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No. 64492-1-1

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

IN RE: LIMITED TAX GENERAL OBLIGATION BONDS OF THE
CITY OF EDMONDS

Rowena Rohrbach, Public Representative, Appellant

vs.

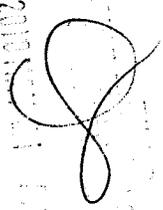
City of Edmonds, Respondent

APPELLANT'S REPLY BRIEF

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DIVISION I
EDMONDS, WA

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I. SUMMARY OF ARGUMENT

The Respondents fail to point the court to any express statutory authority for the issuance of bonds for the principal purpose of providing excess bandwidth capacity to businesses. The power of cities, even optional municipal code cities, to issue bonds and place the public treasury at risk is rightly limited by the constitution and the common law. In this instance, the City of Edmonds (“the City”) seeks a judicial determination that it has the right to issue bonds for purposes for which no express authority exists, and for which no implied authority should be found. In the absence of express or implied authority, the City’s ordinance is unlawful, and the trial court’s ruling was in error and should be reversed.

II. ARGUMENT

“In the nineteenth century, economies of the eastern United States grew at a rapid rate as a result of railroad linkages between markets and producers. Infrastructure, particularly railroads, was essential to economic development and was sought after with abandon. State governments were prompted to provide public credit and subsidies to private

railroads to attract growth in undeveloped areas. However, economic growth could not always be sustained: Because railroad lines were sometimes abandoned, the solvency of financing governments was dangerously impaired due to the liabilities and obligations that had been incurred. In some cases, financing governments were driven to near bankruptcy. This financial instability spawned a political reaction that restricted the financial activities of local and state governments. Often, state constitutions were amended to prohibit the granting of public financial aid to private enterprise.

Washington was not immune from this political reaction and included in its constitution Article VIII, sections 5 and 7.

These sections prohibit the state and its political subdivisions from loaning state money or credit, and prevent the gifting of public money or property, to any private entity, unless necessary to support the poor and infirm.

Nevertheless, a century later, many still view government mobilization of capital for private enterprise as a key

component in community development and job preservation.”

David Martin, *Washington State Constitutional Limitations on Gifting of Funds to Private Enterprise: A Need for Reform*, 20 Seattle U. L. Rev. 199, 199-200 (1996).

At the core of this case is whether the City has the legal authority to incur debt and issue bonds for purposes which, although having a tangential public purpose for city utility and communication purposes, are principally for the benefit of commercial entities and not principally or exclusively municipal in nature. Appellant acknowledges that the City is a “home rule” optional municipal code city. But that analysis does not end the story. Even optional municipal code cities have limits on their power, and violations of the state constitution and statutory principles are foremost among those limits.

The City’s plans for operating its telecommunications service are vague and its “business plan” to do so remains undisclosed. Nonetheless, the City requests that this court issue its “blank check” of approval for the City’s intent to engage in the business of being a “telecommunications provider” in the name of “economic

development”. By analogy, the City appears to suggest that it has the right to issue bonds so that it could own and operate a Krispy Kreme franchise in its downtown core, for the economic development that might result. Such arguments were the same arguments advanced by cities seeking to roll out the “red carpet” for the railroads in the late 1890s when our Constitution was drafted, and which resulted in the constitutional limitations on gifts and lending of credit.

a. The City’s authority to issue bonds is limited.

As a “creature of statute”, the City’s authority is limited to those powers conferred on it by the constitution, statutes, and its own charter, if any. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wash.2d 679, 743 P.2d 793 (1987), citing 2 E. McQuillin, *Municipal Corporations* § 10.09 (3d rev. ed. 1979); see also, *Okeson v. City of Seattle*, 159 Wash.2d 436, 445, 150 P.3d 556 (2007) (*Okeson II*).

In analyzing whether a municipal action is authorized, the court analyzes first whether there has been an express grant of authority. If there is no such grant, the court then inquires into whether authority for the proposed action is nevertheless

"necessarily or fairly implied in or incident to" the express powers of the City. Finally, if authority for the proposed action is neither expressly granted nor fairly implied, the court must determine if the action is permissible nonetheless as an activity "essential to" the declared objects and purposes of the City. *Okeson II, supra*; accord, *City of Tacoma, supra*, 108 Wash.2d at 692.

- b. No express authority exists for a city to issue bonds primarily for telecommunications purposes.

As noted in the Brief of Appellants, no express authority exists for the City to issue bonds for telecommunications purposes. *Brief of Appellants at pp. 13-16.* The City apparently argues that the authority for "councilmanic"¹ bonds contained in RCW 35.22.280(4) constitutes the express authority required for the issuance of bonds in this instance. *Brief of Respondent at 40-41.* However, a closer look at the cases interpreting this provision refutes this argument.

In *Edwards v. Renton*, 67 Wn.2d 598, 409 P.2d 153 (1965), Edwards was in the process of constructing a shopping center in

¹ Councilmanic bonds are limited tax general obligation (LGTO) bonds approved by a city council without the approval of voters of the City. By the state constitution and statute, councilmanic bonds may not exceed 1.5% of a city's assessed valuation. WA Constitution, Article VIII, §6; RCW 39.36.020(2).

the City of Renton. The shopping center was to be served by a stoplight which would have provided benefit to the developer and to the city street system. After a design for a stoplight was agreed upon, the City agreed to reimburse Edwards the following year for the installation after Edwards advanced the funds for it. When the City went through its budget process the following year, however, the propriety of the reimbursement was questioned because the project was constructed without compliance with applicable public works bid laws, and the city refused to honor the agreement. 67 Wash.2d 598 at 599-601.

Edwards sued to enforce the City's agreement to reimburse for the full amount. After the trial court did not award the full cost of reimbursement, Edwards appealed, arguing that the City had incurred valid debt. The court disagreed, noting:

Municipal corporations do not possess inherent power to borrow money. Authority to do so must be found in appropriate legislative provisions. Plaintiffs have, in the instant case, pointed to no statutory authority permitting a city of the second class to borrow money in such a fashion as here attempted, and we have found none. Power to do so

should not and will not be inferred or implied from a general statutory authority permitting municipalities to enter into contracts or to incur indebtedness. 15 McQuillin, Municipal Corporations § 39.07 (3d ed. 1950); 2 Antieau, Municipal Corporation Law § 15.00 (1965).

67 Wash.2d 598 at 601-602.

Respondents may assert this statement of the law is not applicable because Renton was a second class and not a code city. However, the more recent case of *Chemical Bank v. WPPSS*, 99 Wn.2d 772 (1983), the City reaffirmed this principle in the context of cities of all classes.²

Striking down the issuance of bonds to pay for power purchase contracts, the court reaffirmed the principle that:

[T]he power to borrow money “should not and will not be inferred or implied from a general statutory authority permitting municipalities to enter into contracts or to incur indebtedness”. Moreover, a municipal corporation's powers are limited to those conferred in express terms or those

² The participants in the WPPSS bond scheme included first class cities, a city operating under second class powers, third class cities, and towns. 99 Wash.2d at 782-783.

necessarily implied. *In re Seattle*, 96 Wash.2d 616, 629, 638 P.2d 549 (1981). If there is any doubt about a claimed grant of power it must be denied. *Port of Seattle v. State Utils. & Transp. Comm'n*, 92 Wash.2d 789, 794-95, 597 P.2d 383 (1979). The test for necessary or implied municipal powers is legal necessity rather than practical necessity. *Hillis Homes, Inc. v. Snohomish Cy.*, 97 Wash.2d 804, 808, 650 P.2d 193 (1982). As we stated in *Hillis*: “[i]f the Legislature has not authorized the action in question, it is invalid no matter how necessary it might be.”

Id. at 792, quoting with approval from *Edwards*, *supra* at 602.

The Supreme Court in *Chemical Bank* held that where there is no express authority to incur debt or issue bonds, it must be denied unless determined to be legally necessary (as opposed to practically necessary). *Id.* at 792-793. The Court in *Chemical Bank* found that the cities and municipal corporations lacked authority to enter into contracts which guaranteed debt that had the potential for “dry hole” liability (the duty to make payments with no assurance of any electrical power in exchange).

Although the Respondents point out that the Supreme Court

in *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987) sought to limit the breadth of its *Chemical Bank* holding, the *Tacoma* court was focused on the operation of Tacoma's electrical utility. Under RCW Chapter 35.92, the issuance of bonds (both general obligation and revenue) is expressly authorized for electrical utility purposes. See RCW 35.92.080, 35.92.100.

No authority has been cited for the proposition that there is any express authority for a City to issue councilmanic bonds for the primary purpose of providing a telecommunications service. In this respect, the distinction between being able to offer a service and having authority to issue debt for the same must be emphasized. There are many things cities can do, but fewer for which they can incur bonded indebtedness.

- c. The issuance of bonds is not "necessarily or fairly implied in or incident to" the express powers of the City, nor is it "essential to" the declared objects and purposes of the City.

In the absence of express statutory authority, the City's issuance of bonds primarily for purposes of offering telecommunications bandwidth to the public must be "necessarily or fairly implied in or incident to" express powers of the City. *Okeson II, supra*; accord, *City of Tacoma, supra* . If there is doubt

as to whether such a power has been granted, however, it must be denied. *Wilson v. City of Seattle*, 122 Wash.2d 814, 822, 863 P.2d 1336 (1993); *Employco Personnel Services, Inc. v. Seattle*, 117 Wash.2d 606, 617, 817 P.2d 1373 (1991).

A city acts within its implied powers if all of the following conditions are met: (1) the city is exercising a proprietary power, (2) the action is within the purpose and object of the enabling statute, (3) the action is not contrary to express statutory or constitutional limitations, and (4) the action is not arbitrary, capricious, or unreasonable. *Okeson II, supra*, at p. 447; *City of Tacoma, supra*, at 693-695.

"The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity." *Okeson v. City of Seattle*, 150 Wash.2d 540, 78 P.3d 1279 (2003) (*Okeson I*). Where the act is for the common good of all, it is not a proprietary function.

The City acknowledges that its actions are not strictly for the benefit of the City, either in its governmental capacity (e.g., as a water utility meter reader) or as a provider of services. In fact, the

City touts the general benefits to the public of economic development as part of the justification for its proposed issuance of bonds. *Brief of Respondent* at pp. 19, 36-39. See also, *Declaration of James Baller*. CP 38-40.

Even if the court finds the City's proposed activity to be proprietary in nature and thus meeting the first prong of the *Okeson* test set forth above, the authority to issue bonds is not within the purpose and object of any enabling statutory authority.

- d. The economic development authority of the City does not include the issuance of bonds to operate a business.

A closer look at the authorities cited by the City in support of its economic development argument reveals that they are inapposite. For example, the City cites RCW 35.21.703 in support of its argument. However, that statute simply states that economic development programs are "in the public purpose" and that cities have the right to contract with nonprofit corporations. It does not authorize the issuance of bonds for economic development programs or purposes.

The more recent legislative enactment relied upon by the City, Ch. 509, Laws of 2009, does not aid its argument. In that

enactment, our legislature made a specific finding of the desirability of expanding access to high speed internet services, and authorized “broadband mapping” to occur in the event that state, federal, or private funds were appropriated for that purpose. Ch. 509, Laws of 2009, §§1-2. The state department of information services was authorized to conduct the broadband mapping. The legislation, however, was completely silent on any authority of local governments (counties or cities) to issue bonds or spend money in support of expanding broadband services. In fact, the legislation implies just the opposite: the only money that is permitted to be spent by the legislation is “matching funds for federal and other grants to fund the operation of the community technology opportunity program”.

The City further cites in support of its arguments the line of cases authorizing the issuance of bonded indebtedness for sports stadiums, including *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996), and *King County v. Taxpayers of King County*, 133 Wn.2d 584, 949 P.2d 1260 (1997). What the Respondents fail to acknowledge is that in both of said cases, the legislature had expressly authorized municipal debt for that purpose. In *CLEAN*,

the Legislature had approved in a 1995 special session EHB 2115, “the Stadium Act” to authorize the issuance of bonds for the construction of what is now known as Safeco Field. It was the constitutionality of the Stadium Act and the viability of a referendum petition to challenge the same that was at issue in *CLEAN*. Finding sufficient public benefit to make the legislature’s authorization valid and not violative of the constitutional prohibitions against gifts of public funds and lending of credit, the court in *CLEAN* held that the express authorization was valid. 130 Wn.2d at 797-801.

Likewise, in *King County v. Taxpayers of King County*, *supra*, King County brought a declaratory judgment action based on RCW Chapter 7.25 to expressly validate bonds which it intended to issue for the financing of the same stadium. Again, however, the court found that the express authorization of the legislature embodied in the Stadium Act was sufficient to permit the issuance of bonds for that purpose. 133 Wn.2d at 604-606.

The absence of an express authorization by the constitution or legislature, which was not an impediment in either *CLEAN* or *King County*, is the principal obstacle which the City cannot overcome in this case.

- e. Authorization to issue bonds for economic development is not “necessarily or fairly implied in or incident to” the powers of the City.

The City may argue that the authority to issue bonds for economic development is impliedly authorized as necessary to serve the interests of the City. As the *Chemical Bank* court, *supra*, noted, however, the term “necessary” in the context of the line of cases strictly limiting the authority of cities to incur debt means “legal necessity” rather than “practical necessity”. The fact that issuance of bonds is practical or desired, as it clearly is here, does not render it legally necessary so as to support the issuance of municipal debt which is otherwise restricted.

The cases cited by the City in support of its argument that it may issue bonds even though private parties will primarily be served, upon closer examination, do not stand up to close scrutiny, primarily because they involve activities for which the legislature has expressly authorized the issuance of bonds.

The City cites the case of *In re City of Lynnwood*, 118 Wash. App. 674, 77 P.3d 378 (2003) as support for its argument. In the *Lynnwood* case, however, the City of Lynnwood formed a Public Facilities District (PFD) for the purpose of acquiring and

constructing a regional convention center. Formation of a PFD and the issuance of general obligation or revenue bonds for the purpose of constructing convention centers and regional community centers, however, is expressly authorized by the legislature. RCW 35.57.030, RCW 35.57.090; RCW 35.59.060, RCW 35.59.070.

Chandler v. City of Seattle, 80 Wash. 154, 141 P. 331 (1914) concerned the issuance of bonds for the improvement and extension of a dam on the Cedar River which provided electrical power to the City. The authority of the City to issue those bonds was likewise expressly authorized, in that case by the public utilities act (Laws 1909), later codified as RCW Chapter 35.92. *Id.* at 156.

Other cases relied upon by the City do not involve the issuance of bonds at all. For example, *Winkenwerder v. Yakima*, 52 Wn.2d 617, 328 P.2d 873 (1958), did not involve the issuance of bonds for any purpose. It simply held that it was lawful for the City of Yakima to lease the right to a private company to erect signs on the top of parking meters in Yakima's downtown. Instead of causing the City to incur indebtedness, the legislation in question generated revenue for the City and was held to fall within the city's

right to contract with a private party.

The City also touted the case of *Issaquah v. Teleprompter Corporation*, 93 Wn.2d 567, 611 P.2d 741 (1980) in support of its assertion that the City has authority to issue the bonds in question. While *Issaquah* clearly held that cities have the legal authority to own and operate a cable television system, *Issaquah* does not stand for the proposition that a city may issue bonds for that purpose.

The court in *Issaquah* made it clear that the operation of a cable television system was not the operation of a utility as defined by RCW Chapters 35.92 and 35A.80. In each of those statutes, as indicated previously, express authority to issue bonds exists. See RCW 35.92.080, 35.92.100.³ Consequently, the operation of a cable television system, while authorized by *Issaquah*, is not a utility function, and does not necessarily bring with it the authority to issue bonds for that purpose. *Issaquah* is silent on the ability of a city to issue bonds for the purpose of cable television system operation.

³ RCW 35A.80.010 incorporates by reference the authority granted under Chapter 35.92.

Similarly, the Attorney General's opinion on which the city relies, AGO 2003 NO. 11, is completely silent on the narrower issue presented in this case, which is whether the City has authority to issue bonds for the principal purpose of providing telecommunications services.

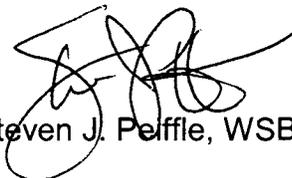
III. CONCLUSION

The trial court erred in finding that the City has the right to issue bonds for the construction of bandwidth, over 99% of which will not be used for a direct municipal purpose. The issuance of bonds for the City's proposed action is not expressly authorized by statute, nor impliedly authorized or legally necessary. As a result, the trial court should not have approved Edmonds Ordinance 3721, and the judgment of the trial court should be reversed.

RESPECTFULLY SUBMITTED this 20th day of May, 2010.

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