. Poulsbo, 46 Wn. App. 79 (1987), (petition to the state supreme court denied 6/2/87), affirmed the trial court's approval of special connection fees under RCW 35.92.025. One argument had attempted to apply RCW 82.02.020, which links the charge for the utility's costs " . . . attributable to the property being charged" No cost attribution is required in RCW 35.92.025, which requires that the charge be an " . . . equitable share of the cost of such system" In compliance with Boe, newcomers were charged for " . . . the historical cost of the system as it exists today" Prisk at 804.

I also mention a reference discovered to an article in Volume 8 of Zoning and Planning Law Report (Oct. 85, p. 158), discussing invalid connection charges, was not available for perusal. Properly handled, the two statutes provide appropriate means of financing utility or capital cost recovery.

V. LID WAIVERS

Maxim A. Johnston v. Spokane County Health District, Spokane Superior Court Case No. 86205161-3, is scheduled for argument June 29, 1987. It involves a challenge by a property owner to the Spokane County Health District's requirement that an owner of an on-site sewage disposal system (septic tank) must sign a ULID/LID waiver as a condition of inspection and health district approval. Current health district regulations further require disconnection of on-site sewage disposal systems and connection to a public sewer whenever access to a public sewer arises within 200 feet. The waiver form is reflected in Appendix B. (p. 144)

Arguments raised could include the aspects of relative bargaining strength and the element of assent (manifestation of assent) to contract formation. The Restatement 2nd of Contracts, Section 174, accepts only duress by physical compulsion as a basis to void formation (grasping the hand of the elderly victim to force signature). The comments show the distinction: without formation, the contract is void and even a good faith purchaser is without protection. Ratification could occur for "voidable," but not "void," contracts. The void contract is distinguished from a voidable obligation in Sections 175 and 176(1)(b) of the Restatement 2nd of Contracts. These provisions deal with the issue of duress by threat, including threat of criminal prosecution as making a contract voidable.

An earlier Spokane Case (1980), Hallett v. Spokane, No. 80-2-00947-2, was a Spokane County Superior Court decision invalidating an LID assessment on the basis of no special benefit, notwithstanding the landowner's execution of an LID waiver. The plaintiffs there had asserted duress and contended the waiver was void.

The initial trial court opinion skirted the issue of duress on the basis that there was a showing of special benefit related to the current LID project assessment.

On reconsideration, however, without specifically mentioning duress, the court reversed itself, holding that the city had not established special benefit and the assessment was cancelled. The opinions are supplied in Appendix C (p. 146).

The pending Johnston litigation tests provisions of the Spokane County Health District's Rules and Regulations for Sewage Disposal Systems, promulgated March 1, 1985, which apply city and county-wide.

Section 1.04.067 thereof states:

"1.04.007 AUTHORITY. Pursuant to the authority of RCW 43.20.050 (Powers and Duties of State Board of Health), these regulations are hereby established as minimum requirements of the Spokane County Health District (SCHD) Board of Health, governing on-site sewage systems. (Statutory Authority: RCW 43.20.050. 83-13-014 (Order 259), WAC 248-96-010, filed June 3, 1983; Order 101, WAC 248-96-010, filed June 10, 1974."

There is a grandfather clause exempting existing on-site installations, but the regulations do apply to new construction or to an alteration, repair or extension of an existing system.

Section 1.04.110 requires anyone affected by the regulations to complete an application for the on-site sewage system. The provision challenged by Plaintiff Johnston is 1.04.110(7):

- "7. The property owner or authorized agency of a sewage permit application representing a property located within an incorporated city or town, sewer district or areas within the WWMA designated as urban, suburban, commercial or industrial (as identified in Spokane County's adopted Comprehensive Plan) shall be required to obligate without protest said properties to future participation in a sewer LID/ULID pursuant to a legally binding agreement."

The primary strategy adopted by plaintiff in Johnston is the voter franchise issue, relying upon Article I, Section 19, of the state constitution. The waiver involved contains a waiver of protest and appointment of the health district to sign the petition if the owner or successor does not. The waiver preserves the right of the owner to object to or protest the amount of the assessment. With respect to the form of the waiver, distinction has been made between not protesting and affirmatively signing the petition for an LID under the petition method. A further refinement of the issue is whether the signatory must waive a right to object based upon lack of special benefit or to controvert the amount of the assessment. Attorneys with whom I have discussed this point have largely felt that the protest waiver should not be so extensive as to waive the right to dispute the fairness (amount) of the dollar assessment. An additional wrinkle is whether the waiver should include a power of attorney (should it be durable?) to sign the petition.

Prior to the Johnston lawsuit, other private owners' counsel have raised policy and legal arguments that the waiver was an improper effort to shift general public problems to specific shoulders or an unfair extraction akin to developer fees. A portion of Prisk v. Poulsbo, supra, further supports this kind of argument, but the issue is not yet completely clear.

The city of Spokane has intervened in the hearing by stipulation. The district and city have submitted a volume of materials, including the Spokane Aquifer Water Quality Management Plan and a detailed description of the reasons for the LID waiver.

The city's belief attempts to justify the measure as a reasonable exercise of police power to protect the public health. Jeffery v. McCullough, 97 Wn.2d 892, 652 P.2d 9 (1982), a Seattle rent control case, concludes, first, that there is no fundamental right or suspect class involved there. The test continues on 3 prongs as a "minimal scrutiny" issue:

1. equal treatment of all members of a designated class;
2. rational basis to select class memberships; and
3. the classification selected is rationally related to the purpose of the ordinance.

Responding to the voter franchise issue, reliance is also placed upon King County Water District v. Review Board, 87 Wn.2d 536, 554 P.2d 1060 (1976), where extraterritorial management by the city of a water district was upheld in face of a voter representation challenge. The further refinement of Committee v. Val Vue Sewer District, 14 Wn. App. 838, 545 P.2d 42 (1976), was used to establish that only the true holders of an economic interest (contract vendees) in property were entitled to vote as owners with respect to protesting the formation of a ULID. The rationale was that the vendee held the beneficial interest in the property; the seller only a security interest.

The health district position in the litigation (represented by private Spokane Council Ed Parry) offers detailed documentation of the reasons behind the LID waiver. Stressed in the affidavits is the need for the elimination of approximately 39,000 septic tanks, which are contributing an established pollution burden to the Spokane aquifer. Also stressed is the involvement from the State Board of Health and WAC Ch. 248-96, relating to elimination of on-site sewage disposal systems and extension of sewer service. Problems of restricted development, mandated by health needs in absence of an LID waiver program are highlighted. A comparison is made in the instant case to Toandos Peninsula Ass'n v. Jefferson County, 32 Wn. App. 473, 648 P.2d 448 (1982). That case noted extensive meetings and negotiations between developers and the county. It affirmed the concept that the county could impose conditions upon issuance of a building permit. The problem here, to some extent, may be in distinguishing obligations. A governmental unit may impose reasonable conditions upon permit issuance, including acceptance of contract obligations. See Toandos, infra. Tacking a contractual proviso upon a mandatory permit infers that the decisions to engage in a permitted activity is, itself, consensual. To the extent a mutually binding contract analysis applies, the issues further seem to depend on the underlying question of the enforceability of the waiver as a running covenant. (See William Stoebeck's article, "Running Covenants; An Analytical Primer," 52 Washington Law Review 861.)

Recall RCW 35.67.310, which addresses this question to an extent by simple contract/covenant measures to enable enforceability. That statute envisions the "contract" to be entered into is based:

" . . . upon such terms, conditions and payments as may be prescribed by ordinance."

Ultimately, I see the judicial question to involve a police powers analysis along the lines of Jeffery v. McCullough, *infra*, and the philosophy expressed by Justice Hale at the opening of Steilacoom v. Thompson, 69 Wn.2d 705 at 706 (1966):

"Finding a just balance between public benefit and private detriment constitutes one of the great functions of our judicial system."

CONCLUSION

The city of Spokane does not have a well-established policy on utilizing the statutory opportunities discussed. A proper treatment in a paper of this nature should include forms, contracts, ordinances and a spread sheet chart or checklist summarizing procedures. Fred Andrews' 1977 article (noted above) offers forms and a good discussion of a consensus of opinions he developed through inquiries. At least, however, in Spokane, we may anticipate further guidance on the LID waiver as a result of the Johnston litigation. I look forward to further development of my own understanding and to working with other attorneys and the Municipal Research staff in a continuing better development of materials for general use in these areas.

APPENDIX A

DISTRICTS--SEWER--WATER--DRAINAGE--CITIES AND TOWNS-- RECORDING UNDER RCW 65.08.170 AS CONDITION PRECEDENT TO IMPOSITION OF CONNECTION CHARGES

Although RCW 65.08.170 requires a city, town, or other municipality (as defined in RCW 35.91.020) to record certain connection charges in the office in which deeds are recorded, neither that statute nor any other applicable law purports to set forth the legal consequences of a failure to comply or, specifically, to say that recording in any way affects the legality of those charges as between the municipality and those who tap in, or hook up, to and use the particular facilities in question; therefore, a person may not connect with or tap into sewer or water facilities without paying the connection fee even though such fee has not been recorded pursuant to RCW 65.08.170.

AGLO 1979 No. 41

Barbara Granlund, State Representative
December 20, 1979

APPENDIX B

REAL PROPERTY COVENANT
AND AGREEMENT

THIS AGREEMENT AND COVENANT is made and executed this _____ day of _____, 19____ by Spokane County Health District (SCHD) and Max Johnston, as owner(s) of the following described real property located in the State of Washington, County of Spokane, to wit: S. 3812 Ridgeview and legally described as:

which property is located within an incorporated city or town, sewer district or area within the Waste Water Management Area designated as urban, suburban, commercial or industrial (as identified in Spokane County's adopted Comprehensive Plan), and who as owners have, or through their authorized agent have, made a sewage permit application to Spokane County Health District, in accordance with Title I, Environmental Health, Chapter 4, Rules and Regulations for Waste Water Systems for Spokane County, adopted by the Board of Health of the Spokane County Health District February 21, 1985.

1. Obligation. In accordance with Section 1.04.110,7., of said regulations, the Owners hereby obligate themselves, their heirs, successors, assigns and personal representatives to join in any valid petition for the formation of a Local Improvement District or Utilities Local Improvement District for the installation, maintenance and operation of sewer service and facilities which may be proposed to be established for the area in which the above described property is located, and which will serve the above described property, and said Owners for themselves, their heirs, successors, assigns and personal representatives agree not to protest the establishment of any such Local Improvement District or Utilities Local Improvement District for such area and serving said property whether proposed by petition or by resolution of the appropriate governmental agency; PROVIDED, HOWEVER, this obligation shall not constitute a waiver of any right of the said Owners, their heirs, successors, assigns or personal representatives to object to or to protest the amounts established by assessment lists proposed or adopted for such Local Improvement District or Utilities Local Improvement District as applied to the above described property.

The Owners further agree that, if they, their heirs, successors, assigns or personal representatives refuse to join in a proposed petition for such a Local Improvement District or Utilities Local Improvement District after five (5) days notice in writing from the Spokane County Health District requesting such joinder, the Spokane County Health District Health Officer shall have the right, power, and authority to sign said petition for and on behalf of the Owners, their heirs, successors, assigns or personal representatives as it pertains to the above described property.

2. Covenant. The obligation and agreements hereinabove contained are hereby declared to be covenants running with the above described land and shall be binding upon the Owners, their heirs, successors, assigns and personal representatives.

The Owners shall pay upon delivery of this agreement to the Spokane County Health District the fee for recording this agreement and covenant with the Spokane County Auditor.

Owner

Owner

Owner's Address _____

We hereby consent to the above agreement and covenant.

Date

Contract Seller/Mortgagee/Deed of Trust Holder

Accepted in accordance with Spokane County Health District Rules and Regulations for Sewage Disposal Systems, March 1, 1985, as a condition for issuing SCHD permit # 76-1093 this _____ day of _____, 19 _____.

By _____
Health Officer,
Spokane County Health District

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LESTER P. HALLETT and MARY E.)
HALLETT, husband and wife,)
)
) Plaintiffs,)
)
) vs.)
) MEMORANDUM OPINION
)
CITY OF SPOKANE,)
)
) Defendant.)

Plaintiffs challenge the assessment on their lots fronting on East 20th Avenue for a construction of a sewer project, being LID No. 6975, extending from Myrtle to Cuba

In 1976, plaintiffs and others petitioned for a LID to pave Myrtle from Congress to 19th. Myrtle adjoins the plaintiffs' property to the west. The City, at that time in order to avoid the later excavation at the intersection of Myrtle and 20th should a sewer be built easterly on 20th, installed an extension or stub of the then-existing sewer to the east edge of this intersection. The cost of this sewer construction was shared by the lots in the paving district.

In May, 1979, the plaintiffs' septic tank required pumping for a second time. Since plaintiffs were then within 100 feet of a public sewer, they were obliged by Health Department requirements to connect with the sewer. When plaintiffs proceeded to apply for this connection, they were required to sign a Sewer Waiver Agreement, waiving their right to protest any further LID which might be formed

MEMORANDUM OPINION
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for the purpose of extending the sewer east on 20th Avenue, and agreeing to pay an assessment at the time such a sewer was built.

It so happens that as a result of a petition by one Swartout a-developer, who had developed land in the vicinity of plaintiffs, this sewer project on East 20th became a reality, and the plaintiffs were notified of their assessment. Plaintiffs wrote the City Council objecting to their property being assessed, stating the history of the situation and their problems with the septic tank and the previous connection. At the meeting of the City Council, Mr. Hallett appeared and reiterated his objections and asked some questions of his own. The Council reviewed this matter and heard from both Mr. Hallett and Mr. Glen Yake of the City Manager's Office-Engineering. It was then moved and seconded and by motion approved that the Ordinance go into effect adopting the assessment roll.

It is now contended that plaintiffs' assessment should be nullified as being the result of an invalid waiver of their right to object; that there is no special benefit to their property by this LID, and that they were not given an adequate hearing.

First, it should be noted that the law attaches a presumption of correctness to the assessment roll; the burden rests on the one attacking the assessment. The court must affirm the assessment unless it finds from the evidence that the assessment is founded upon a fundamentally wrong basis, and/or the decision of the Council was arbitrary or capricious.

As regards the claim that the waiver is void and invalid, it does not appear that the plaintiffs were completely controlled in the

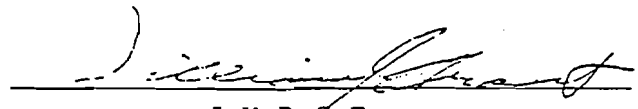
exercise of their free will in signing this form. There would appear to be at least adequate consideration insofar as this was of benefit to the plaintiffs in being connected with the sewer at that time, rather than at a later time. It does seem that the City was acting in good faith and with prudence, and that this procedure is not uncommon.

It is argued that the LID here involves no special benefit to the plaintiffs' lots. Yet it is agreed that their property has received special benefit in the way of a sewer connection -- just that this has occurred at an earlier time than others in this LID. Special benefit does appear to exist here as to plaintiffs' lots, even though it may actually have pre-existed the actual formation of this LID. It is clear that the parties (the plaintiffs and the City) contemplated this manner of progress of development of sewer facilities on East 20th.

The hearing before the City Council may have been brief, but it does not appear that Mr. Hallett was actually cut off from his statement of objections, nor precluded from expressing them. In essence, therefore, it is not shown that the Council acted in an arbitrary or capricious manner, but to the contrary that its action was made after reasonable deliberation under the circumstances.

The assessment is therefore confirmed.

DATED in Spokane, Washington, this 13th day of August,
1980.


J U D G E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

LESTER P. HALLETT and MARY E.);
HALLETT, husband and wife,);
);
 Plaintiffs,) No. 80-2-00947-2
);
 vs.) COURT'S ORAL OPINION RE:
); MOTION FOR RECONSIDERATION
CITY OF SPOKANE,);
);
 Defendant.);

BY THE COURT: Well, it does appear to the court that the portion of the ordinance requiring the plaintiffs to sign the waiver agreement, looking at it as a whole, was something which as it developed when they had the second pumping of their septic tanks resulting in an agreement that as far as the Halletts are concerned was without consideration. They were in fact required to sign the waiver, being within 100 feet of an existing sewer line and having had their septic tanks pumped twice. They had already paid for the cost of that stub (to which they had to hook up), which had been installed in the intersection. The fact that by coincidence the developer Swartout shortly thereafter decided to petition for the LID that is in question here, 6975, in such close proximity doesn't in the mind of the court transfer that sort of benefit to a kind of special benefit that is required before the assessment that is imposed by the City in this LID 6975 can be proper.

Looking at it, when this latest assessment was made, there is no question that the plaintiffs' lots (and I speak of plural, because it is actually one parcel), had been benefitted by the

Myrtle Street LID -- the extension by way of stub of the sewer through the intersection of Myrtle and 20th. The parcel had been benefitted 100 percent as much as it now exists, even disregarding the extension of the sewer east on 20th, so that as a result this project, and the cost of it, is something which constitutes no special benefit as to the plaintiffs, and I agree that the language cited from Jones is appropriate; there already was the connection to the sewer stub resulting from the Myrtle Street paving. The Halletts' property had already been charged, so to speak, with their share of that cost in the installing of the sewer line necessary for that connection. For them to be assessed again for the cost of laying the sewer pipe on 20th under LID 6975 is an assessment without special benefit, to an extent that it constitutes a taking without a constitutional requirement of compensation.

The court will therefore reconsider its earlier decision and find for the plaintiffs. You may present your Findings and Order to the effect that the court has reconsidered it.

MR. DULLANTY: Thank you, your Honor. I don't at this time have any Findings --

THE COURT: All right.

MR. DULLANTY: -- but I would like to --

THE COURT: Prepare them along the lines that I've indicated

MR. DULLANTY: Yes, your Honor. Thank you.

THE COURT: All right.