

1 **OFFICE OF THE HEARING EXAMINER**  
2 **CITY OF TACOMA**

3 **ALLENMORE EAST**  
4 **HOMEOWNERS ASSOCIATION,**  
5 a Washington nonprofit corporation,

6 **Appellant,**

7 **v.**

8 **CITY OF TACOMA,** a Washington  
9 Municipal corporation, through its  
10 Environmental Services Department,

**Respondent.**

**HEX2022-017**  
**(TPU Account No. 100314652)**

**DECISION ON RESPONDENT**  
**CITY'S MOTION FOR**  
**SUMMARY JUDGMENT**

11 **THIS MATTER** comes before JEFF H. CAPELL, the Hearing Examiner for the City  
12 of Tacoma, Washington, on a motion for summary judgment filed by the Respondent City of  
13 Tacoma on December 9, 2022.<sup>1</sup> In a prehearing conference held with the parties on  
14 November 9, 2022, the parties indicated that there were no known material facts in dispute  
15 between them, and that their issues in this appeal were strictly legal. The City indicated its  
16 intent to file a motion for summary judgment on at least one legal issue, and a submission  
17 schedule was agreed upon by all involved.

18 Thereafter, the City made the following submissions in conformance with the agreed  
19 upon motion schedule:

20 \_\_\_\_\_  
21 <sup>1</sup> The parties are as set forth in the captioned heading above. Appellant, Allenmore East Homeowners Association, is referred to interchangeably as "Allenmore," the "HOA," or "Appellant." The Respondent, City of Tacoma, is referred to as the "City" or as its utility arm "TPU." The Tacoma Municipal Code is at times referred to herein by its abbreviation "TMC" and the Revised Code of Washington is referred to by its common abbreviation "RCW." In some motion pleadings, the City has erroneously billed itself as the Appellant. The City is the Respondent in this appeal.

**DECISION ON RESPONDENT**  
**CITY'S MOTION FOR**  
**SUMMARY JUDGMENT**

1 • **Appellant’s [sic] Motion for Summary Judgment, Respondent Exhibit List and Exhibits R-1 through R-7**, received by the Hearing Examiner’s office on  
2 December 9, 2022,<sup>2</sup>

3 • **Amended Respondent’s Motion for Summary Judgment, Respondent Exhibit List and Exhibits R-1 through R-7**, received by the Hearing Examiner’s office on  
4 December 13, 2022 (as amended, the “City Motion”), which included:

- 5 • Exhibit R-1: Cover letter from Daniel Hoover, Office Assistant, Customer Services addressed to Hearing Examiner, TMB Room 720, dated October 19, 2022.
- 6 • Exhibit R-2: Appellant’s Request for Hearing – Disputed Utility Bill form, dated 7 18 October 2022.
- 8 • Exhibit R-3: William G. Maibusch, Vice President, Allenmore East Homeowners [sic] Association, response letter dated 20 June 2022 re: STATEMENT OF  
9 DISPUTED UTILITY BILL ACCOUNT NO. 100314652.
- 10 • Exhibit R-4: Dan C. Thompson, Ph. D., Business Operation Division Manager, City of Tacoma Environmental Services letter dated February 22, 2021 re: Solid  
11 Waste Service at 2440 South Steele Street Tacoma, WA 98405 – Account #100314652.
- 12 • Exhibit R-5: William G. Maibusch, Vice President, Allenmore East Homeowners [sic] Association, letter dated 29 November 2021 re: SOLID WASTER SERVICE  
13 AT 2440 SOUTH STEELE STREET ACCOUNT NO. 100314652.
- 14 • Exhibit R-6: Declaration of Katherine Saucier in Support of Appellant’s [sic] Motion for Summary Judgment dated 9th day of December, 2022.
- 15 • Exhibit R-6A: Tacoma Public Utilities Invoice, Billing period – 1/9/21 to 2/8/21, re: Account #100314652.
- 16 • Exhibit R-7: Customer Services Policies, Effective 08/12/2020 Utility Board Resolution #U-11184.
- 17 • Supplemental Declaration of Katherine Saucier in Support of Appellant’s [sic] Motion for Summary Judgment, dated Jan. 31, 2023, and received Feb. 1, 2023.
- 18 • Second Supplemental Declaration of Katherine Saucier in Support of Respondent’s Motion for Summary Judgment, dated Jan. 10, 2023 [sic] and received on Feb. 10, 2023.<sup>3</sup>

19 <sup>2</sup> The City’s Motion for Summary Judgment received by the Hearing Examiner’s office on December 9, 2022, was  
20 titled “APPELLANT’S MOTION FOR SUMMARY JUDGMENT” and contained an exhibit list and  
21 accompanying exhibits. By email communication dated 12/12/2022, the Legal department confirmed its  
typographical error in the title of its December 9, 2022 motion for summary judgment submission and further  
stated it, “will submit a corrected version.” On 12/13/22 the City submitted, via email, an “AMENDED  
RESPONDENT’S MOTION FOR SUMMARY JUDGMENT” that included an exhibit list and accompanying  
exhibits.

<sup>3</sup> The second declaration was filed in response to a question posed by the Examiner on February 1, 2023. It was  
filed with the Hearing Examiner’s Office on February 10, 2023. Given the filing date, the “January 10, 2023” date  
of this pleading is likely erroneous by one month.

1 Although the agreed motion schedule accounted for filing responses and replies, the Appellant  
2 did not file a response making the filing of replies moot.

3 **RELEVANT BACKGROUND**

4 “[F]indings of fact on summary judgment are not proper, are superfluous, and are not  
5 considered by [ ] [an] appellate court.”<sup>4</sup> This is so because material facts are not supposed to be  
6 in dispute for summary judgment to be proper, making summary judgment purely a  
7 determination of a legal issue(s), and without need for findings to be made from conflicting  
8 facts.

9 Nonetheless, after reviewing the City Motion, as well as the other pleadings and filings  
10 of record in this matter to date, the Examiner does provide the following undisputed material  
11 background facts, upon which the parties appear to agree, and upon which this decision is based  
12 for context:

13 1. Appellant is a Washington non-profit corporation. Appellant is incorporated with  
14 the Washington Secretary of State with “Homeowners Association”<sup>5</sup> listed as its business  
15 purpose. The Washington Secretary of State lists William Maibusch (“Maibusch”) as a  
16 “Governor” of the Appellant’s corporation. As a listed governor, Maibusch has apparent  
17 authority to act on Appellant’s behalf. Maibusch has been Appellant’s representative to this  
18 point in this Appeal, and he has represented that he is the Vice-President of the HOA.

19 2. Appellant’s principal office is listed with the Washington Secretary of State as  
20 “2440 S STEELE ST UNIT 107, TACOMA, WA, 98405-2806, UNITED STATES.”  
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<sup>4</sup> *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 117, 362 P.3d 974 (2015).

<sup>5</sup> Abbreviated herein as “HOA.”

1           3. Tacoma Public Utilities (“TPU”) customer service records show Allenmore East  
2 Homeowners Association, the Appellant here, as the customer for TPU/City utility services at  
3 Appellant’s principal address of 2440 South Steele Street, Tacoma, Washington 98405-2806.  
4 Appellant’s TPU customer account number is 100314652.

5           4. As part of its solid-waste services from the City, for which TPU customer service  
6 handles billing, the Appellant has had four 90-gallon recycling containers in service at its  
7 physical location for the use of Appellant’s residents since January 1, 2018. Solid-waste  
8 services are provided to the Appellant pursuant to the Appellant’s verbal request and the City’s  
9 acceptance of that request. There is no written agreement for solid-waste services between the  
10 City and the Appellant.

11           5. For the period beginning January 1, 2018, through February 8, 2021, the City only  
12 billed Appellant for two 90-gallon recycling containers. TPU discovered its under-billing after  
13 an accrual of \$1,005.34 (the “Outstanding Amount”). TPU then made demand for payment of  
14 the Outstanding Amount in its invoice for the period of 1/9/21 to 2/8/21.

15           6. Appellant challenged the City’s ability to back-bill under the circumstances  
16 because some of Appellant’s member/residents who benefitted from having the two additional  
17 90-gallon containers during the back-billed period are no longer HOA member/residents.  
18 Appellant’s contention is that it is not fair to saddle the Outstanding Amount onto current  
19 member/residents if they were not member/residents during the time the back-billed services  
20 were rendered.

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1 **ISSUES PRESENTED**<sup>6</sup>

2 1. Whether the City/TPU has the authority to back-bill for services?

3 2. Whether the Appellant was properly billed as the Customer?

4 3. Whether the Hearing Examiner has any authority to adjust the Outstanding Amount  
5 on fairness/equity or other grounds?

6 **ANALYSIS, AUTHORITY AND CONCLUSIONS**

7 1. The Hearing Examiner has subject matter jurisdiction over this appeal under TMC  
8 1.23.050.B.19 and B.21, as an “Appeal[ ] arising out of the imposition by the Director, or his or  
9 her staff, of solid waste utility charges...” and as a “dispute[ ] concerning utility service.”

10 2. The summary judgment process is intended to eliminate a trial or hearing if only  
11 questions of law remain for resolution, and neither party contests facts necessary to reach a  
12 legal determination.<sup>7</sup> Neither party has contested the background facts set forth above.  
13 Appellant filed no response to the City Motion at all. Given the foregoing, summary judgment  
14 is appropriate here.

15 ***Whether the City/TPU has the authority to back-bill for services?***

16 3. The City/TPU, as a municipal utility provider, is generally obligated by law to  
17 bill the cost of utility services provided.<sup>8</sup> The foregoing notwithstanding, “A municipal

18 \_\_\_\_\_  
19 <sup>6</sup> The City stated the issue on summary judgment as “Whether Appellant’s request to adjust the solid waste utility  
20 service billing in question should be denied because the Appellant, and not the individual condominium owners, is  
21 the customer responsible for payment of solid waste utility service and there is no dispute that the customer  
received the services, which are the subject of the disputed billing?” The Examiner’s framing of issues still  
resolves the City’s issue as framed.

<sup>7</sup> *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); *Wilson v. Steinbach*, 98 Wn.2d 434, 656  
P.2d 1030 (1982); *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007); *Wedbush Sec., Inc. v. City  
of Seattle*, 189 Wn. App. 360, 363, 358 P.3d 422 (2015) citing *Avanade, Inc. v. City of Seattle*, 151 Wn. App. 290,  
297, 211 P.3d 476 (2009).

<sup>8</sup> See, e.g., RCW 35.21.120, RCW 80.28.080; TMC 12.09.160; *Housing Auth. v. Sewer and Water District*, 56  
Wn. App. 589, 784 P.2d 1284 (1990).

1 corporation has inherent power to enter into a compromise settlement of disputed claims,  
2 arising out of a subject matter concerning which the municipality has the general power to  
3 contract.”<sup>9</sup> The City’s provision of utilities to its customers is a contractual relationship in  
4 which the City agrees to provide utility service for specified payment from the named  
5 customer.<sup>10</sup> In this appeal, however, there is no dispute over the accuracy of the Outstanding  
6 Amount. Rather, the Appellant seeks a waiver or adjustment of the Outstanding Amount due  
7 to TPU’s late billing, and based on Appellant’s changing membership.

8 4. In the absence of authority to the contrary,<sup>11</sup> the *Housing Authority* case just cited  
9 controls the issue here. In that case, the Housing Authority of King County had been billed  
10 incorrectly low for utilities for four years. The under billing was the result of the utility’s failure  
11 to change the rate classification of an apartment building owned by the housing authority after  
12 construction of the apartment building was completed. When the deficit was discovered, the  
13 utility customer was back-billed and the back-billing was upheld by the court. The court  
14 concluded that the utility was obligated to collect moneys owed it, or risk violating  
15 laws/policies against preferential billing and discrimination. The court concluded that not  
16 collecting an actual amount owed would amount to a preference. The court further concluded  
17 that the back-billing could not be estopped from collection even if the utility had been negligent  
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20 <sup>9</sup> *Warburton v. Tacoma Sch. Dist.*, 55 Wn.2d 746, 752, 350 P.2d 161 (1960), citing *Abrams v. Seattle*, 173 Wash.  
21 495, 502, 23 P.2d 869 (1933), and *Christie v. Port of Olympia*, 27 Wn.2d 534, 179 P.2d 294 (1947). See also  
*Eugster v. City of Spokane*, 139 Wn. App. 21, 31-32, 156 P.3d 912, 918 (2007) (*A good faith settlement of a  
dispute is sufficient consideration, absent any actual donative intent, to not be a violation of the constitutional  
prohibition on gifting public funds.*)

<sup>10</sup> Such an agreement can be verbal.

<sup>11</sup> Again, the Examiner and the parties agreed on a motion schedule at the prehearing conference. For whatever reason, Appellant did not file a response to the City Motion.

1 in under billing the customer.<sup>12</sup> The foregoing authority is directly on point here. The Appellant  
2 submitted no contrary authority.

3 ***Whether the Appellant was properly billed as the Customer?***

4 5. The state legislature has construed “person” to include “any public or private  
5 corporation or limited liability company.”<sup>13</sup> Persons generally have the ability to enter into  
6 contracts.

7 6. Under the law, a corporation exists as a legal organization distinct from its  
8 shareholders, or in the case of an incorporated HOA, its members.<sup>14</sup> That distinct  
9 organization, of necessity, “[a]cts through its officers, directors, employees, and other  
10 agents.”<sup>15</sup> Here, Appellant acted through its officers, directors, and other agents to procure  
11 solid-waste utility service from the City by verbal agreement. It did so as an incorporated  
12 HOA for its members collectively rather than have service for its members individually.<sup>16</sup>

13 7. Non-profit corporations specifically have the authority to enter into contracts  
14 under state law.<sup>17</sup> Billing the Appellant HOA was proper here. No evidence was presented  
15 showing a contractual relationship between the City and the individual resident/members of  
16 the HOA for solid waste services. How the HOA interacts with its members, and what the  
17 responsibilities are between them is a matter for the HOA and its membership. In the  
18 corporate context, however, a newly bought-in shareholder will still potentially be affected  
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20 <sup>12</sup> 56 Wn. App. at 595.

21 <sup>13</sup> *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 662, 343 P.3d 370, 377 (2014), citing RCW 1.16.080(1).

<sup>14</sup> *State v. Brelvis Consulting, LLC*, 7 Wn. App. 2d 207, 215, 436 P.3d 818, 824 (2018), internal cites omitted.

<sup>15</sup> *Id.*

<sup>16</sup> The City may have had a role in this setup as well. It is possible that the City would not provide individual service as opposed to a collective service in a condominium setting with multi-family housing.

<sup>17</sup> RCW 24.03A.140(7).

1 by the corporation's preexisting liabilities.

2 ***Whether the Hearing Examiner has any authority to adjust the back-billed***  
3 ***amount on fairness/equity or other grounds?***

4 8. Here again, in the absence of contrary authority, the *Housing Authority* case is  
5 controlling. As stated above, in the *Housing Authority* case, the court held that the public  
6 policy against rate discrimination [and preferences] requires a utility to collect  
7 undercharges. The Housing Authority argued that the undercharges should be prevented by  
8 the equitable principle of estoppel. The court countered that it could not permit the Housing  
9 Authority to thwart the aforementioned policy by raising equitable defenses.

10 9. Just as in the *Housing Authority* case, Appellant's plea for a fairer outcome  
11 than having to pay the Outstanding Amount becomes essentially a request in equity. Equity  
12 is based on a set of common law principles established over time that allow judges (with  
13 equitable authority) to apply a level of fairness and equality to a given case if the facts  
14 support doing so. The most applicable equitable principle here might be estoppel, which  
15 could be applied to rule that TPU was estopped, or prevented from collecting the  
16 Outstanding Amount because of its error and late billing. Washington case law has  
17 indicated, however, that hearing examiners do not have the authority to engage equitable  
18 principles in their decisions.<sup>18</sup>

19 10. As a result, the Examiner concludes that the Outstanding Amount is due and  
20 owing from the Appellant to the City/TPU in accordance with the *Housing Authority* case  
21 and without modification because the Examiner has no authority to modify the Outstanding



1 Amount based on equity, and actually appears to be prevented from doing so by the holding  
2 in the *Housing Authority* case in any event. No interest, late fees or other penalties should  
3 attach to the Outstanding Amount due to TPU's error in billing, however.

4 **DECISION AND ORDER**

5 The City Motion is hereby GRANTED and Appellant's appeal is effectively  
6 DENIED as a result. The City/TPU is required by law, in the absence of a valid dispute as  
7 to amount, to collect the money owed, and the Examiner is without any authority to waive  
8 or reduce the same.

9 The Outstanding Amount shall be paid over 24 months' time<sup>19</sup> starting 30 days  
10 from the date of this Decision and shall be payable without interest, late fees or other  
11 penalty. This repayment period is significantly less than the time the Outstanding Amount  
12 accrued due to the City's oversight. The Appellant should have that amount of time to make  
13 the repayment in order to budget for it, and to lessen the impact of repaying the amount  
14 accrued. To the extent that any of the Outstanding Amount exceeds a three-year period, the  
15 exceeding amount should be deducted from the Outstanding Amount and it should be  
16 recalculated.<sup>20</sup>

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<sup>18</sup> *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 638-640, 689 P.2d 1084 (1984)(*hearing examiner had no authority to consider equitable issues and equitable estoppel in particular*).

<sup>19</sup> Or sooner at Appellant's discretion.

<sup>20</sup> This is in accordance with RCW 4.16.080(3) and TPU Customer Service Policy 4.2.10.

1 NOW THEREFORE, the City’s Motion for Summary Judgment requesting an order  
2 dismissing Allenmore East Homeowners Association’s appeal is GRANTED.

3 **ORDERED** this 14th day of February, 2023.

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5 \_\_\_\_\_  
6 **JEFF H. CAPELL, Hearing Examiner**

7 **NOTICE**

8 **TMC 1.23.160 “Appeal of Hearing Examiner decisions” provides the following:**

9 **1.23.160 Appeal of Hearing Examiner decisions.**

10 A. Appeal of those matters in which the Hearing Examiner enters a final decision as set  
11 forth in subsection B of Section 1.23.050, except in regard to applications from preliminary plat  
12 approval, may be brought by any party to the adjudicative proceeding which led to the decision  
13 entered. In regard to applications for preliminary plat approval, any aggrieved person having  
14 standing under the ordinance governing such application, or as otherwise provided by law, may  
15 appeal the Examiner’s decision as provided herein.

16 B. Appeals from decisions of the Hearing Examiner in regard to those matters set forth  
17 in subsection B of Section 1.23.050 shall be appealable to the Superior Court for the State of  
18 Washington; provided, however, that those determinations regarding civil penalties, as set forth  
19 in subsections B.18 and B.19, and disputes concerning utility service, as set forth in subsection  
20 B.21, shall be appealable to the Tacoma Municipal Court. Any court action to set aside, enjoin,  
21 review or otherwise challenge the decision of the Examiner shall be commenced within 21 days  
of the entering of the decision by the Examiner, unless otherwise provided by statute.