No. 100599-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

No. 82119-9-I (consolidated with No. 82161-0-I)

JANE KOLER / LAND USE & PROPERTY LAW, PLLC *et al.*,

Respondents,

v.

CITY OF BLACK DIAMOND, *et ano*.,

Petitioners,

ANSWER TO PETITION FOR REVIEW BY RESPONDENTS KOLER, GLENN, AND BREMNER

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I. INTRODUCTION

From the start of this dispute, Mayor Carol Benson ("Mayor Benson") of the City of Black Diamond ("the City") has erroneously conflated her authority as mayor with that of the City Council. Now, seeking discretionary review of the unanimous Court of Appeals decision in *Koler/Land Use & Prop. Law, PLLC v. City of Black Diamond*, __Wn.App.2d __, 501 P.3d 1209, 2021 WL 6112336 (2021) ("*Koler*"), Mayor Benson essentially argues that as mayor, she had a constitutional right to "establish appointive offices as [she] sees fit."[1] In terms of creating appointive offices, Mayor Benson's position is "la ville, c'est moi."

Unfortunately for Mayor Benson and the City now aligned with her, their argument for review based on a purported "significant question of law under the Constitution" is baseless.[2] Moreover, the City and Mayor's other arguments do not fare any better. They do not identify any error in the Court of Appeals decision, and they fail to satisfy any of the criteria for

[1] *See* Petition for Review, at p. 1. See also id, at pp. 18-23.
[2] RAP 13.4(b)(3)

discretionary review. Accordingly, this Court should deny review. This Court should also instruct the trial court that Respondents Jane Koler ("Koler"), Daniel Glenn ("Glenn") and Anne Bremner ("Bremner") will be entitled to their reasonable appellate attorney's fees if they prevail on remand.

II. RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

The Court of Appeals' opinion provides a concise statement of the facts in this case.[3] Koler, Glenn, and Bremner supplement the Court of Appeals' discussion, and respond to the City and Mayor Benson's Statement of the Case, as follows.[4]

Koler, Glenn, and Bremner each executed separate contracts with the City Council in the summer of 2017 to perform legal services. Koler and Glenn's contracts called for them to provide legal services to the City. CP 50-51, 59-60. *See also* CP 251-252. When Mayor Benson refused to honor those contracts, the City Council engaged Anne Bremner to sue Mayor Benson

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[3] *See Koler*, 501 P.3d at 1210-11.

[4] Koler, Glenn, and Bremner have previously supplied their own detailed statement of the case, in compliance with RAP 10.3(5), in their Opening Brief of Appellants to the Court of Appeals, at pp. 3-13.

to vindicate the City Council's contracting authority. CP 545 at ¶ 27, 546 at ¶ 29, and 641. However, when the November 2017 City Council elections changed the City Council's composition, the new City Council directed Bremner to withdraw from the lawsuit, which was subsequently voluntarily dismissed with prejudice at the City's behest. CP 546-547, at ¶¶ 30-31.

On April 29, 2019, Koler, Glenn, and Bremner brought this suit to compel the City to pay them for the work they had performed pursuant to their contracts. CP 1. Roughly three months later, on August 1, 2019, the then-City Council majority enacted, and Mayor Benson signed, Ordinance 19-1124. CP 91-93. That Ordinance states in part as follows:

> Washington state law . . . states, "*Provision shall be made* for obtaining legal counsel for the city, *either* by appointment of a city attorney on a full-time or part-time basis, *or* by any reasonable contractual arrangement for such professional services" . . . .
>
> [T]he Black Diamond Municipal Code *currently lacks any provisions governing the process for selecting and retaining a City Attorney* . . . .
>
> [T]o avoid uncertainty, the City Council desires to clarify the process by which the City obtains the legal services of a City Attorney . . . .
>
> The city attorney shall be selected by the mayor with confirmation by the council, and shall serve at

> the pleasure and under the primary direction of the mayor.

CP 91-92 (emphasis added).

Despite the concessions contained in Ordinance 19-1124, Mayor Benson and the City continue to insist that that the city attorney has long been an appointive position.[5] However, in support of their position, the City and Mayor Benson make a demonstrably false factual assertion. Specifically, they claim that in 2017 "no fewer than 21 provisions of the BDMC [Black Diamond Municipal Code] referred to the office of the City Attorney."[6] However, while there were 21 provisions in the BDMC as it existed in 2017 that referred to a "city attorney", *only one* referenced "the office of city attorney."[7] Moreover, the one that *does* reference "the office of city attorney"—BDMC 2.66.020(B)—says nothing about how that office is to be filled.

The City and Mayor's discussion of the facts throughout the Petition for Review is also striking for the lack of attention

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[5] Petition for Review, at p. 7.
[6] *Id.* (emphasis added).
[7] *See* Opening Brief of Appellants, filed with the Court of Appeals on April 12, 2021, at p. 21 (listing relevant BDMC provisions), and Appendix B to the Opening Brief of Appellants (containing text of relevant BDMC provisions).

it pays to BDMC Chapters 2.08 and 2.66.[8] As the Court of Appeals noted, BDMC Chapter 2.08 "requires appointive officers to receive a salary and sets a . . . term of one year for such officers."[9] BDMC 2.66.020(A) requires the City to defend "official[s] or employee[s]" from legal claims arising from actions in their official capacities.[10] By contrast, "[n]one of the legal service agreements [in the record] provided for the payment of a salary or a set term" consistent with the requirements imposed on "all officers" by BDMC Chapter 2.08.[11] And the contracts signed by purported "officers" Morris and Linehan

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[8] The Petition for Review does not even list BDMC 2.08, or any subpart, in its Table of Authorities. *See* Petition for Review, at p. v.

[9] *Koler*, 501 P.3d at 1213. The ellipsis in the quotation is for the word "maximum," which Koler, Glenn, and Bremner submit was included as a harmless by mistake by the Court of Appeals.

[10] BDMC 2.66.020(A). The scope of the defense required under BDMC 2.66.020 is illuminated by the other subsections of BDMC Chapter 2.66, including specifically 2.66.010(B) (defining "official") and 2.66.050(D) (stating in part that "[s]uch official or employee shall not accept nor voluntarily make any payment, assume any obligation, or incur any expense related to the claim or suit").

[11] *See Koler*, 501 P.3d at 1213. *Compare* the indemnity clauses in the legal services agreements by Morris, Kenyon-Disend, Koler, Glenn, and Bremner in the record on review at CP 220, 351, 46, and 55.

required them to *indemnify the City* for suits against the City arising from their negligence, which "directly conflict[s] with BDMC § 2.66.020['s]" assertion that all city officers are to be defended and *indemnified by the City*.[12]

The City and Mayor Benson also offer an incomplete account of the "power struggle" that flared up in 2016.[13] Repeatedly calling the City Council majority a "faction" may fit within the bounds of proper advocacy, but Petitioners nowhere inform this Court that a city council acts through a simple majority as a matter of law, except when overriding a veto.[14] It is also significant that the City and Mayor Benson fail to mention that the City Council was familiar with AGO 1997 No.7, and had reviewed the detailed opinion letter prepared by Philip A. Talmadge and Thomas M. Fitzpatrick dated May 5, 2016, well

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[12] *See Koler*, 501 P.3d at 1213. *Compare* CP 220 and CP 351 *with* BDMC 2.60.010(B), 2.60.020(A), and 2.66.050(D).
[13] Petition for Review, at pp. 8-10.
[14] *See* RCW 35A.12.120 (simple majority of members required to pass ordinances and "resolutions for the payment of money"), *and* RCW 35A.12.130 (majority plus one required to override a veto).

before the City Council exercised its authority to contract with Koler, Glenn, and Bremner. *See* CP 345-48, 768, 63, 73-75. [15]

Finally, the City and the Mayor again distort the facts, and raise a red-herring, by repeatedly asserting that "Glenn and Koler . . . viewed their client as the City Council."[16] This claim is contradicted by the plain terms of the relevant contracts, as well as by other evidence in the record indicating that Koler and Glenn attempted to provide legal advice to the Mayor and the city administration, as well as to the City Council, but were rebuffed. CP 50, 59, 98 at ¶ 12, 250, and 605. This claim is also raised for the first time on appeal, and contradicts the City's argument in the trial court, where the City asserted that "all of the contemporaneous documents reflect an intention for Koler and

[15] In proceedings below, the City and Mayor Benson emphasized Phil Talmadge's criticisms of Councilwoman Erika Morgan contained in CP 768 (email dated May 3, 2016). *See*, *e.g.*, CP 751. But two days later, Phil Talmadge and Tom Fitzpatrick both signed their opinion letter, in which they stated that "[w]e have attempted to provide objective legal advice regarding the issues that we have been asked to analyze," criticized some of the measures the City Council wished to implement (CP 71-73), but strongly supported the Council's authority to hire and fire legal counsel for the City. CP 73-75.

[16] Petition for Review, at p. 10, and p. 16, note 4.

Glenn *to provide legal representation to the City government as a whole*." CP 496 (emphasis added).

Given the City and Mayor's concession below, and the factual nature of Koler and Glenn's contractual intent, this Court should concern itself only with the question of the City Council's authority to enter the contracts as written. The City and the Mayor should only be allowed to raise the factual issue of Koler and Glenn's intent, if at all, on remand to the trial court.[17]

III. ARGUMENT WHY THIS COURT SHOULD NOT ACCEPT REVIEW

1. Summary of the Argument.

The Petition for Review fails to identify any basis for this Court to grant discretionary review under RAP 13.4. *Koler* raises no significant question of law under the Constitution of the State of Washington, since constitutional "home rule" principles are primarily concerned with endowing local governments with ample powers, not with how those powers are divided *within* any local government. As a correct and straightforward application

[17] Koler and Glenn of course deny the claim that they intended to work only for the Council, not the City, and reserve all rights to present any and all factual and legal defenses to this claim in the trial court.

of the Optional Municipal Code to the facts existing in Black Diamond in 2017, the holdings of the Court of Appeals do not conflict with any prior decision by this Court or the Court of Appeals. Nor is there any issue of substantial public importance presented by this case. Accordingly, this Court should deny discretionary review.

2. *Koler* poses no danger to constitutional principles of home rule and does not raise a significant issue of constitutional law.

The City and Mayor's claim that *Koler* "improperly interferes with the City's right to local self government" does not succeed in raising any "significant question of law under the Constitution of the State of Washington."[18]

It is widely recognized that "Washington State adopted a trio of home rule constitutional provisions in 1889."[19] But even

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[18] Petition for Review, at p. 17 (emphasis added); RAP 13.4(b)(3).

[19] Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 Seattle U.L. Rev. 809, 810 and note 5 (2015). The Petition for Review, at p. 18, extensively quotes from Spitzer's note 5 without citation. *See also Lakehaven Water & Sewer Dist. v. City of Fed. Way*, 195 Wn.2d 742, 755-757, 466 P.3d 213, 220-221 (2020) (extensively citing Spitzer with approval).

a cursory review of the relevant constitutional provisions—Article XI, section 10, Article XI, section 11, and Article XI, section 12—reveals that they are primarily concerned with granting extensive powers and authorities *to cities* and other local entities, in a manner consistent with "general law." This is not the same thing as being concerned with granting extensive powers—or even *any* powers—to *mayors*.

Article XI, section 10, does support the principle that municipalities—especially those with more than 10,000 inhabitants—should be afforded some "flexibility" regarding how they organize their internal affairs.[20] It states in part as follows:

> Cities and towns . . . may become organized under such general laws . . . and shall organize in conformity therewith; and cities or towns . . . shall be subject to and controlled by general laws. Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and

[20] Spitzer, *"Home Rule,"* 38 Seattle U.L. Rev. at 824 (noting that "article XI, section 10, has resulted in significant flexibility in how cities structure their governments").

> subject to the Constitution and laws of this state . . . .[21]

Crucially, however, the "flexibility" granted to cities and towns is granted "under . . . general laws," and "subject to and controlled by general laws."[22] Article XI, section 10 clearly lends no support to the proposition that mayors can do whatever they want, regardless of the terms of the Optional Municipal Code.

Neither does either Article XI, section 11 or Article XI, section 12, which respectively grant extensive police powers and fiscal powers and responsibilities to cities and towns.[23] Again, to grant such powers *to cities and towns* is not the same thing as granting such powers to *mayors*. Nor do these provisions in any way suggest that the State Constitution somehow favors granting *contracting* authority to mayors, as opposed to city councils. Therefore, the City and the Mayor's attempt to find in the Court

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[21] Wa. Const. art. XI, § 10. A copy of this entire Section is attached to this Answer in the Appendix.

[22] *Id.* The significance of organizational flexibility being controlled by and subject to general laws is made clear below in the discussion of the Optional Municipal Code.

[23] The full text of each of these sections of the Constitution is attached to this Brief in the Appendix.

of Appeals' opinion a "significant question of law under the Constitution" fails.[24]

3. The City and Mayor's arguments about *statutory* home rule do not identify any error in *Koler* and fail to make a case for discretionary review.

Construed as concerning statutory law, and in particular the Optional Municipal Code, the Petition's arguments about "home rule" fail to identify any error in the Court of Appeals' decision, or any reason for this Court to accept review.

The Optional Municipal Code, like the constitutional provisions on which it is based, is primarily concerned with ensuring that *municipalities* have extensive powers.[25] But unlike the Washington constitution, the Optional Municipal Code is not silent as to how powers and authorities are to be distributed within a city government. In particular, it expressly grants the

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[24] RAP 13.4(b)(3).

[25] *See, e.g., Lakehaven*, 195 Wn.2d at 755 (noting that "[h]ome rule [as expressed in the Optional Municipal Code] grants municipalities the broadest powers of local self-government") (emphasis added). *See also* RCW § 35A.01.010 (stating that "[t]he purpose and policy of this title is to confer upon *two optional classes* ***of cities*** created hereby the broadest powers of local self-government consistent with the Constitution of this state") (emphasis added).

general power to contract *to city councils*, not to mayors, and it does so even in "mayor-council plan" cities.[26]

The Optional Municipal Code does make one express derogation from the city council's general contracting authority: it states that "[t]he mayor shall have the power of appointment and removal of all appointive officers and employees subject to any applicable law, rule, or regulation relating to civil service."[27] However, as the Court of Appeals correctly emphasizes, RCW 35A.12.090 does not itself specify whether the city attorney is an "appointive officer."[28]

The specification of which are the appointive officers of a city is contained in RCW 35A.12.020, which states in part as follows:

> *The appointive officers shall be those provided for by charter or ordinance* and shall include a city

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[26] *See* RCW 35A.12.190 (itself part of a chapter dealing with the "mayor-council plan of government") and RCW 35A.11.010. The Petition for Review deserves credit for acknowledging and even emphasizing this point in its Statement of Facts, at pp. 6-7.

[27] RCW 35A.12.090.

[28] *Koler,* 501 P.3d at 1212. As discussed in more detail below, this is a crucial difference between RCW 35A.12.190 and RCW 35.27.070, which was central to Division II's decision in *State v. Volkmer*, 73 Wn. App. 89, 867 P.2d 680 (1994).

> clerk and a chief law enforcement officer. The office of city clerk may be merged with that of a city treasurer, if any, with an appropriate title designated therefor. *Provision shall be made for obtaining legal counsel for the city, either by appointment of a city attorney on a full-time or part-time basis, or by any reasonable contractual arrangement for such professional services*.[29]

Read in conjunction with RCW 35A.12.090 and the rest of Title 35A RCW, this language RCW 35A.12.020 compels the result reached by the Court of Appeals in this case:

> [I]f . . . a city ordinance provides for the appointment of a city attorney, then the mayor has authority to choose the city attorney. If, however, the city council has not made the city attorney an appointive officer, then it is the council who retains the authority to make a 'reasonable contractual arrangement for such professional services . . . .*Because the city council did not, by ordinance, provide that the city attorney is an appointive officer, RCW 35A.12.090 did not confer on Mayor Benson the exclusive authority to contract for legal services*.[30]

Mayor Benson and the City's arguments to the contrary all fail as a matter of law. One can see this by noting just how hostile those arguments are to the principles of "home rule" they purport to defend. "Home rule" is meant to give *municipalities* some

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[29] RCW 35A.12.020 (emphasis added).
[30] *Koler*, 501 P.3d at 1212-13 (citing to and relying on AGO 1997 No. 7) (emphasis added).

choices about the form of government.[31] One of those choices, expressly authorized by statute, is that of *either* making the city attorney an appointed officer, *or* procuring city attorney services by reasonable contractual arrangements under the authority of the council. This is the *municipality*'s choice, vested in the city council through its power to enact ordinances. Mayor Benson, however, claims she had the power to make this choice on her own, over the formal objections of the City Council. Mayor Benson would also have this Court affirm her ability to ignore other parts of the BDMC, such as BDMC Chapter 2.08 and BDMC Chapter 2.66, which if given their intended effect, defeat her claim that as of 2017 the City had a history of mayoral appointment to the office of city attorney. This is not municipal self-determination; it is mayoral self-aggrandizement.

Moreover, mayoral self-aggrandizement as practiced on the scale by Mayor Benson in 2017, and as advocated for by her here, is not just some vaguely bad thing, it is deeply antithetical

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[31] *See* RCW 35A.01.070(5). *See also* Spitzer, *"Home Rule,"* 38 Seattle U.L. Rev. at 857 (noting that the "Optional Municipal Code . . . . gave *cities* several choices regarding form of government") (emphasis added).

to the rule of law. To allow a mayor to exercise city council authority without a clear formal delegation of such authority would create a situation ripe for confusion, conflict and abuse.[32] It is not for nothing that the State Legislature, with its own extensive experience with the division of powers and due process in the development of state law, required substantial formalities for ordinances adopted by city councils, including: majority approval, "one subject . . . clearly expressed in its title," presentation to the mayor, and post-enactment publication, authentication by the clerk, and "availab[ility] for inspection by the public at reasonable times and under reasonable conditions."[33] These requirements, like RCW 35A.12.020's requirement to provide for appointed offices "by charter or ordinance," are part of the "general law" constitutionally binding on code cities under Article XI, Section 10. No code city or mayor can legally avoid them.

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[32] Mayor Benson and the current City Council themselves seem to have recognized this, as shown by their recitals in Ordinance 19-1124. CP 91.

[33] RCW 35A.12.120, RCW 35A.12.130, and RCW 35A.12.150. *Compare* Petition for Review, at p. 22 (objecting to the requirement of "a separate ordinance expressly and specifically establishing . . . the office").

The bottom line is that the State Legislature required that the creation of any appointive office in mayor-council code cities be by "charter or ordinance," with the formalities attendant thereto.[34] The Court of Appeals decision to uphold this law is not "hypertechnical."[35] Rather, it is a necessary consequence of giving effect to the clear and reasonable legislative intent expressed in the Optional Municipal Code.

For the reasons given above, all of the issues proposed for review by Petitioners were correctly resolved by the Court of Appeals.[36] The absence of any error relating to the Court of Appeals' application of the Optional Municipal Code to the facts

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[34] RCW 35A.12.020. This of course also decisively undermines the Mayor's and City's contention that a city could choose how to acquire legal services through "longstanding custom or practice" not reflected in written law. *Compare* Petition for Review, at pp. 1, 4, 8, and 22.

[35] *Compare* Petition for Review, at p. 17. In contrast, one argument that *would* be "hyper-technical" is that code cities do not have to comply with the Optional Municipal Code, because the Optional Municipal Code itself is not listed as part of "the general law" in RCW 35A.01.050. Koler, Glenn, and Bremner submit that it is self-evident that the Optional Municipal Code is part of the "general law" binding on code cities.

[36] *Compare* Petition for Review, at pp. 3-5.

of this matter undermines the case for this Court to accept discretionary review.

4. *Koler* does not conflict with any other case by this Court or the Court of Appeals.

Mayor Benson and the City assert that *Koler* conflicts with Division II's opinion in *State v. Volkmer*, 73 Wn. App. 89, 867 P.2d 680 (1994).[37] This is incorrect, for at least two reasons. First, *Volkmer* concerned a town organized under Title 35, rather than a code city organized under Title 35A. Its holding was substantially driven by the fact that RCW 35.27.070 expressly endows mayors of towns with the authority to appoint a city attorney.[38] As exhaustively established by the Court of Appeals in *Koler,* and was previously well-argued in AGO 1997 No. 7, this is <u>not</u> true under Optional Municipal Code. This disposes of any conflict between *Koler* and *Volkmer* regarding the City Council's authority to contract with Koler and Glenn.

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[37] Petition for Review, at pp. 25-28.

[38] *See Volkmer*, 73 Wn. App. at 94 (holding on the basis of RCW 35.27.070 that "[c]learly, it is the Mayor to whom the Legislature has granted the express authority to hire legal counsel for the municipality").

Second, as to the City Council's authority to contract with Bremner on behalf of the City, *Koler* and *Volkmer* are distinguishable, rather than in conflict.[39] In *Volkmer*, Division II concluded that the alleged underlying illegal activity by the mayor was not in fact illegal.[40] In *Koler*, for all the reasons set forth in that opinion and re-stated above, the Court of Appeals concluded that Mayor Benson's actions in thwarting the City Council's contracting authority were illegal, and that "the city council *would have prevailed* in the lawsuit initiated by Bremner."[41] This removes any inconsistency between *Koler* and *Volkmer* bearing on the City Council's authority to hire Bremner to sue the Mayor.

Finally, neither *Koler's* statement that "the lawsuit Bremner was hired to initiate was not dismissed on its merits," nor its conditional statement that "the city council *would have prevailed*" had it proceeded to final resolution on the merits,

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[39] The argument that follows rephrases that in *Koler*, 501 P.3d at 1215-16 (¶¶ 38-40).

[40] *Volkmer*, 73 Wn. App. at 93-94 (holding that the mayor did not have a nondiscretionary duty to sign all resolutions adopted by the town council).

[41] *Koler*, 501 P.3d at 1216 (emphasis added).

suffices to warrant review.[42] It is indisputable that the City Council's case against Mayor Benson was not *actually litigated.* Therefore, Koler, Glenn, and Bremner are not collaterally estopped from bringing their contract claims for attorney's fees.[43] If *Koler* had stated that City Council's case was not "actually litigated on its merits", as opposed to "not dismissed on its merits" it would have been clearly correct, and avoided any basis for asserting a conflict with cases holding that a dismissal with prejudice is a final judgment on the merits. As for *Koler's*

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[42] *Koler*, P.3d at 1215-16 (emphasis added). *Compare* Petition for Review, at p. 24 and pp. 27-28.

[43] *See, e.g., Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957, 961 (2004) (noting that "[c]ollateral estoppel may be applied to preclude only those issues that have *actually been litigated*," and that "the party [estopped] . . . must have had *a full and fair opportunity to litigate* the issue in the earlier proceeding") (emphasis added). *See also Marquardt v. Fed. Old Line Ins. Co. (Mut.)*, 33 Wn. App. 685, 689, 658 P.2d 20, 23 (1983) (noting that "collateral estoppel should not be applied to judgments of dismissal, even when based on settlement agreements, since the parties could settle for myriad reasons not related to the resolution of the issues they are litigating"), *and* 14A Wash. Prac., Civil Procedure § 35:34 (3d ed.). Since Bremner had withdrawn prior to the dismissal, collateral estoppel also fails for lack of privity. CP 546-47.

conditional "would have prevailed" statement, it is amply justified for all the reasons given above. And as a conditional statement, the assertion is not equivalent to holding that either this particular voluntary dismissal with prejudice, or any such dismissal, is not a final judgment on the merits.

Mayor Benson and the City therefore fail to show any basis for review under RAP 13.4(b)(1) and (2).

5. No evidence in the record suggests that any of Mayor Benson's fellow mayors wish to follow her in breaking the law. Therefore, this case poses no question of substantial public interest.

Contrary to the Petition's argument, *Koler* creates salutary incentives, not perverse ones.[44] The generalizable part of *Koler's* narrow, fact-specific holding is that when a code city lacks any charter or ordinance providing for an appointive office, a mayor who insists on appointing to the purported office against the formal express opposition of a majority of the city council violates the law, and can be sued by the city council at the expense of the city.[45] There is a simple way to avoid any such litigation in the future: mayors should desist from the illegal

[44] *Compare* Petition for Review, at pp. 30-31.
[45] *Koler*, 501 P.3d at 1211-16.

activity precisely identified in *Koler*.[46] That any mayor in the future who continues to violate the law can be sued by the city council simply serves to uphold the rule of law.

In addition, there is no evidence for Mayor Benson's implied assertion that there are *any* (let alone *many*) mayors of code cities determined to similarly violate the law in the future. Indeed, with the passage of Ordinance 19-1124, even Mayor Benson's own law-breaking days appear to be over, at least with regard to the issue posed by this case. CP 91-93. Therefore, the argument that this Court should accept review because the case poses "an issue of substantial public interest" fails.[47]

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[46] This simple way still leaves mayors many options. They can persuade city councils to pass ordinances expressly granting them the appointment power, as the City of Black Diamond belatedly did with Ordinance 19-1124. CP 91. Or, with council approval via resolution, they can engage legal service providers ("city attorneys") on a case-by-case basis but yield to a majority of the city council if the council, by resolution, terminates the contract. There may be other "reasonable contractual arrangement[s]" mayors could enter into, with the approval of the city council, provided only that the mayor acknowledge that ultimate contracting authority resides in the city council in the absence of any ordinance to the contrary.

[47] RAP 13.4(b)(4). *Compare* Petition for Review, at pp. 30-31.

IV. RESPONDENTS'ARGUMENT FOR AN AWARD OF REASONABLE APPELLATE ATTORNEY FEES ON REMAND

Koler, Glenn, and Bremner devoted a section of their Opening Brief of Appellants to requesting their reasonable fees and expenses, based on the contractual fee provisions in their respective contracts.[48] Pursuant to RAP 18.1(j), Koler, Glenn and Bremner repeat their request here, again based on their contracts and the law that "[a] party is entitled to attorney fees on appeal if a contract . . . permits recovery of attorney fees at trial and the party is the substantially prevailing party."[49] This Court should remand to the trial court with instructions that Koler, Glenn, and Bremner will be entitled to an award of their reasonable attorney fees on appeal if they prove to be the prevailing parties on remand.

V. CONCLUSION

A *mayor* of a code city is not automatically entitled to exercise all of the powers and authorities granted *to cities* by the Optional Municipal Code. Specifically, as the Court of Appeals

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[48] *See* Opening Brief of Appellants, at p. 48. *See also* CP 48 at ¶ 14, CP 57 at ¶ 14, and CP 87 at ¶ 14.

[49] *Hwang v. McMahill*, 103 Wn. App. 945, 954, 15 P.3d 172, 177 (2000)

properly held in *Koler*, a mayor may not appoint to a purported office of city attorney unless a charter or ordinance provides such an appointment power. In the City of Black Diamond in 2017 there was no such charter or ordinance, so the relevant contracting authority remained with the City Council. Mayor Benson's thwarting of the City Council's authority to contract with Koler and Glenn was illegal, and therefore the City Council was authorized to hire Bremner, at City expense, to sue Mayor Benson. This follows from the application of the clear terms of the Optional Municipal Code to the undisputed facts of the case. There is no basis for discretionary review under RAP 13.4(b), so this Court should deny review.

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DATED this 25th day of February 2022

I certify pursuant to RAP 18.17(b) that this Answer to the Petition for Review contains 4,999 words, and therefore complies with RAP 18.17(c)(10).

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CERTIFICATE OF SERVICE

I certify that on February 25, 2022, I served the foregoing Answer to Petition for Review to Mr. David Linehan, Ms. Jessica Skelton, and Ms. Sarah S. Washburn, counsel for Petitioners, by means of using the Supreme Court's e-filing and e-service facility. I also emailed a PDF copy of the foregoing Answer to Petition for Review to counsel for Petitioners at their email addresses of:

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Dated this 25th day of February 2022 at Tacoma, Washington.

By: s/David J. Corbett
David J. Corbett

APPENDIX TO ANSWER TO PETITION FOR REVIEW

Wa. Const. Article XI § 10.
Incorporation of Municipalities

Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized, or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election, shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution shall be subject to and controlled by general laws. Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had at which election there shall be chosen by the qualified electors of said city, fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election and qualified electors, whose duty it shall be to convene within ten days after their election, and prepare and propose a charter for such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published in the daily newspaper of largest general circulation published in the area to be incorporated as a first class city under the charter or, if no daily newspaper is published therein, then in the newspaper having the largest general circulation

within such area at least once each week for four weeks next preceding the day of submitting the same to the electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given as required by law. Said elections may be general or special elections, and except as herein provided shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter, or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.

CREDITS

Adopted 1889. Amended by Amendment 40 (Laws 1963, Ex.Sess., S.J.R. No. 1, p. 1526, approved Nov. 3, 1964).

Wa. Const. Article XI § 11. Police and Sanitary Regulations

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

CREDITS

Adopted 1889.

Wa. Const. Article XI § 12. Assessment and Collection of Taxes in Municipalities

The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.

CREDITS

Adopted 1889.

DAVID CORBETT PLLC

February 25, 2022 - 9:20 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,599-7
Appellate Court Case Title:	Jane Koler/Land Use & Property Law, PLLC, et al. v. City of Black Diamond, et al.

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