

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

S. MICHAEL KUNATH,
Plaintiff,

v.

CITY OF SEATTLE,
Defendant,

and

ECONOMIC OPPORTUNITY
INSTITUTE,
Intervenor-Defendant.

No. 17-2-18848-4 SEA

ORDER ON PARTIES'
CROSS-MOTIONS FOR
SUMMARY JUDGMENT

SUZIE BURKE, *et al.*,
Plaintiff,

v.

CITY OF SEATTLE,
Defendant.

DENA LEVINE, *et al.*,
Plaintiff,

v.

CITY OF SEATTLE,
Defendant.

SCOTT SHOCK, *et al.*,
Plaintiffs,

v.

CITY OF SEATTLE,
Defendant.

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1. Introduction

On November 17, 2107, this matter came before the court for oral arguments on the following motions and cross-motions in this consolidated action:

- Defendant City of Seattle’s Motion for Summary Judgment (Dkt. 47D).
- Intervenor-Defendant Economic Opportunity Institute’s Motion for Summary Judgment (Dkt. 47A)
- Plaintiff Kunath’s Cross-Motion for Summary Judgment (Dkt. 57)
- Burke/Levine Plaintiffs’ Cross-Motion for Summary Judgment (Dkt. 56J)
- Shock Plaintiffs’ Cross-Motion for Summary Judgment (Dkt. 56B)

For the reasons explained below, the court will deny the Defendants’ Motions for Summary Judgment and grant the Plaintiffs’ Motions for Summary Judgment.

2. Parties and Counsel

Plaintiff Kunath. Plaintiff S. Michael Kunath (“**Kunath**”) is represented by Matthew F. Davis of Davis Leary.

Burke Plaintiffs. Plaintiffs Suzie Burke, Gene Burrus and Leah Burrus, Paige Davis, Faye Garneau, Kristi Dale Hoofman, Lewis M. Horowitz, Theresa Jones and Nigel Jones, Nick Lucio and Jessica Lucio, Linda R. Mitchell, Erika Kristina Nagy, Don Root, Lisa Sterritt and Brent Sterritt, and Norma Tsuboi (the “**Burke Plaintiffs**”) are represented by Scott M. Edwards and Ryan P. McBride of Lane Powell PC and David Dewhirst of The Freedom Foundation.

Levine Plaintiffs. Plaintiffs Dena Levine, Christopher Rufo, Martin Tobias, Nicholas Kerr, Chris McKenzie, Alisa Artis, Lien Dang, Kerry Lebel, and Dorothy M. Sale (the “**Levine Plaintiffs**”), are represented by Robert M. McKenna, Daniel J. Dunne, Jr. and Adam Tabor of Orrick, Herrington & Sutcliffe LLP; Gerry L. Alexander of Bean, Gentry, Wheeler & Peterzell, PLLC; and Philip A. Talmadge of Talmadge Fitzpatrick Tribe PLLC.

1 **Shock Plaintiffs.** Plaintiffs Scott Shock, Sally Oljar, Steve Davies and John Palmer
2 (the “**Shock Plaintiffs**”) are represented by Brian T. Hodges and Ethan W. Blevins of the
3 Pacific Legal Foundation.

4 **Defendant City of Seattle.** Defendant City of Seattle (the “**City**”) is represented by
5 Seattle City Attorney Peter S. Holmes and Kent Meyer, Assistant City Attorney; Paul J.
6 Lawrence, Gregory J. Wong and Jamie L. Lisagor of Pacifica Law Group LLP; and Hugh D.
7 Spitzer.

8 **Defendant Economic Opportunity Institute.** Defendant Economic Opportunity
9 Institute (“**EOI**”) is represented by Knoll Lowney and Claire E. Tonry of Smith & Lowney,
10 PLLC.

11 **Amicus Curiae Rental Housing Association of Washington.** Amicus Curiae
12 Rental Housing Association of Washington (“**RHA**”) is represented by Katherine A. George
13 of Johnston George LLP.
14

3. **Documents Considered**

15 The Court has considered the pleadings and other documents filed by the parties, and
16 in particular the following items, including their attachments, totaling approximately 1,200
17 pages:
18

	<u>Dkt. No.</u>
<u>Pleadings By Defendant City of Seattle</u>	
Defendant City of Seattle’s Motion for Summary Judgment	47D
Declaration of Gregory J. Wong in Support of Defendant City of Seattle’s Motion for Summary Judgment	47E
City of Seattle’s Combined Reply in support of Its Motion for Summary Judgment and Opposition to Plaintiffs’ Cross-Motions for Summary Judgment	67
Second Declaration of Gregory J. Wong in Support of Defendant City of Seattle’s Motion for Summary Judgment	68

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Pleadings By Defendant City of Seattle

Dkt. No.

City of Seattle’s Response to Amicus Curiae Memorandum of Rental Housing Association of Washington 73

Pleadings by Intervenor-Defendant Economic Opportunity Institute **Dkt. No.**

Intervenor-Defendant Economic Opportunity Institute’s Motion for Summary Judgment 47A

Declaration of Claire Tonry in Support of Economic Opportunity Institute’s Motion for Summary Judgment 47B

Economic Opportunity Institute’s Response and Reply on Cross-Motions for Summary Judgment 65

Economic Opportunity Institute’s Reply to Levine and Burke Plaintiffs’ Untimely Opposition Brief 81

Pleadings By Plaintiff Kunath

Dkt. No.

Kunath’s Response to Seattle Motion for Summary Judgment and Cross-Motion for Summary Judgment 57

Plaintiff Kunath’s Response to EOI’s Motion for Summary Judgment and Cross-Motion for Summary Judgment 58

Declaration of Matthew Davis in Opposition re: Motions for Summary Judgment 59

Kunath’s Reply to Seattle’s Response to Cross-Motion for Summary Judgment 74

Kunath’s Reply to Economic Opportunity Institute’s Response re: Cross-Motion for Summary Judgment 75

Declaration of Matthew F. Davis in Support of Reply on Cross-Motion for Summary Judgment Against Economic Opportunity Institute 76

Corrected Declaration of Matthew Davis in Opposition re: Motions for Summary Judgment 78

1	<u>Pleadings By Burke/Levine Plaintiffs</u>	<u>Dkt. No.</u>
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3	Opposition to City’s Motion for Summary Judgment	
4	Declaration of Christopher Rufo	54
5	Declaration of Dorothy Sale	55
6	Declaration of Martin Tobias	56
7	Declaration of Nicholas Kerr	56F
8	Declaration of Dena Levine	56G
9	Declaration of Christopher McKenzie	56H
10	Declaration of Alisa Artis	56K
11	Declaration of Lewis Horowitz	56L
12	Declaration of Jason Mercier	60
13	Declaration of Adam Nolan Tabor	61
14	Burke/Levine Plaintiffs’ Opposition to Economic Opportunity	70
15	Institute’s Motion for Summary Judgment	
16	Declaration of Daniel J. Dunne in Support of Burke/Levine Plaintiffs’	71
17	Opposition to Economic Opportunity Institute’s Motion for Summary	
18	Judgment	
19	Burke/Levine Plaintiffs’ Reply in Support of Motion for Summary	79
20	Judgment	
21	Second Declaration of Adam Nolan Tabor in Support of [Burke/Levine]	80
22	Plaintiffs’ Motion for Summary Judgment	
23	<u>Pleadings By Shock Plaintiffs</u>	<u>Dkt. No.</u>
24	Shock Plaintiffs’ Response to Motions for Summary Judgment Filed by	56B
25	the City and Defendant-Intervenor and Cross-Motion for Summary	
26	Judgment	
27	Shock Plaintiffs’ Reply in Support of Cross-Motion for Summary	72
28	Judgment	

4. Background

A. City’s Ordinance

On July 10, 2017, the Seattle City Council unanimously passed Council Bill 119002 (the “**Bill**”). The Bill’s title describes its purpose:

AN ORDINANCE imposing an income tax on high-income residents; providing solutions for lowering the property tax burden and the impact of other regressive taxes, replacing federal funding potentially lost through federal budget cuts, providing public services, including housing, education, and transit, and creating green jobs and meeting carbon reduction goals, and adding a new Chapter 5.65 to the Seattle Municipal Code.

Council Bill 119002, July 10, 2017 (Declaration of Gregory J. Wong in Support of Defendant City of Seattle’s Motion for Summary Judgment, Ex. A (Dkt. 47E).

On July 14, 2017, Seattle Mayor Ed Murray signed the Bill, and it became Seattle Ordinance No. 125339 (the “**Ordinance**”). The Ordinance is codified as Chapter 5.65 of the Seattle Municipal Code and is entitled, “Chapter 5.65 - INCOME TAX ON HIGH-INCOME RESIDENTS.” *Ibid.*

The Ordinance imposes an income tax on the “total income” of resident taxpayers (with certain credits for income tax paid to another state or local government) as follows:

Resident taxpayers whose Internal Revenue Service filing status was “single,” “head of household,” qualifying widow(er) with dependent child,” or “married filing separately” for the tax year, including individuals making the election in subsection [SMC] 5.65.040.A.1, or a trust	Total income in the tax year up to \$250,000	0%
	Amount of total income in the tax year in excess of \$250,000	2.25%

Resident taxpayers whose Internal Revenue Service filing status was “married filing jointly” for the tax year and not calculating total income based on “married filing separately” status as provided for under subsection [SMC] 5.65.040.A.1	Total income in the tax year up to \$500,000	0%
	Amount of total income in the tax year in excess of \$500,000	2.25%

SMC 5.65.030.B. *See also* SMC 5.65.020 and SMC 5.65.060.

The term, “total income,” is defined at SMC 5.65.020.G:

“Total income” means the amount reported as income before any adjustments, deductions, or credits on a resident taxpayer’s United States individual income tax return for the tax year, listed as “total income” on line 22 of Internal Revenue Service Form 1040, “total income” on line 15 of Internal Revenue Service Form 1040A, “total income” on line 9 of Internal Revenue Service Form 1041, or the equivalent on any form issued by the Internal Revenue Service that is not reported on Schedule K-1 for a beneficiary.

The City estimates that “[t]hose who would be subject to the [City’s income] tax have incomes in the top three percent of all Seattle households.” Declaration of Gregory J. Wong, Exhibit C, at 3 (“Seattle Income Tax Threshold Information Sheet,”) (Dkt. 47E).

B. Plaintiff Kunath’s Suit

On July 14, 2017, the same day the Mayor signed the Ordinance, Plaintiff Kunath filed a Complaint for Declaratory Relief (Dkt. 1) On August 8, 2017, Plaintiff Kunath filed his First Amended Complaint (Dkt. 10) (the “**Kunath Amended Complaint**”).

Plaintiff Kunath seeks a judgment declaring the Ordinance to be void on the following grounds:

- The Ordinance taxes “net income,” not “gross income,” and thus violates RCW 36.65.030, (which provides, “A county, city, or city-county shall not levy a tax on net income.”). Kunath Amended Complaint, at ¶¶ 10-36, 47-49, 59.

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- The Ordinance taxes “net income,” not “gross income,” and thus violates art. XI, § 12 of the Washington Constitution (which prohibits cities from assessing taxes not authorized by the legislature). *Id.*, at ¶¶ 10-36, 44-46, 60.
 - The tax levied by the Ordinance is a tax on “property” that “is not uniform” because it imposes tax on the “property” of only some residents and not others, and thus violates art. VII, § 1 of the Washington Constitution (which provides, in part, that “All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax...” *Id.*, at ¶¶ 37-40, 50-56, 61.
 - The tax levied by the Ordinance exceeds one percent of the value of income per year, in violation of art. VII, § 2 of the Washington Constitution. *Id.*, at ¶¶ 41, 57-58, 62.

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C. Burke Plaintiffs’ Suit

15 On August 9, 2017, the Burke Plaintiffs filed a Complaint for Declaratory and
16 Injunctive Relief in in Case No. 17-2-21032-3. Later that same day, they filed an Amended
17 Complaint for Declaratory and Injunctive Relief (the “**Burke Amended Complaint**”) in that
18 case. On August 17, 2017, the court consolidated the Burke Plaintiffs’ suit with the Kunath
19 suit (Dkt. 16).

20 The Burke Plaintiffs seek a judgment declaring the Ordinance to be void and an
21 injunction preventing the City from enforcing the Ordinance on the following grounds:

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- The Ordinance exceeds the City’s statutory taxing authority (Burke Amended Complaint, at ¶¶ 2, 29(a)).
 - The Ordinance violates the prohibition against net income taxes stated in RCW 36.65.030. *Id.*, at ¶¶ 3, 18-19, 29(b).
 - The Ordinance “violates statutory limitations on Municipal gross income taxes imposed by Ch. 35.102 RCW” because “the purposes to which the funds

1 are dedicated ... are not valid purposes for which municipalities are
2 authorized to impose taxes.” *Id.*, at ¶ 4; *see also* ¶ 5.

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- 4 • The Ordinance “was enacted without a vote of the people exceeding the
5 authority granted to the city council by the people under the Charter of the
6 City of Seattle, and, therefore, is invalid.” *Id.*, at ¶ 32(a); ¶ 6; *see also* ¶¶ 6,
7 31.
 - 8 • The Ordinance “violates the privacy rights of Washington Citizens under art.
9 I, Section 7 of the Washington Constitution because [it compels] the
10 disclosure of private affairs to the government.” *Id.*, at ¶ 8; *see also* ¶ 35(a).
 - 11 • The Ordinance “imposes an unconstitutional non-uniform tax in violation of
12 the Uniformity Clause, art. VII, Section 1 of the Washington Constitution.”
13 *Id.*, at ¶ 9; *see also* ¶¶ 20, 35(b).

14 **D. Levine Plaintiffs’ Suit**

15 On August 9, 2017, the Levine Plaintiffs filed a Complaint for Declaratory and
16 Injunctive Relief in in Case No. 17-2-21076-5. On August 17, 2017, the court consolidated
17 the Burke Plaintiffs’ suit with the Kunath suit (Dkt. 16). On August 31, 2017, the Levine
18 Plaintiffs filed their First Amended Complaint for Declaratory and Injunctive Relief (the
19 “**Levine Amended Complaint**”) in this consolidated case (Dkt. 26).

20 The Levine Plaintiffs seek a judgment declaring the Ordinance to be void and an
21 injunction preventing the City from enforcing the Ordinance on the following grounds:

- 22 • “The Legislature has not authorized [the City] to tax personal income, and has
23 not specifically authorized [the City] to tax “total income” in particular.”
24 Levine Amended Complaint, at ¶ 56; *see also* ¶¶ 53-55)
- 25 • “[T]he Legislature prohibits [the City] from taxing personal income” pursuant
26 to RCW 36.65.030. *Id.*, at ¶ 57.

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- “Seattle lacks the power to tax income under the City Charter, which does not confer the power to tax personal income on the City [and the] City has not placed a Charter Amendment before the voters of Seattle that would empower it to tax income.” *Id.*, at ¶ 58.
 - The Ordinance “imposes a non-uniform tax on personal income” in violation of the Uniformity Clause, art. VII, Section 1 of the Washington Constitution. *Id.*, at ¶ 59.

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E. Shock Plaintiff’s Suit

On August 30, 2017, the Shock Plaintiffs filed a Complaint for Declaratory and Injunctive Relief in Case No. 17-2-22917-2 (the “**Shock Complaint**”). On November 13, 2107, the court consolidated the Shock Plaintiffs’ suit with the Kunath suit (Dkt. 77).

The Shock Plaintiffs seek a summary judgment declaring the Ordinance to be void and an injunction preventing the City from enforcing the Ordinance on the following grounds:

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- The Ordinance impermissibly imposes a tax on “net income” in violation of RCW 36.65.030.” Shock Complaint, at ¶ 20; *see also* ¶¶ 35-36.
 - The Ordinance exceeds the City’s statutory taxing authority. *Id.*, at ¶¶ 33-36 .
 - “The City Charter does not grant the City the authority to levy a tax on income.” *Id.*, at ¶¶ 37.
 - “The Ordinance does not impose the tax at a uniform tax rate as required by art. VII, Section 1 of the Washington State Constitution.” *Id.*, at ¶¶ 21; *see also* ¶¶ 22, 42-43.
 - The Ordinance violates the Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and art. I, Section 12 of the Washington State Constitution. *Id.*, at ¶¶ 49-50.

1 **F. Defendant-Intervenor Economic Opportunity Institute’s Suit**

2 By order dated September 20, 2017, the court allowed EOI to intervene as an
3 additional Defendant in this case.

4 On September 21, 2017, EOI filed a Complaint in Intervention (Dkt. 47) (“**EOI’s**
5 **Complaint**”), requesting the court to issue a judgment declaring that “RCW 36.65.030 is
6 unconstitutional and void and that the [Ordinance] is valid.” EOI’s Complaint, at ¶ 2.

7 EOI argues that RCW 36.65.030 violates art. II, § 19 of the Washington Constitution,
8 which prohibits legislative bills from addressing more than one subject (the “**Single-Subject**
9 **Rule**”) and from having a subject that is not expressed in the title of the bill (the “**Subject-in-**
10 **Title Rule**”). *Id.*, at ¶¶ 46-48.

11 **5. Parties’ Cross Motions for Summary Judgment**

12 **A. Defendant City’s Motion**

13 The City urges the court to issue a declaratory judgment upholding the Ordinance.

14 The City argues:

- 15 • RCW 36.65.030 (which prohibits taxes on net income) is inapplicable to the
16 Ordinance because the Ordinance taxes “total income,” a figure derived from
17 resident taxpayers’ federal personal income tax returns.
- 18 • The Ordinance, despite its title describing the tax as an “income tax,” actually
19 imposes an “excise tax” that the City is authorized to impose pursuant to
20 RCW 35A.82.020 and RCW 35.22.280(32).
- 21 • Regardless of how the tax is labeled, the City is authorized to impose it
22 pursuant to RCW 35A.11.020, a 2007 statute that provides that “Within
23 constitutional limitations ... [the City has] all powers of taxation for local
24 purposes.”
- 25 • It is time to reverse a long line of Washington Supreme Court decisions, all of
26 which hold that income taxes are “property taxes” and thus subject to the

1 “uniformity” restrictions that art. VII, § 1 of the Washington Constitution
2 applies to property taxes.

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4 **B. Defendant EOI’s Motion**

5 Intervenor-Defendant Economic Opportunity Institute (“EOI”) echoes the City’s
6 arguments, and additionally urges the court to conclude that even if RCW 36.65.030
7 otherwise would be applicable to the Ordinance, violates art. II, § 19 of the Washington
8 Constitution because it violates the “Single-Title Rule” and the “Subject-in-Title Rule.”

9 **C. Plaintiffs’ Cross-Motions**

10 In their cross-motions, the Plaintiffs generally oppose each of the Defendants’ legal
11 arguments summarized above, and they urge the court to issue a declaratory judgment in
12 their favor, invalidating the Ordinance.

13 **6. Discussion**

14 **A. Summary Judgment Standard**

15 Summary judgment is appropriate if no genuine issue of material fact exists and the
16 moving party is entitled to judgment as a matter of law. *Dean v. Fishing Co. of Alaska*, 177
17 Wn.2d 399, 405, 300 P.3d 815 (2013). When determining whether summary judgment is
18 appropriate, the court must consider the facts and all reasonable inferences from those facts
19 in the light most favorable to the nonmoving party. *Shoffner v. State*, 172 Wn.App. 866,
20 871–72, 294 P.3d 739 (2013).

21 All parties agree that there is no dispute of any material fact and that the court may
22 rule on the parties’ cross-motions for summary judgment. The court has considered all
23 admissible evidence included in the approximately 1,200 pages of materials submitted by the
24 parties and the court has disregarded any inadmissible evidence.

1 **B. Legislature Must Expressly Delegate**
2 **Specific Taxing Authority to Municipalities**

3 The City argues that its personal income tax is “within the taxing authority delegated
4 by the state” (City’s Motion, at 2), citing to the Washington Constitution, art. VII, § 9, which
5 provides that “[f]or all corporate purposes, all municipal corporations may be vested with
6 authority to assess and collect taxes;” and art. XI, § 12, which authorizes the Legislature to
7 grant municipalities the power to levy taxes for “county, city, town, or other municipal
8 purposes;” *Id.*, at 5-8.

9 In *Watson v. City of Seattle*, 189 Wn.2d 149, 401 P.3d 1 (2017), the Washington
10 Supreme Court summarized the limitations on the taxing authority of municipalities:

11 The Washington State Constitution generally vests taxing power in
12 the state legislature. *See* WASH. CONST. art. I, § 1. Municipal
13 corporations have no inherent power to tax. *See Arborwood Idaho,*
14 *LLC*, 151 Wn.2d [359] at 365-66, 89 P.3d 217 (2004); 16
15 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL*
16 *CORPORATIONS* § 44.5 (3d ed. 2013). . . . [A]rticle VII permits
17 the legislature to delegate tax powers to cities and towns. *See*
18 WASH. CONST. art. VII, § 9 (“For all corporate purposes, all
19 municipal corporations may be vested with authority to assess and
20 collect taxes.”). . . .

21 189 Wn.2d at 165, 401 P.3d 1. *See also* Washington Constitution art. XI, § 12 (“[T]he
22 legislature *may*, by general laws, vest in the corporate authorities [of counties, cities, towns,
23 or other municipal corporations] the power to assess and collect taxes for such purposes.”
24 [Emphasis added]).

25 These constitutional provisions are not self-executing. In *King County v. City of*
26 *Algona*, 101 Wn.2d 789, 791, 681 P.2d 1281 (1984), the Washington Supreme Court stated,
“We have consistently held that municipalities must have *express* authority, either
constitutional or legislative, to levy taxes.” [Emphasis added]. *See also Arborwood Idaho*
LLC v. City of Kennewick, 151 Wn.2d 359, 366, 89 P.3d 217 (2004); *Rivett v. City of*
Tacoma, 123 Wn.2d 573, 584, 870 P.2d 299 (1994) (“It is clear that neither cities nor

1 counties may levy taxes which have not been expressly authorized by the Legislature. It is
2 also clear that neither the broad police powers nor any other general grant of power to cities
3 and counties encompass the power to tax.”).

4 Unless the City can identify a statute that specifically authorizes it to impose the type
5 of tax described in the Ordinance, the Ordinance cannot withstand the Plaintiffs’ challenge.

6
7 **C. The City’s Income Tax is Not an “Excise Tax”
Authorized by RCW 35.22.280(32) and RCW 35A.82.020**

8 Despite the fact that the Ordinance is entitled, “Income Tax on High-Income
9 Residents,” the City characterizes its tax as excise tax that the Legislature has authorized by
10 reason of RCW 35.22.280(32) and/or RCW 35A.82.020. City’s Motion, at 20-21 (Dkt.
11 47D); City’s Reply, at pp 27-29.

12 An excise tax is a tax that is imposed on a taxpayer for voluntarily exercising a
13 certain right or privilege. *Tesoro Refining and Marketing Co. v. State Dept. of Revenue*, 135
14 Wn.App. 411, 418, 144 P.3d 368 (2006).

15 RCW 35.22.280(32) allows a city to impose an excise tax for the privilege of being
16 licensed to do business in the city:

17 Any city of the first class shall have power:

18 * * *

19 (32) To grant licenses for any lawful purpose, and to fix by
20 ordinance the amount to be paid therefor, and to provide for
21 revoking the same. However, no license shall be granted to
22 continue for longer than one year from the date thereof. A city may
not require a business to be licensed based solely upon registration
under or compliance with the streamlined sales and use tax
agreement.

23 RCW 35A.82.020 provides that a city may issue business licenses for up to one year
24 at a time for purposes of “regulation or revenue:”

25 A code city may exercise the authority authorized by general law
26 for any class of city to license and revoke the same for cause, to
regulate, make inspections and to impose excises for regulation or

1 revenue in regard to all places and kinds of business, production,
2 commerce, entertainment, exhibition, and upon all occupations,
3 trades and professions and any other lawful activity...

4 No such license shall be granted to continue for longer than a
5 period of one year.

6 The City asserts that Seattle residents enjoy a taxable “privilege,” and it argues that
7 RCW 35.22.280(32) and RCW 35A.82.020 authorize the tax that the Ordinance imposes –
8 namely, an annual license fee (excise tax) upon high-income residents based on those
9 residents’ “total income.”

10 The City offers alternate descriptions of the “privilege” that it is taxing. Initially, the
11 City argues that “The Ordinance imposes ‘excises for ... revenue ... upon [the] lawful
12 activity’ of resident taxpayers’ receipt of income within Seattle.” City’s Motion, at 21.

13 To the extent that the Ordinance purports to impose a tax on the “privilege” of
14 receiving pay for labor, such a “privilege” is not a valid basis for an excise tax. *See Cary v.*
15 *City of Bellingham*, 41 Wn.2d 468, 250 P.2d 114 (1952) [Held, city’s purported “excise tax”
16 on the “right to earn a living by working for wages is not a ‘substantive privilege’ permitted
17 by the state. It is ... one of those inalienable rights ... secured to all ... by the liberty,
18 property, and happiness clauses of the national and state Constitutions.”]; *see also Jensen v*
19 *Henneford*, 185 Wash. 209, 217-219 (1936) [rejecting the Washington State Tax
20 Commission’s argument that the “Personal Net Income Tax Act of 1935” could be
21 characterized as an excise tax on “the privilege of receiving income.”].

22 In its reply brief, the City puts forth an alternate argument, that “[c]hoosing to live in
23 Seattle is a ‘lawful activity’ that is subject to the City’s excise tax authority” (City’s Reply,
24 at 28 (Dkt. 67)); and that

25 [t]he tax is on the benefit of taking advantage of the city’s
26 protections by being a Seattle resident (the incident), imposed on
personal total income above the thresholds (the measure), at a rate
of 2.25% for any amount over the threshold (the rate).

1 *Id.*, at 29.

2 The court disagrees. Although RCW 35.22.280(32) grants the City broad authority to
3 impose excise taxes on businesses for the privilege of doing business within city limits,
4 *Watson v. City of Seattle*, 189 Wn.2d 149, 170, 401 P.3d 1 (2017), the City’s right to impose
5 excise taxes under that statute may be levied only “upon the right to do business, not upon
6 the right to exist...” *Id.*, at 168, 401 P.3d 1 (2017), citing *Pac. Tel. & Tel. Co.*, 172 Wash.649,
7 654, 21 P.2d 721 (1933). The court agrees with the Burke/Levine Plaintiffs’ response to the
8 City’s argument:

9 [T]he right to live in the City and earn a livelihood does not
10 constitute a voluntary or privileged activity for which an individual
11 must obtain a license, nor is there any activity the city revokes if an
12 individual fails to pay; violators are not banished, fired from the
13 jobs or required to forfeit income. *Margola Assocs. v. City of*
14 *Seattle*, [121 Wn.2d 625,] 641[, 854 P.2d 23 (1993)] (“violation of
15 a traditional licensing ordinance leads to a revocation of the license
16 and a cessation of the licensed activity”). RCW 35.22.280(32)’s
17 licensing authority does not apply, because the City cannot license
18 the right to live in the City.

19 Burke/Levine’s Motion, at 17 (Dkt. 56J).

20 In short, the City’s tax, which is labeled, “Income Tax,” is exactly that. It cannot be
21 restyled as an “excise tax” on the alternate “privileges” of receiving revenue in Seattle or
22 choosing to live in Seattle.

23 **D. RCW 35A.11.020 Does Not Authorize the City’s Tax**
24 **as an Income Tax or as a “Sui Generis” Tax**

25 The City argues RCW 35A.11.020 authorizes it to impose the tax described in the
26 Ordinance. That statute provides, in relevant part:

Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits all powers of taxation for local purposes except those which are expressly preempted by the state as provided in [certain statutes referring to liquor, motor fuel excise, and insurance premiums, none of which is relevant here].

1 This general description of code cities' taxing power does not by itself authorize any
2 particular type of tax. In *King County v City of Algona*, 101 Wn.2d 789, 681 P.2d 1281
3 (1984), the Washington Supreme Court rejected the City of Algona's claim that
4 RCW 35A.11.020's "general grant of taxing power" gave it the authority to levy a tax on
5 another municipality. The court stated:

6 The general grant of taxation power on which Algona relies in
7 RCW 35A.11.020 contains no *express* authority to levy a tax on
8 the state or another municipality. To allow the City to impose the
9 tax in this case would violate the established rule that
10 municipalities must have specific legislative authority to levy a
11 particular tax. *Citizens for Financially Responsible Gov't v.*
Spokane, [99 Wn.2d 339, 343, 662 P.2d 845 (1983)]; *Hillis*
Homes, Inc. v. Snohomish Cy., [97 Wn.2d 804, 809, 650 p.2d 193
(1982)]. [Emphasis in original]

12 101 Wn.2d 789, 793, 681 P.2d 1281; *see also City of Port Angeles v. Our Water-Our*
13 *Choice!*, 170 Wn.2d 1, 14 n.7, 239 P.3d 589 (2010).

14 Citing an out-of-state case and two scholarly articles, the City argues that its income
15 tax "also could be appropriately characterized as *sui generis*, for which the legislature has
16 also granted the city authority." City's Motion, at p. 21 (Dkt. 47D); *see also* City's Reply, at
17 32-34 (Dkt. 67). Regardless of what label one may choose in classifying the City's tax, the
18 requirement remains that the Legislature must specifically authorize the tax. The City has
19 not identified any specific statutory authorization for its tax.

20 To summarize, the general grant of taxing power recited in RCW 35A.11.020,
21 standing alone, confers no specific authority on the City to impose any tax, let alone the
22 specific authority to impose an income tax or a "*sui generis*" tax. Moreover, whatever effect
23 RCW 35A.11.020 otherwise might have in this case is overridden by RCW 36.65.030's
24 prohibition on net income taxes, discussed immediately below.

1 **E. RCW 36.65.030 Prohibits the City’s Tax on Net Income**

2 In 1984, the Legislature passed Substitute Senate Bill No. 4313, which was approved
3 by the Governor and codified as RCW 36.65.030. The statute provides, “A county, city, or
4 city-county shall not levy a tax on net income.” The applicability of this statute in this case
5 turns on the definition of “net income.”

6 In interpreting RCW 36.65.030, the court first must attempt to discern the statute’s
7 “plain meaning.” If a term in the statute is undefined, then the court may look to standard
8 dictionary definitions to determine the term’s plain and ordinary meaning. *State v. Watson*,
9 146 Wn.2d 947, 954, 51 P.3d 66 (2002); *Audit & Adjustment Co. v. Earl*, 165 Wn.App. 497,
10 502-503, 267 P.3d 441 (2011).

11 The City relies on Black’s Law Dictionary’s definition of “net income” (“[t]otal
12 income from all sources minus deductions, exemptions, and other tax reductions.” [Black’s
13 Law Dictionary (10th ed. 2014)]. City’s Motion, at 7 (Dkt. 47D).

14 The City also relies on the Webster’s Dictionary definition of “net income” (“the
15 balance of gross income remaining after deducting related costs and expenses [usually] for a
16 given period and losses allocable to the period.” [Webster’s Third New Int’l Dict. 1520
17 (1993)]. *Id.*

18 The City additionally cites to the *Audit & Adjustment Co. v. Earl* case, in which the
19 court treated “net earnings” and “net income” as equivalent terms, based on Black’s Law
20 Dictionary and Webster’s Dictionary:

21 The ordinary meaning of “earnings” is “the balance of revenue for
22 a specific period that remains after deducting related costs and
23 expenses incurred—compare profit.” Webster’s Third New Int’l
24 Dictionary, at 714 (2002). **“Net earnings” is equivalent to “net**
25 **income”** and means “the balance of gross income remaining after
26 deducting related costs and expenses [usually] for a given period
and losses allocable to the period.” Webster’s, *supra*, at 1520; *see*
also Black’s Law Dictionary, at 832, 1139 (9th ed. 2009).
[Emphasis added]

1 *Audit & Adjustment Co. v. Earl*, 165 Wn.App. at 503, 267 P.3d 441 (2011); *see also* City’s
2 Motion, at 5-6 (Dkt. 47D).

3 Plaintiff Kunath quotes the edition of Black’s Law Dictionary that was current in
4 1984, when RCW 36.65.030 was enacted:

5 Net Income. Income subject to taxation after allowable deductions
6 and exemptions have been subtracted from gross or total income.
7 The excess of all revenues and gains for a period over all expenses
8 and losses of the period.

9 Net income for income tax purposes is **what remains out of gross**
10 **income after subtracting ordinary and necessary expenses**
11 incurred in efforts to obtain or to keep it. *Walling’s Estate v.*
12 *Commissioner of Internal Revenue*, C.A.Pa, 373 F.2d 190, 193.
13 [Emphasis added]

14 Corrected Declaration of Matthew Davis in Opposition re: Motions for Summary Judgment,
15 Ex. 8 (Dkt. 78) (quoting Black’s Law Dictionary, Special Deluxe Fifth Edition (1979)); *see*
16 *also* Kunath Motion, at 4-8 (Dkt. 57).

17 The Levine/Burke Plaintiffs quote the Multistate Tax Compact, adopted by the
18 Washington Legislature as part of Chapter 82.56 RCW. That statute defines “income tax” as
19 a tax that inherently requires a netting process:

20 4. "**Income tax**" means a tax imposed on or measured by **net**
21 **income** including any tax imposed on or measured by an amount
22 arrived at by **deducting expenses from gross income**, one or more
23 forms of which expenses are not specifically and directly related to
24 particular transactions. [Emphasis added]

25 RCW 82.56.010(4); Burke/Levine Motion, at 21 (Dkt. 56J).

26 Regardless of which of these definitions one uses, the conclusion is the same: the
City’s income tax is a tax on net income.

The City disagrees, and argues that its income tax instead is imposed on “total
income,” which SMC 5.65.020.G defines as the amount

reported as income before any adjustments, deductions, or credits
on a resident taxpayer’s United States individual income tax return

1 for the tax year, listed as “total income” on line 22 of Internal
2 Revenue Service Form 1040, “total income” on line 15 of Internal
3 Revenue Service Form 1040A, “total income” on line 9 of Internal
4 Revenue Service Form 1041, or the equivalent on any form issued
by the Internal Revenue Service that is not reported on Schedule
K-1 for a beneficiary.

5 City’s Motion, at 6-7 (Dkt. 47D). Although the amount is labeled “total income” on the
6 respective IRS forms, it is not a gross figure, but rather a net figure, because it is the sum of
7 net figures.

8 Stated another way, the “total income” figure on each IRS form is a sum comprising
9 several income sources, each of which is listed on that form, and each of which is determined
10 after deduction of allowable expenses and losses related to that income source, including net
11 income from pass-through business entities, sole proprietorships, and disregarded entities; net
12 capital gain income; net rental income; and net royalty income.

13 The City concedes that the “total income” amount comprises net figures, but argues
14 that

15 although netting occurs, the netting only reflects that the taxpayer
16 pays personal income taxes solely on actual profits, dividends, or
17 other gain received. And the City taxes that total amount of such
profits, dividends, or other gain as income without deductions or
exemptions.

18 City’s Motion, at 8. This argument does not change the fact that the sum of several net
19 figures necessarily is a net figure. Additionally, although the lines below line 22 of Form
20 1040 allow a taxpayer to subtract additional deductions and credits and make other
21 adjustments, that does not change the fact that the figure on line 22 is already a net amount.

22 The City cites to the *Audit & Adjustment Co.* case in support of its argument that
23 “total personal income” may be analogous to “net proceeds” from a transaction, and so
24 cannot be considered “net income.” City’s Motion, at 8, citing *Audit & Adjustment Co. v.*
25 *Earl*, 165 Wn.App., at 503, 267 P.3d 441 (2011). In that case, the court distinguished
26

1 between the term “net income” (“the balance of gross income remaining after deducting
2 related costs and expenses [usually] for a given period and losses allocable to the period.”
3 [quoting Black’s Law Dictionary, 9th ed., at 832, 1139 (9th ed. 2009)], versus “net proceeds”
4 (“[t]he amount received in a transaction minus the costs of the transaction (such as expenses
5 and commissions).” [citing Black’s, *supra*, at 1325].

6 The City’s argument is not persuasive. Although it is true that “net proceeds” is not
7 synonymous with “net income,” a “total income” figure that includes “net proceeds”
8 necessarily reflects the result of a netting process, and thus is “net income.”

9 In sum, the court concludes that the City’s Ordinance imposes a tax on net income.

10 **F. RCW 36.65.030 Does Not Violate Washington Constitution Art. II § 19**

11 In its Motion for Summary Judgment, Intervenor-Defendant EOI repeats the
12 arguments raised by the City, and additionally requests the court to grant a judgment
13 declaring that the Ordinance “is not prohibited by RCW 36.65.030, and that RCW 36.65.030
14 is unconstitutional and void.” EOI’s Motion, at 2 (Dkt. 47A).

15 EOI argues that RCW 36.65.030 violates article II, § 19 of the Washington
16 Constitution because it violates Single-Subject Rule and the Subject-in-Title Rule. For the
17 reasons explained below, the court concludes that RCW 36.65.030 does not violate those
18 rules.

19 **1. Washington Constitution Article II, § 19**

20 Article II, § 19 of the Washington Constitution provides, “No bill shall embrace more
21 than one subject, and that shall be expressed in the title.” This provision is to be liberally
22 construed in favor of legislation. *Amalgamated Transit Union Local 587 v. State*, 142
23 Wash.2d 183, 206, 11 P.3d 762, 27 P.3d 608 (2000); *Wash. Fed’n of State Emps. v. State* ,
24 127 Wash.2d 544, 555, 901 P.2d 1028 (1995). However, the Supreme Court has held that
25 “when laws are enacted in violation of this constitutional mandate, the courts will not hesitate
26 to declare them void.” *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash.2d 13, 24, 200

1 P.2d 467 (1948). See *Washington Ass'n for Substance Abuse and Violence Prevention v.*
2 *State*, 174 Wn.2d 642, 654, 278 P.3d 632 (2012).

3 The purposes of art. II § 19 are to prevent “logrolling,” or pushing legislation through
4 by attaching it to other necessary or desirable legislation; and to assure that the members of
5 the Legislature and the public are generally aware of what is contained in new laws. *Lee v.*
6 *State*, 185 Wn.2d 608, 620, 374 P.3d 157 (2016); *Patrice v. Murphy*, 136 Wn.2d 845, 854-
7 855, 966 P.2d 1271 (1998).

8 The court must presume that RCW 36.65.030 is constitutional unless EOI proves
9 beyond a reasonable doubt that the statute is unconstitutional. *In re Welfare of A.W.*, 182
10 Wn.2d 689, 701, 344 P.3d 1186 (2015); *Island County v. State*, 135 Wn.2d 141, 147, 955
11 P.2d 377 (1998).

12 **2. RCW 36.65.030 Does Not Violate the Single-Subject Rule**

13 EOI argues that RCW 36.65.030 violates the Single Subject Rule. EOI Motion, at
14 8-12 (Dkt. 47A). EOI urges the court to look at the title that the Code Reviser gave to the act
15 after it was signed by the Governor, which is “Combined City and County Municipal
16 Corporations.” Chap. 36.65 RCW. EOI argues that RCW 36.65.030 violates the Single-
17 Subject Rule because it includes a restriction upon cities and counties in a chapter of the
18 Revised Code that concerns only combined city and county municipal corporations. The
19 court disagrees for the reasons explained below.

20 The first step in applying the Single Subject Rule is determining whether a bill’s title
21 is general or restrictive. “A restrictive title ‘is one where a particular part of branch of a
22 subject is carved out and selected as the subject of the legislation.’” *State v. Broadaway*, 133
23 Wn.2d 118, 127, 942 P.2d 363 (1997). If a title is general, the court must determine whether
24 there is “a rational unity between the operative provisions themselves as well as the general
25 topic.” *Lee v. State*, 185 Wn.2d at 620-621, 374 P.3d 157. “Rational unity exists when the
26 matters within the body of the [legislation] are germane to the general title and to one

1 another.” *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 70, 782-783, 357 P.3d 1040 (2015).
2 If the title is restrictive, it “limits the scope of the act to that expressed in the title.” *State v.*
3 *Broadaway*, 133 Wn.2d at 127, 942 P.2d 363.

4 In *Mount Spokane Skiing Corp. v. Spokane County*, 86 Wn.App. 165, 181-183, 936
5 P.2d 1148 (1997), the court concluded that the title, “AN ACT Relating to local government:
6 amending RCW 35.21.730, 35.21.756 ... 35.21.755 ... and repealing RCW 35.21.725” was a
7 general title. The court explained:

8 It is well established that the title of an act need not be an index to
9 the contents, nor express every detail contained therein. *Rourke v.*
10 *Department of Labor & Indus.*, 41 Wn.2d 310, 312, 249 P.2d 236
11 (1952). The test of sufficiency is whether the title gives notice of
12 its object so as to lead to a reasonable inquiry of the content. *State*
13 *v. Lounsbury*, 74 Wn.2d 659, 664, 445 P.2d 1017 (1968). “All that
14 is required is that there be some ‘rational unity’ between the
15 general subject and the incidental subdivisions. If this nexus can be
16 found, the act will survive the light of constitutional inspection.”
17 *Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wn.2d 392, 403, 418
18 P.2d 443 (1966). The Laws of 1985, ch. 332 describe the
19 legislation as relating to local government. While the subdivisions
20 within the act deal with different aspects of the power of local
21 government, all sections relate to the general subject matter of
22 local government as it pertains to cities and towns. Because the
23 contents of the bill are encompassed within the general subject
24 matter of the title, the act does not violate the prohibition against
25 multiple subjects. RCW 35.21.730 is constitutional

19 86 Wn.App. at 182-183, 936 P.2d 1148.

20 Here, Substitute Senate Bill 4313 was the 1984 legislative bill that included what later
21 was codified as RCW 36.65.030. Declaration of Daniel J. Dunne, Ex. A (Dkt. 71); *see also*
22 Declaration of Matthew Davis, Ex. 16 (Dkt. 78). The title of SSB 4313 is, “AN ACT
23 Relating to local government; and adding a new chapter to Title 36 RCW.” The court must
24 consider this title, rather than the chapter title that the Code Reviser added later, because the
25 title of the bill is what the legislators saw and relied upon when they voted on the bill. *See*
26 *Zenner v. Graham*, 34 Wash. 81, 83, 74 Pac. 1058 (1904).

1 The title of the bill is general because it refers generally to “local government.” See
2 *Mount Spokane Skiing Corp. v. Spokane County*, 86 Wn.App. at 181-183, 936 P.2d 1148;
3 *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 209-210, 11 P.3d 762, 27
4 P.3d 608 (2000). There is a rational unity between the general subject stated in the
5 title - “local government,” and the general subject of subsection 3 of the bill - a prohibition
6 against local governments levying net income taxes. See *Gruen v. State Tax Commission*, 35
7 Wn.2d 1, 22-23, 211 P.2d 651 (1949).

8 EOI argues that regardless of the title of the bill, the court should find a violation of
9 the Single-Subject Rule because “different types of local government are different subjects,”
10 (EOI’s Reply, at 4 (Dkt. 81)), and “the Legislature cannot bury substantive restrictions on
11 one form of government in a bill or statute chapter that is otherwise about another form of
12 government.” *Ibid.* But the Plaintiffs point out that nothing was “buried” in the bill; that
13 Section 3 (which became RCW 36.65.030) was part of the original version of the bill; and
14 that the legislators were aware that in order to restrict combined city-counties from imposing
15 income taxes, it was necessary to restrict cities and counties as well, pursuant to Washington
16 Constitution, art. XI, § 16. The Plaintiffs cite to a December 2, 1983 Senate Local
17 Government Committee memorandum regarding the bill, which states, in part:

18 Sec. 3 Tax on Net Income. Prohibits a city-county from levying a
19 tax on net income. Note: This section also includes cities and
20 counties because there can be no legislative prohibition or
21 restriction on a city-county unless such prohibition or restriction
applies equally to every other city, county, and city-county.

22 Declaration of Matthew J. Davis, Ex. 18 (Dkt. 59); see also Corrected Declaration of
23 Matthew J. Davis, Ex. 18 (Dkt.78). In other words, there was no “logrolling.” SSB 4313
24 was drafted to effectuate the constitutional requirement to restrict the powers these local
25 governments equally.

1 **3. RCW 36.65.030 Does Not Violate Subject-in-Title Rule**

2 EOI argues that RCW 36.65.030 violates the Subject-in-Title Rule. EOI’s Motion,
3 at 12-13. The court disagrees. The statute complies with the Subject-in-Title Rule just as it
4 complies with the Single-Subject Rule, and for the same reasons. The title of the bill is “An
5 Act relating to local government.” There is rational unity because the subject stated in the
6 title, “local government,” is naturally and reasonably connected to the subject of Section 3 of
7 the bill, which became RCW 36.65.030, namely, taxing authority of cities, counties and city-
8 counties.

9 To summarize, EOI has not proved beyond a reasonable doubt that RCW 36.65.030
10 violates article II, § 19 of the Washington Constitution. The court therefore must give full
11 effect to RCW 36.65.030, which squarely prohibits the net income tax that the Ordinance
12 imposes.

13 **G. Plaintiffs’ Alternate Claims That Ordinance**
14 **Violates Constitution Art. VII, § 1**

15 The Plaintiffs request the court to issue a judgment invalidating the Ordinance on
16 grounds that the income tax is a graduated tax on property and thus violates the uniformity
17 requirement that Washington Constitution art. VII, § 1 imposes on property taxes. Shock
18 Plaintiffs’ Motion, at 10-14 (Dkt. 56B); Burke/Levine Plaintiffs’ Motion, at 24-32 (Dkt. 56J);
19 Kunath Motion, at 10-18 (Dkt. 57).

20 The court declines to address this constitutional issue. “Where an issue may be
21 resolved on statutory grounds, the court will avoid deciding the issue on constitutional
22 grounds.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000); *Sinear v. Daily*
23 *Journal-American*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982); *see also Kershaw Sunnyside*
24 *Ranches, Inc. v. Yakima Interurban Lines Ass’n*, 156 Wn.2 253, 277 n. 19 (2006).

25 The court has determined that no statute authorizes the City’s net income tax and that
26 RCW 36.65.030 prohibits the tax. The Ordinance being invalid on statutory grounds, it is
unnecessary to consider the art. VII § 1 issue.

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H. Shock Plaintiffs’ Claim That Ordinance Violates Equal Protection

The Shock Plaintiffs request the court to issue a judgment invalidating the Ordinance on grounds that it violates the equal-protection provisions of Washington Constitution art. 1, § 12 and the U.S. Constitution amendment 14, §1. Shock Motion, at 14-18.

It is unnecessary for the court to reach this issue because the court has determined that the Ordinance is invalid on statutory grounds. *Tunstall v. Bergeson*, 141 Wn.2d at 210, 5 P.3d 691; *Sinear v. Daily Journal-American*, 97 Wn.2d at 152, 641 P.2d 1180.

7. Order

To summarize, the Defendants’ motions will be denied and the Plaintiffs’ motions will be granted because the City’s tax is not an “excise tax” and thus is not authorized by RCW 35A.82.020 and RCW 35.22.280(32); the City’s tax is not authorized by RCW 35A.11.020; the City’s tax is not otherwise authorized by any other statute; and RCW 35.65.030 prohibits the tax.

For the reasons stated above, the court:

1. Denies Defendant City of Seattle’s Motion for Summary Judgment (Dkt. 47D);
2. Denies Intervenor-Defendant Economic Opportunity Institute’s Motion for Summary Judgment (Dkt. 47A);
3. Grants Plaintiff Kunath’s Cross-Motion for Summary Judgment (Dkt. 57);
4. Grants the Burke/Levine Plaintiffs’ Cross-Motion for Summary Judgment (Dkt. 56J); and
5. Grants the Shock Plaintiffs’ Cross-Motion for Summary Judgment (Dkt. 56B).

Date: November 22, 2017.

s/ John R. Ruhl
John R. Ruhl, Judge

King County Superior Court
Judicial Electronic Signature Page

Case Number: 17-2-18848-4
Case Title: KUNATH ET AL VS CITY OF SEATTLE

Document Title: ORDER ON CROSS-MOTIONS FOR S.J.

Signed by: John Ruhl
Date: 11/22/2017 2:02:09 PM

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Judge/Commissioner: John Ruhl

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