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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

BRIEF OF APPELLANT

BAILEY, DUSKIN, PEIFFLE
& CANFIELD, P.S.

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I. INTRODUCTION

The City of Edmonds desires to use \$4 million in taxpayer dollars to issue bonds for the express purpose of building a segment of a fiber optic network, over ninety-nine percent of which is not necessary for City purposes at the present time. While the City seeks broadly to characterize this project as an economic development exercise or as a valid municipal purpose, the primary interest of the City is not the development of the fiber optic network for traditional municipal purposes.

II. ASSIGNMENTS OF ERROR

No. 1. The trial court erred in holding that the City's intent to "sell" excess capacity on the City of Edmonds' high speed fiber optic system to private businesses, organizations and individuals was a lawful public purpose of the City of Edmonds under its home rule powers as a code city under RCW Chapter 35A and under the economic development authority provide by RCW 35.21.703.

No. 2. The trial court erred in declaring valid the bonds authorized by Edmonds ordinance No. 3721.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Does City of Edmonds Ordinance No. 3721 conflict with a statute or constitutional provision?

B. Is the City of Edmonds' proposal to issue bonds, the vast majority of which will be used for fundamentally private purposes, a lawful use of the municipality's credit?

IV. STATEMENT OF THE CASE

On December 16, 2008, the City of Edmonds (hereinafter "the City" or "Edmonds") adopted its Ordinance No. 3271¹, theoretically authorizing the City to issue up to \$4.2 million in general obligation bonds for the purpose of financing certain matters identified in the ordinance. As stated in the ordinance, "the Project" was described as follows:

...design and construct a wireless water meter system and extend and improve the City's fiber optic network both to support that system and for other municipal and public purposes (the "Project") (a) to enable timely, efficient and cost-effect [sic] water meter reading; (b) for use by other City departments in order to enhance other utility operations, public safety operations, and other City services; (c) for use by other governmental, educational and health institutions pursuant to interlocal agreements and other contractual agreements; and (d) to the extent

¹ See attached Appendix "A".

capacity is available, for use under contract by private persons and entities that need access to high capacity internet and other high capacity telecommunications services, and to pay the costs of issuance and sale of the bonds (the "costs of issuance").

Ordinance 3271, §3.

Despite the relatively benign sounding "public purposes" set out in the ordinance, closer scrutiny reveals that the City does not need the vast majority of the capacity which it intends to build with the project. Indeed, only a tiny fraction of the capacity of this new \$4.2 million system will be used for the city's stated governmental purposes of water meter reading, public safety and city departmental communications, or use by other governmental, educational and health institutions. According to the City's own expert, less than nine one-thousandth of one percent of the expanded capacity will be used for these purposes. *Declaration of R.G. (Rick) Jenness in Support of the City of Edmonds' Motion for Summary Judgment*, ¶139, CP 174. It is the City's stated intent to "sell" the 99.9914 percent of excess capacity to "private persons and entities that need access to high capacity internet and other high capacity telecommunications services". Ordinance 3271, §3.

The City does not identify whether these private persons or entities are to be residents or businesses located in Edmonds. Indeed, neither the ordinance itself nor anything else in the record suggests such an intended limitation.

Offered as some of the principal benefits of the Project are what have to be recognized as purely private benefits. The City's principal expert, Rick Jenness, testified that his business would directly benefit to the approximate tune of \$68,000 per year.

Declaration of R.G. (Rick) Jenness as Owner of Procom Industries, Inc., ¶15, CP 560. Likewise, Europe Through the Back Door, Inc., an Edmonds company, testified through its Chief Information Officer, Kevin Wilmot, that it would benefit financially to the tune of \$3,000 to \$5,000 per month from being able to connect to the City's system. *Declaration of Kevin Wilmot*, ¶12, CP 563.

A close scrutiny of the record reveals that underlying the City's identified purposes is a desire by the City and perhaps other entities to litigate a "broadband test case" because of legal uncertainty about the ability to sell excess capacity and the interest in obtaining an appellate ruling on the issue following trial court litigation. *Declaration of R.G. (Rick) Jenness In Support of the City*

of *Edmonds' Motion for Summary Judgment*, Ex. 3 at page 6, CP 218. Likewise, the city's true intent appears to be operating a business enterprise for the purposes of generating up to \$2,000,000 per year in new City revenue. *Id.*, Exhibit 3, at pp. 7-8, CP 219-220.

The issuance of general obligation bonds for this project violates the Washington State Constitution and other state statutes. The City's ordinance No. 3271 authorizing the issuance of the bonds is invalid, and the trial court erred in declaring the ordinance valid.

V. STANDARD OF REVIEW

This matter comes before this Court following summary judgment. This court reviews the trial court's ruling on summary judgment de novo. *Reyes v. City of Renton*, 121 Wash.App. 498, 502, 86 P.3d 155 (2004). Summary judgment is properly granted if there are no material issues of fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment is appropriate if, in view of all the evidence, reasonable persons could reach only one conclusion. *Hansen v. Friend*, 118 Wash.2d 476, 485, 824 P.2d 483 (1992). Where the issues are questions of

statutory or constitutional interpretation, this court also reviews those issues de novo. *Citizens Protecting Resources v. Yakima County*, 152 Wash.App. 914, 933, 219 P.3d 730 (2009), *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wash.2d 292, 298, 149 P.3d 666 (2006); *State v. Jackman*, 156 Wash.2d 736, 746, 132 P.3d 136 (2006).

VI. ARGUMENT

Edmonds Ordinance #3721 conflicts with both the state Constitution and statutory provisions and is therefore invalid.

a. Ordinances are not valid when they conflict with the state constitution or other statutes.

Ordinances are presumed constitutional; the party asserting otherwise has the burden of proof. An ordinance is invalid if "(1) a general statute preempts city regulation of the subject or (2) ... the ordinance directly conflicts with a statute." A city is preempted from enacting an ordinance if the legislature has stated, either expressly or by implication, its intent to preempt the area. *Housing Authority of City of Pasco and Franklin County v. City of Pasco*, 120 Wash.App. 839, 843, 86 P.3d 1217 (2004); citing *Brown v. City of Yakima*, 116 Wash.2d 556, 559, 807 P.2d 353 (1991); *Heinsma v.*

City of Vancouver, 144 Wash.2d 556, 561, 29 P.3d 709 (2001).

b. The City is prohibited by the state Constitution from making gifts or loaning its credit for the benefit of individuals or corporations.

The Washington State Constitution, Article VIII, §7, provides:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

In the context of this provision, the Supreme Court has previously stated:

[P]ublic funds cannot be used to benefit private interests **when the public interest is not primarily being served**. *Japan Line, Ltd. v. McCaffree*, 88 Wash.2d 93, 98, 558 P.2d 211 (1977). Public expenditures must, therefore, further public purposes. *United States v. Town of North Bonneville*, 94 Wash.2d 827, 832, 621 P.2d 127 (1980). "An expenditure is for a public purpose when it confers a benefit of reasonably general character to a significant part of the public." *In re Marriage of Johnson*, 96 Wash.2d 255, 258, 634 P.2d 877 (1981). "Where it is debatable as to whether or not an expenditure is for a public purpose, we will defer to the judgment of the legislature." *Anderson v. O'Brien*, 84 Wash.2d 64, 70, 524 P.2d 390 (1974).

CLEAN v. State, 130 Wash.2d 782, 792-793, 928 P.2d 1054 (1996) (*emphasis added*).

In the context of Article VII, §1 of the state Constitution, our Supreme Court has previously made clear that determining whether something was a "public purpose" was a fact-specific inquiry. In *U. S. v. Town of North Bonneville*, 94 Wash.2d 827, 621 P.2d 127 (1980), the court expressly stated: "What is a public municipal purpose is not susceptible of precise definition, since it changes to meet new developments and conditions of times." *Id.* at p. 833, quoting *McQuillin*, 15 *Municipal Corporations* §39.19, at 32 (3rd ed. 1970).

Article VII, Section 1 of the State Constitution limits municipal power to levy and collect taxes "for public purposes only". The *North Bonneville* court held that the requirement of Article VII, §1 was met when the Town of North Bonneville contracted to purchase property from the U.S. Government for the purpose of relocating the town which would otherwise be destroyed for the construction of a powerhouse project on the Columbia River. In so holding, the court relied on the public purposes that were demonstrated by the Town's intent to retain a large portion of the proposed new town site for municipal purposes like streets and parks, and the need to preserve "the continued economic and

social viability of the town". 94 Wash.2d 827 at p. 834.

The Bonneville court went on to analyze a challenge based on the lending of credit provisions of Article VIII, §7 of the State Constitution. The court noted cases which held that lending of public funds violated Article VIII, §7 if the loan "inures to the primary benefit of private entities". *Id.* at p. 835, citing *Port of Longview v. Taxpayers of Port of Longview*, 85 Wash.2d 216, 533 P.2d 128 (1974); *Johns v. Wadsworth*, 80 Wash. 352, 141 P. 892 (1914); see also, *Lassila v. City of Wenatchee*, 89 Wash.2d 804, 576 P.2d 54 (1978).

The *North Bonneville* court distinguished those prior cases by noting that no private party could be immediately identified who would benefit from North Bonneville's lending of credit. 94 Wash.2d 827 at p. 836. In addition, it noted the necessity of the contracts at issue in order to "insure the continued viability of the town". *Id.* at p. 837.

In the case at bar, there are specific private parties whose prospective financial gain have already been identified and to some extent quantified by the City. CP 560, 563. Unlike *North Bonneville*, however, there are no facts in the record that would

indicate that the issuance of bonds for the expansion of the fiber optic network is necessary for the continued viability of the City of Edmonds.

Later public lending of credit cases continued this same style of analysis. In *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1997), the court upheld legislation authorizing the creation of taxing districts which would issue bonds and collect taxes to pay for the construction of baseball stadiums. Our Supreme Court noted that the purpose of the constitutional limitation was to "prevent state funds from being used to benefit private interests where the public interest is not primarily served". *Id.* at p. 797, quoting from *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 98, 558 P.2d 211 (1977)(*emphasis added*). The *CLEAN v. State* court's analysis was primarily related to the prohibition against gifts of public funds under Article VIII, §7. It distinguished that legislation, however, from the case of *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978), and held that the legislation did not violate the constitution. 130 Wn.2d at 795-796.

In *Lassila, supra*, the city of Wenatchee had sought to redevelop its central business district by purchasing certain

properties, then declaring some of those properties as surplus and reselling them to a private entity. Noting that municipal lending of credit must be limited to the "necessary support of the poor and infirm", the *Lassila* court struck down the City's actions. It held the fact that the City subsequently received consideration when the properties were sold to the private party did not change the character of the transaction from an unconstitutional lending of the city's credit. 89 Wn.2d at 811.

Significantly, the *Lassila* court also noted that the city's "expected future benefit" did not remedy the unconstitutionality of the loan. As the court stated, "We have repeatedly held that a loan of money or credit by a municipality to a private party violates Const. art. 8, §7 regardless of whether it may serve a laudable public purpose." *Id.* at 811-812, citing *Japan Line, Ltd. v. McCaffree, supra*; *Port of Longview v. Taxpayers, supra*; *State ex rel. O'Connell v. Port of Seattle*, 65 Wash.2d 801, 805-806, 399 P.2d 623 (1965); *Johns v. Wadsworth*, 80 Wash. 352, 141 P. 892, 893 (1914).

Similarly, in *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997), the Court was asked to analyze Article VIII, §7 in

the context of Spokane's effort to construct a parking garage in its business district. The *CLEAN v. Spokane* court's opinion devoted only two paragraphs to this issue, but suggested that *CLEAN v. State, supra*, was controlling. Without significant analysis, the court held that the City of Spokane's plan to conditionally pledge parking meter revenues was not an unconstitutional gift of credit because it was a pledge made from the City to a public entity (the Spokane Public Development Authority) for the sake of a publicly owned facility. *Id.* at 470.

These cases make it clear that an inquiry under Article VIII, §7 is a fact-specific undertaking. However, case law is clear that the mere fact that some "laudable purpose" or expected future benefit exists does not authorize the issuance of the city's credit for a purpose that is not primarily for public purposes.

c. The City's ordinance does not primarily serve public interests and thus conflicts with RCW 35A.40.080.

As previously noted, the City of Edmonds seeks to issue bonds for expansion of its fiber optic network. Fourteen ten-thousandths of one percent (0.0014%) of the capacity of this expansion will be used for admittedly public purposes such as

water meter reading, public safety and city departmental communications, or use by other governmental, educational and health institutions. The other 99.9986% of the expansion will not be used for what traditionally would be considered a public or municipal purpose.

The City's authority for the issuance of bonds in general is limited by the State Constitution and by RCW 35A.40.080, which clarifies the authority of optional municipal code cities to issue bonds:

In addition to any other authority granted by law, a code city shall have authority to ratify and fund indebtedness as provided by chapter 35.40 RCW; to issue revenue bonds, coupons and warrants as authorized by chapter 35.41 RCW; to authorize and issue local improvement bonds and warrants, installment notes and interest certificates as authorized by chapter 35.45 RCW; to fund indebtedness and to issue other bonds as authorized by chapters 39.44, 39.48, 39.52 RCW, RCW 39.56.020, and 39.56.030 **in accordance with the procedures and subject to the limitations therein provided.**

RCW 35A.40.080 (*emphasis added*).

A close examination of this section shows that the City's proposal is not authorized under any of the eight statutory provisions specifically referenced in RCW 35A.40.080:

- a. RCW Chapter 35.40--this chapter specifically relates to the ratification and funding of municipal debt after consolidation or annexation.
- b. RCW Chapter 35.41--this chapter is the municipal revenue bond act authorizing revenue bonds to be issued under certain circumstances.
- c. RCW Chapter 35.45--this chapter authorizes the issuance of bonds for "local improvements" in local improvement districts.
- d. RCW Chapter 39.44--this chapter contains miscellaneous provisions relating to bond issues but contains no express authority to issue bonds.
- e. RCW Chapter 39.48--this chapter relates to the issuance of bonds from one governmental unit to another.
- f. RCW Chapter 39.52--this chapter relates to the funding and payment of existing indebtedness by the issuance of additional bonds.
- g. RCW Section 39.56.020--this section relates to the rate of interest on municipal bonds but gives no authority to issue them.

h. RCW Section 39.56.030--this section relates to the duty of the issuing officer to fix bond interest at market rate.

The City's proposal to issue bonds is not authorized under any section referenced in RCW 35A.40.080. Thus, unless the City can rely on the "[i]n addition to any other authority granted by law" language of RCW 35A.40.080, the city lacks the authority to issue bonds for its intended purposes.

RCW 35.22.280(4) sets out generally that second class cities have authority: "To borrow money for corporate purposes on the credit of the corporation, and to issue negotiable bonds therefor, on such conditions and in such manner as shall be prescribed in its charter..." (emphasis added). Under this statute, however, the issuance of bonds must be for "corporate purposes". There is no authority to issue bonds for any other purpose under RCW 35.22.280.

Likewise, RCW 35.37.040 is sometimes cited as additional general authority for bond issuance, but it contains limiting language: "Every city and town, may, without a vote of the people, contract indebtedness or borrow money for strictly municipal purposes on the credit of the city or town and issue negotiable

bonds therefor..." (*emphasis added*). The emphasized language makes it clear the legislature intended that there be a strict limit on the issuance of bonds for non-municipal purposes.

Thus, there is no statute which provides authority for the City of Edmonds to issue bonds when the proceeds are not to be used for strictly municipal purposes. Ordinance 3721 conflicts with state law in this respect and is invalid.

VII. CONCLUSION

The City's intention to expand its fiber optic network through the use of public credit is not authorized because it violates the constitutional prohibition against lending of credit. The proposal is not for the "necessary support of the poor and infirm". In fact, the record would suggest the ordinance and Project would primarily benefit of some of Edmonds' wealthier business interests.

Nor does the City's ordinance meet any of the statutory requirements for the issuance of bonds in RCW 35A.40.080 or any other statutory provision authorizing the issuance of municipal bonds.

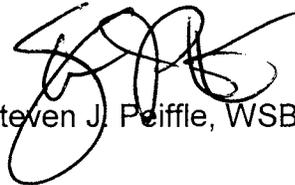
Because the City of Edmonds ordinance 3271 conflicts with Const. Article VIII, §7, and state statutes, it is not a valid ordinance.

The trial court's declaratory judgment declaring it valid was in error,
and this court should reverse the decision of the trial court.

RESPECTFULLY SUBMITTED this 22nd day of March,
2010.

BAILEY, DUSKIN, PEIFFLE &
CANFIELD, P.S.

Attorneys for Appellant Rowena
Rohrbach

A handwritten signature in black ink, appearing to be 'S. Peiffle', written over the printed name below.

Steven J. Peiffle, WSBA #14704

APPENDIX "A"

CITY OF EDMONDS, WASHINGTON

ORDINANCE NO. 3721

AN ORDINANCE of the City of Edmonds, Washington, relating to contracting indebtedness; providing for the issuance of not to exceed \$4,200,000 par value of limited tax general obligation bonds for general City purposes to provide part of the funds with which to design and construct a wireless water meter system, to extend and improve the City's fiber optic network for the purpose of supporting that system and for other municipal and public purposes, and to pay the costs of issuance and sale of the bonds; fixing the date, form, maturities, interest rates, terms and covenants of the bonds; establishing a bond redemption fund and construction funds; and providing for the public sale of the bonds.

Passed December 16, 2008

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CITY OF EDMONDS, WASHINGTON

ORDINANCE NO. 3721

AN ORDINANCE of the City of Edmonds, Washington, relating to contracting indebtedness; providing for the issuance of not to exceed \$4,200,000 par value of limited tax general obligation bonds for general City purposes to provide part of the funds with which to design and construct a wireless water meter system, to extend and improve the City's fiber optic network for the purpose of supporting that system and for other municipal and public purposes, and to pay the costs of issuance and sale of the bonds; fixing the date, form, maturities, interest rates, terms and covenants of the bonds; establishing a bond redemption fund and construction funds; and providing for the public sale of the bonds.

THE CITY COUNCIL OF THE CITY OF EDMONDS, WASHINGTON, DOES ORDAIN as follows:

Section 1. Recitals. The City Council of the City of Edmonds, Washington (the "City") makes the following findings:

1.1 The City desires to construct, own and operate a wireless water meter system to replace its existing water meter system.

1.2 The City currently owns and operates a high capacity telecommunications fiber optic network that serves the City's utility operations, public safety operations and other City services, and desires to extend and improve that system in order to support the new wireless water meter system and to enhance other utility operations, public safety operations, and other public services.

1.3 The extension and improvement of the City's existing fiber optic network creates excess capacity that may be used to provide access to ultra high capacity internet and other telecommunications services; capacity for accommodating expanding technologies and demand; intergovernmental coordination and services (including educational and health institutions); and more and faster service to members of the public who are in need of those services.

1.4 The City is in need of financing a wireless water meter system and the extension and improvement of the City's fiber optic network (the "Project," as defined in Section 3, below), the estimated total cost of which is more than \$4,200,000, and the City does not have available sufficient funds to pay the cost.

1.5 To pay costs of the Project, the City Council finds it necessary and advisable that the City issue and sell its limited tax general obligation bonds in the principal amount of not to exceed \$4,200,000 (the "Bonds").

Section 2. Debt Capacity. The assessed valuation of the taxable property within the City as ascertained by the last preceding assessment for City purposes for the calendar year 2008 is \$7,615,549,203. The City has outstanding general indebtedness evidenced by limited tax general obligation bonds, notes, leases and conditional sales contracts in the principal amount of \$20,265,320 incurred within the limit of up to 1½ % of the value of the taxable property within the City permitted for general municipal purposes without a vote of the qualified voters therein, unlimited tax general obligation bonds in the principal amount of \$6,895,000 incurred within the limit of up to 2½ % of the value of the taxable property within the City for capital purposes only, issued pursuant to a vote of the qualified voters of the City, and the amount of indebtedness for which bonds are authorized herein to be issued is not to exceed \$4,200,000.

Section 3. Authorization of Bonds. The City shall borrow money on the credit of the City and issue negotiable limited tax general obligation bonds evidencing that indebtedness as described in Section 4, for general City purposes to provide part of the funds with which to design and construct a wireless water meter system and extend and improve the City's fiber optic network both to support that system and for other municipal and public purposes (the "Project") (a) to enable timely, efficient and cost-effect water meter reading; (b) for use by City departments in order to enhance other utility operations, public safety operations, and other City services, (c) for use by other governmental, educational and health institutions pursuant to interlocal agreements and other contractual arrangements, and (d) to the extent capacity is available, for use under contract by private persons and entities that need access to high capacity internet and other high capacity telecommunications services, and to pay the costs of issuance and sale of the bonds (the "costs of issuance"). The general indebtedness to be incurred shall be within the limit of up to 1½ % of the value of the taxable property within the City permitted for general municipal purposes without a vote of the qualified voters therein.

Section 4. Description of Bonds. The bonds shall be called Limited Tax General Obligation Bonds of the City of Edmonds (the "Bonds"), with such other or additional designation as determined in a resolution of the City Council confirming the terms of the sale of the Bonds (the "Bond Sale Resolution"), and shall be in the amount of not to exceed \$4,200,000, or such lesser principal amount that will produce sufficient proceeds to provide no more than \$4,200,000 to pay part of the costs of carrying out the Project, plus the additional proceeds required to pay the costs of issuance. The Bonds shall be dated the date of their initial delivery; shall be issued in fully registered form; shall be in the denomination of \$5,000 or any integral multiple thereof within a single maturity; shall be numbered separately, in the manner and with any additional designation as the fiscal agent of the State of Washington (as the same may be designated by the State of Washington from time to time) (the "Bond Registrar") deems necessary for purposes of identification; and shall contain such additional terms as are specified in the Bond Sale Resolution in accordance with Section 17.

The Bonds shall bear interest (computed on the basis of a 360-day year of twelve 30-day months), payable semiannually on each succeeding June 1 and December 1, commencing June 1, 2009 (or on such other dates as the Council shall establish in the Bond Sale Resolution), to the maturity or earlier redemption of the Bonds, at such rate or rates as the Council shall establish in the Bond Sale Resolution. Only one interest rate may be specified for Bonds of the same maturity.

The Bonds shall mature or be subject to mandatory redemption on December 1 in such years and on such dates as the Council shall establish in the Bond Sale Resolution through and including the final maturity, which shall be no later than December 1, 2033 (and may be earlier), all in accordance with the maturity schedule set forth in the Bond Sale Resolution.

Section 5. Registration and Transfer of Bonds. The Bonds shall be issued only in registered form as to both principal and interest and shall be recorded on books or records maintained by the Bond Registrar (the "Bond Register"). The Bond Register shall contain the name and mailing address of the owner of each Bond and the principal amount and number of each of the Bonds held by each owner.

Bonds surrendered to the Bond Registrar may be exchanged for Bonds in any authorized denomination of an equal aggregate principal amount and of the same interest rate and maturity. Bonds may be transferred only if endorsed in the manner provided thereon and surrendered to the Bond Registrar. Any exchange or transfer shall be without cost to the owner or transferee. The Bond Registrar shall not be obligated to exchange or transfer any Bond during the 15 days preceding any principal payment or redemption date.

The Bonds initially shall be registered in the name of Cede & Co., as the nominee of The Depository Trust Company, New York, New York ("DTC"). The Bonds so registered shall be held in fully immobilized form by DTC as depository in accordance with the provisions of a Blanket Issuer Letter of Representations dated August 6, 1996 between the City and DTC (as it may be amended from time to time, the "Letter of Representations"). Neither the City nor the Bond Registrar shall have any responsibility or obligation to DTC participants or the persons for whom they act as nominees with respect to the Bonds regarding accuracy of any records maintained by DTC or DTC participants of any amount in respect of principal of or interest on the Bonds, or any notice which is permitted or required to be given to registered owners hereunder (except such notice as is required to be given by the Bond Registrar to DTC).

For as long as any Bonds are held in fully immobilized form, DTC, its nominee or its successor depository shall be deemed to be the registered owner for all purposes hereunder and all references to registered owners, bondowners, bondholders or the like shall mean DTC or its nominee and, except for the purpose of the City's undertaking herein to provide continuing disclosure, shall not mean the owners of any beneficial interests in the Bonds. Registered ownership of such Bonds, or any portions thereof, may not thereafter be transferred except: (i) to any successor of DTC or its nominee, if that successor shall be qualified under any applicable laws to provide the services proposed to be provided by it; (ii) to any substitute depository appointed by the City or such substitute depository's successor; or (iii) to any person if the Bonds are no longer held in immobilized form.

Upon the resignation of DTC or its successor (or any substitute depository or its successor) from its functions as depository, or a determination by the City that it no longer wishes to continue the system of book entry transfers through DTC or its successor (or any substitute depository or its successor), the City may appoint a substitute depository. Any such substitute depository shall be qualified under any applicable laws to provide the services proposed to be provided by it.

If (i) DTC or its successor (or substitute depository or its successor) resigns from its functions as depository, and no substitute depository can be obtained, or (ii) the City determines that the Bonds are to be in certificated form, the ownership of Bonds may be transferred to any person as provided herein and the Bonds no longer shall be held in fully immobilized form.

Section 6. Payment of Bonds. Both principal of and interest on the Bonds shall be payable in lawful money of the United States of America. Interest on the Bonds shall be paid by checks or drafts of the Bond Registrar mailed on the interest payment date to the registered owners at the addresses appearing on the Bond Register on the 15th day of the month preceding the interest payment date or, if requested in writing by a registered owner of \$1,000,000 or more in principal amount of Bonds prior to the applicable record date, by wire transfer on the interest payment date. Principal of the Bonds shall be payable upon presentation and surrender of the Bonds by the registered owners to the Bond Registrar. Notwithstanding the foregoing, for as long as the Bonds are registered in the name of DTC or its nominee, payment of principal of and interest on the Bonds shall be made in the manner set forth in the Letter of Representations.

Section 7. Redemption Provisions and Open Market Purchase of Bonds. Some maturities of the Bonds may be issued without the right or option of the City to redeem those Bonds prior to their stated maturity dates, as designated in the maturity schedule set forth in the Bond Sale Resolution. Except for those maturities so designated as not subject to optional redemption prior to maturity, the City reserves the right and option to redeem the Bonds as a whole or in part (within one or more maturities selected by the City and randomly within a maturity in such manner as the Bond Registrar shall determine), at par plus accrued interest to the date fixed for redemption. The City Finance Director may prescribe in the bid forms the optional and mandatory date and the optional and mandatory redemption provisions that he determines are most advantageous to the City.

All or some of the Bonds may be designated as "Term Bonds" by the successful bidder. If those Term Bonds are not redeemed under the optional redemption provisions set forth above or purchased in the open market under the provisions set forth below, they shall be called for redemption randomly (in such manner as the Bond Registrar shall determine) at par plus accrued interest on August 1 in accordance with the schedule set forth in the Bond Sale Resolution.

If the City redeems Term Bonds under the optional redemption provisions, purchases in the open market or defeased Term Bonds, the par amount of the Term Bonds so redeemed or purchased (irrespective of their actual redemption or purchase prices) shall be credited against one or more scheduled mandatory redemption amounts for those Term Bonds. The City shall determine the manner in which the credit is to be allocated and shall notify the Bond Registrar in writing of its allocation at least 60 days prior to the earliest mandatory redemption date for that maturity of Term Bonds for which notice of redemption has not already been given. Portions of the principal amount of any Bond, in installments of \$5,000 or any integral multiple thereof, may be redeemed. If less than all of the principal amount of any Bond is redeemed, upon surrender of that Bond to the Bond Registrar, there shall be issued to the registered owner, without charge therefor, a new Bond (or Bonds, at the option of the registered owner) of the same maturity and interest rate in any of the denominations authorized by this ordinance in the aggregate principal amount remaining unredeemed.

The City further reserves the right and option to purchase any or all of the Bonds in the open market at any time at any price acceptable to the City plus accrued interest to the date of purchase.

All Bonds purchased or redeemed under this section shall be canceled.

Notwithstanding the foregoing, for as long as the Bonds are registered in the name of DTC or its nominee, selection of Bonds for redemption shall be in accordance with the Letter of Representations.

Section 8. Notice of Redemption. The City shall cause notice of any intended redemption of Bonds to be given not less than 30 nor more than 60 days prior to the date fixed for redemption by first-class mail, postage prepaid, to the registered owner of any Bond to be redeemed at the address appearing on the Bond Register at the time the Bond Registrar prepares the notice, and the requirements of this sentence shall be deemed to have been fulfilled when notice has been mailed as so provided, whether or not it is actually received by the owner of any Bond. Interest on Bonds called for redemption shall cease to accrue on the date fixed for redemption unless the Bond or Bonds called are not redeemed when presented pursuant to the call. In addition, the redemption notice shall be mailed within the same period, postage prepaid, to Moody's Investors Service, Inc., and Standard & Poor's at their offices in New York, New York, or their successors, to each NRMSIR or the MSRB and to such other persons, including registered securities depositories, if any, and with such additional information as the City Finance Director shall determine, but these additional mailings shall not be a condition precedent to the redemption of Bonds. Notwithstanding the foregoing, for as long as the Bonds are registered in the name of DTC or its nominee, notice of redemption shall be given in accordance with the Letter of Representations.

Section 9. Failure To Redeem Bonds. If any Bond is not redeemed when properly presented at its maturity or call date, the City shall be obligated to pay interest on that Bond at the same rate provided in the Bond from and after its maturity or call date until that Bond, both principal and interest, is paid in full or until sufficient money for its payment in full is on deposit in the bond redemption fund hereinafter created and the Bond has been called for payment by giving notice of that call to the registered owner of each of those unpaid Bonds.

Section 10. Pledge of Taxes. For as long as any of the Bonds are outstanding, the City irrevocably pledges to include in its budget and levy taxes annually within the constitutional and statutory tax limitations provided by law without a vote of the electors of the City on all of the taxable property within the City in an amount sufficient, together with other money legally available and to be used therefor, to pay when due the principal of and interest on the Bonds, and the full faith, credit and resources of the City are pledged irrevocably for the annual levy and collection of those taxes and the prompt payment of that principal and interest. The City expects that part of cost of debt service on the bonds will be allocated to the waterworks utility of the city, but the revenue of the waterworks utility is not pledged to the payment of principal and interest on the Bonds.

Section 11. Form and Execution of Bonds. The Bonds shall be printed or lithographed on good bond paper in a form consistent with the provisions of this ordinance and state law and

shall be signed by the Mayor and City Clerk, either or both of whose signatures may be manual or in facsimile, and the seal of the City or a facsimile reproduction thereof shall be impressed or printed thereon.

Only Bonds bearing a Certificate of Authentication in the following form, manually signed by the Bond Registrar, shall be valid or obligatory for any purpose or entitled to the benefits of this ordinance:

CERTIFICATE OF AUTHENTICATION

This Bond is one of the fully registered City of Edmonds, Washington, Limited Tax General Obligation Bonds [*plus any additional designation*], described in the Bond Ordinance.

WASHINGTON STATE FISCAL AGENT
Bond Registrar
By _____
Authorized Signer

The authorized signing of a Certificate of Authentication shall be conclusive evidence that the Bond so authenticated has been duly executed, authenticated and delivered and is entitled to the benefits of this ordinance.

If any officer whose facsimile signature appears on the Bonds ceases to be an officer of the City authorized to sign bonds before the Bonds bearing his or her facsimile signature are authenticated or delivered by the Bond Registrar or issued by the City, those Bonds nevertheless may be authenticated, issued and delivered and, when authenticated, issued and delivered, shall be as binding on the City as though that person had continued to be an officer of the City authorized to sign bonds. Any Bond also may be signed on behalf of the City by any person who, on the actual date of signing of the Bond, is an officer of the City authorized to sign bonds, although he or she did not hold the required office on the date of issuance of the Bonds.

Section 12. Bond Registrar. The Bond Registrar shall keep, or cause to be kept, sufficient books for the registration and transfer of the Bonds, which shall be open to inspection by the City at all times. The Bond Registrar is authorized, on behalf of the City, to authenticate and deliver Bonds transferred or exchanged in accordance with the provisions of the Bonds and this ordinance, to serve as the City's paying agent for the Bonds and to carry out all of the Bond Registrar's powers and duties under this ordinance and City Ordinance No. 2451 establishing a system of registration for the City's bonds and obligations.

The Bond Registrar shall be responsible for its representations contained in the Bond Registrar's Certificate of Authentication on the Bonds. The Bond Registrar may become the owner of Bonds with the same rights it would have if it were not the Bond Registrar and, to the extent permitted by law, may act as depository for and permit any of its officers or directors to act as members of, or in any other capacity with respect to, any committee formed to protect the rights of Bond owners.

Section 13. Preservation of Tax Exemption for Interest on Bonds. The City covenants that it will take all actions necessary to prevent interest on the Bonds from being included in

gross income for federal income tax purposes, and it will neither take any action nor make or permit any use of proceeds of the Bonds or other funds of the City treated as proceeds of the Bonds at any time during the term of the Bonds which will cause interest on the Bonds to be included in gross income for federal income tax purposes. The City also covenants that it will, to the extent the arbitrage rebate requirement of Section 148 of the Internal Revenue Code of 1986, as amended (the "Code"), is applicable to the Bonds, take all actions necessary to comply (or to be treated as having complied) with that requirement in connection with the Bonds, including the calculation and payment of any penalties that the City has elected to pay as an alternative to calculating rebatable arbitrage, and the payment of any other penalties if required under Section 148 of the Code to prevent interest on the Bonds from being included in gross income for federal income tax purposes.

Section 14. Designation of Bonds as "Qualified Tax-Exempt Obligations." The City has determined and certifies that (a) the Bonds are not "private activity bonds" within the meaning of Section 141 of the Code; (b) the reasonably anticipated amount of tax-exempt obligations (other than private activity bonds and other obligations not required to be included in such calculation) which the City and any entity subordinate to the City (including any entity that the City controls, that derives its authority to issue tax-exempt obligations from the City, or that issues tax-exempt obligations on behalf of the City) will issue during the calendar year in which the Bonds are issued will not exceed \$10,000,000; and (c) the amount of tax-exempt obligations, including the Bonds, designated by the City as "qualified tax-exempt obligations" for the purposes of Section 265(b)(3) of the Code during the calendar year in which the Bonds are issued does not exceed \$10,000,000. The City designates the Bonds as "qualified tax-exempt obligations" for the purposes of Section 265(b)(3) of the Code. Notwithstanding the foregoing, the City in the Bond Sale Resolution may adjust the determinations set forth in this Section 14 and replace those with other determinations that the City may find to be appropriate at the time the Bonds are sold.

Section 15. Refunding or Defeasance of the Bonds. The City may issue refunding bonds pursuant to the laws of the State of Washington or use money available from any other lawful source to pay when due the principal of and interest on the Bonds, or any portion thereof included in a refunding or defeasance plan, and to redeem and retire, refund or defease all such then-outstanding Bonds (hereinafter collectively called the "defeased Bonds") and to pay the costs of the refunding or defeasance. If money and/or "government obligations" (as defined in chapter 39.53 RCW, as now or hereafter amended) maturing at a time or times and bearing interest in amounts (together with money, if necessary) sufficient to redeem and retire, refund or defease the defeased Bonds in accordance with their terms are set aside in a special trust fund or escrow account irrevocably pledged to that redemption, retirement or defeasance of defeased Bonds (hereinafter called the "trust account"), then all right and interest of the owners of the defeased Bonds in the covenants of this ordinance and in the funds and accounts obligated to the payment of the defeased Bonds shall cease and become void. The owners of defeased Bonds shall have the right to receive payment of the principal of and interest on the defeased Bonds from the trust account. The City shall include in the refunding or defeasance plan such provisions as the City deems necessary for the random selection of any defeased Bonds that constitute less than all of a particular maturity of the Bonds, for notice of the defeasance to be given to the owners of the defeased Bonds and to such other persons as the City shall determine, and for any required replacement of Bond certificates for defeased Bonds. The defeased Bonds

shall be deemed no longer outstanding, and the City may apply any money in any other fund or account established for the payment or redemption of the defeased Bonds to any lawful purposes as it shall determine.

If the Bonds are registered in the name of DTC or its nominee, notice of any defeasance of Bonds shall be given to DTC in the manner prescribed in the Letter of Representations for notices of redemption of Bonds.

Section 16. Bond Fund and Deposit of Bond Proceeds. There is created and established in the office of the City Finance Director a special fund designated as the Limited Tax General Obligation Bond Fund (Wireless Water Meter/Fiber Optic Network Improvements) (the "Bond Fund"), for the purpose of paying principal of and interest on the Bonds. Accrued interest on the Bonds, if any, received from the sale and delivery of the Bonds shall be paid into the Bond Fund. All taxes collected for and allocated to the payment of the principal of and interest on the Bonds shall be deposited in the Bond Fund.

The City Finance Director is authorized and directed to establish a special account or fund (the "Construction Fund"). The principal proceeds and premium, if any, received from the sale and delivery of the Bonds shall be paid into the Construction Fund and used for the purposes specified in Section 3 of this ordinance. The Project shall be carried out consistent with the Wireless Water Meter / Fiber Optic Network Recommendations submitted to the Council, or for such other Wireless Water Meter and/or Fiber Optic Network purposes as the Council may later determine. Until needed to pay the costs of the Project and costs of issuance of the Bonds, the City may invest principal proceeds temporarily in any legal investment, and the investment earnings may be retained in the Construction Fund and be spent for the purposes of that fund except that earnings subject to a federal tax or rebate requirement may be withdrawn from the Construction Fund and used for those tax or rebate purposes.

Section 17. Provision for Sale of Bonds and Notice of Sale. The Finance Director is authorized to fix a date and time for the competitive sale of the Bonds, to give notice of the sale, to determine the bid requirements and the criteria for determining the best bidder, and to specify such other matters as she may determine necessary to carry out the sale of the Bonds, so long as the manner and terms of the sale thereof are consistent with this ordinance. The Finance Director may, at her discretion, provide for the use of an electronic bidding mechanism in connection with the bidding for the sale of the Bonds. The City reserves the right to waive any irregularity in any bid or in the bidding process.

However, if the Finance Director determines, after consultation with the City's financial advisor, that market conditions are such that the City is likely to accomplish the borrowing at a lower overall cost to the City by entering into negotiations for the sale of the Bonds rather than using a competitive sale process, she may proceed to select an underwriter and negotiate a bond purchase agreement providing for the sale of the bonds to the underwriter consistent with the terms of this ordinance.

The final terms of the Bonds, whether reached through competitive sale or negotiation, shall be confirmed by the Bond Sale Resolution adopted by City Council, which may provide for

the matters described in this ordinance and such other matters that the City Council deems necessary, appropriate, or desirable to carry out the purposes of this ordinance.

The Bond Sale Resolution may provide for bond insurance, and may provide conditions or covenants relating thereto, including additional terms, conditions, and covenants relating to the Bonds that are required by the bond insurer, and are consistent with the provisions of this ordinance, including but not limited to restrictions on investments and requirements of notice to and consent of the bond insurer. The Bond Sale Resolution may approve and authorize the execution and delivery on behalf of the City of any contracts and other documents consistent with the provisions of this ordinance for which the City's approval is necessary or to which the City is a party and that are related or incidental to the issuance and sale of the Bonds or to the establishment of the interest rate or rates on the Bonds, including but not limited to agreements with bond insurers and underwriters. The Mayor and the Finance Director are each separately authorized to execute and deliver, on behalf of the City, any contracts and other documents consistent with the provisions of this ordinance for which the City's approval is necessary or to which the City is a party and that are related or incidental to the issuance and sale of the Bonds.

CUSIP numbers will be printed on the Bonds if requested in the bid of the successful bidder, but neither failure to print CUSIP numbers on any Bond nor error with respect thereto shall constitute cause for a failure or refusal by the successful bidder to accept delivery of and pay for the Bonds in accordance with its bid. All expenses in relation to the printing of CUSIP numbers on the Bonds shall be paid by the City, but the fee of the CUSIP Service Bureau for the assignment of those numbers shall be the responsibility of and shall be paid by the successful bidder.

If, prior to the delivery of the Bonds, interest on the Bonds receivable by the owners thereof becomes includable in gross income for federal income tax purposes, or becomes subject to federal income tax except as described in the official statement, the successful bidder, at its option, may be relieved of its obligation to purchase the Bonds, and in such case the deposit accompanying its bid will be returned, without interest.

The City will cause the Bonds to be printed, lithographed or typed and signed and will furnish the approving legal opinion of Foster Pepper PLLC, bond counsel of Seattle, Washington, regarding the Bonds without cost to the purchaser.

The Bonds will be delivered to the successful bidder in Seattle, Washington, within 30 days after the sale date and immediately upon payment to the City of the purchase price in immediately available federal funds in Seattle, Washington, at the City's expense, or at another time or place upon which the Finance Director and the successful bidder may agree at the successful bidder's expense.

Section 18. Preliminary Official Statement. The City Council authorizes the Finance Director to approve and, for the sole purpose of the Bond purchaser's compliance with Securities and Exchange Commission Rule 15c2-12(b)(1), to "deem final" a Preliminary Official Statement as of its date, except for the omission of information as to offering prices, interest rates, selling compensation, aggregate principal amount, principal amount per maturity, maturity dates,

options of redemption, delivery dates, ratings and other terms of the Bonds dependent on such matters.

Section 19. Undertaking to Provide Continuing Disclosure. To meet the requirements of United States Securities and Exchange Commission ("SEC") Rule 15c2-12(b)(5) (the "Rule"), as applicable to a participating underwriter for the Bonds, the City makes the following written undertaking (the "Undertaking") for the benefit of holders of the Bonds:

(a) Undertaking to Provide Annual Financial Information and Notice of Material Events. The City undertakes to provide or cause to be provided, either directly or through a designated agent:

(i) To each nationally recognized municipal securities information repository designated by the SEC in accordance with the Rule ("NRMSIR") and to a state information depository, if any, established in the State of Washington (the "SID") annual financial information and operating data of the type included in the final official statement for the Bonds and described in subsection (b) of this section ("annual financial information");

(ii) To each NRMSIR or the Municipal Securities Rulemaking Board ("MSRB"), and to the SID, timely notice of the occurrence of any of the following events with respect to the Bonds, if material: (1) principal and interest payment delinquencies; (2) non-payment related defaults; (3) unscheduled draws on debt service reserves reflecting financial difficulties; (4) unscheduled draws on credit enhancements reflecting financial difficulties; (5) substitution of credit or liquidity providers, or their failure to perform; (6) adverse tax opinions or events affecting the tax-exempt status of the Bonds; (7) modifications to rights of holders of the Bonds; (8) Bond calls (other than scheduled mandatory redemptions of Term Bonds); (9) defeasances; (10) release, substitution, or sale of property securing repayment of the Bonds; and (11) rating changes; and

(iii) To each NRMSIR or to the MSRB, and to the SID, timely notice of a failure by the City to provide required annual financial information on or before the date specified in subsection (b) of this section.

(b) Type of Annual Financial Information Undertaken to be Provided. The annual financial information that the City undertakes to provide in subsection (a) of this section:

(i) Shall consist of (1) annual financial statements prepared (except as noted in the financial statements) in accordance with applicable generally accepted accounting principles applicable to governmental units, as such principles may be changed from time to time and as permitted by State law, which statements shall not be audited, except, however, that if and when audited financial statements are otherwise prepared and

available to the City they will be provided; (2) a statement of authorized, issued and outstanding general obligation debt of the City; (3) the assessed value of the property within the City subject to ad valorem taxation; and (4) ad valorem tax levy rates and amounts and percentage of taxes collected;

(ii) Shall be provided to each NRMSIR and the SID, not later than the last day of the ninth month after the end of each fiscal year of the City (currently, a fiscal year ending December 31), as such fiscal year may be changed as required or permitted by State law, commencing with the City's fiscal year ending December 31, 2009; and

(iii) May be provided in a single or multiple documents, and may be incorporated by reference to other documents that have been filed with each NRMSIR and the SID, or, if the document incorporated by reference is a "final official statement" with respect to other obligations of the City, that has been filed with the MSRB.

(c) Amendment of Undertaking. The Undertaking is subject to amendment after the primary offering of the Bonds without the consent of any holder of any Bond, or of any broker, dealer, municipal securities dealer, participating underwriter, rating agency, NRMSIR, the SID or the MSRB, under the circumstances and in the manner permitted by the Rule.

The City will give notice to each NRMSIR or the MSRB, and the SID, of the substance (or provide a copy) of any amendment to the Undertaking and a brief statement of the reasons for the amendment. If the amendment changes the type of annual financial information to be provided, the annual financial information containing the amended financial information will include a narrative explanation of the effect of that change on the type of information to be provided.

(d) Beneficiaries. The Undertaking evidenced by this section shall inure to the benefit of the City and any holder of Bonds, and shall not inure to the benefit of or create any rights in any other person.

(e) Termination of Undertaking. The City's obligations under this Undertaking shall terminate upon the legal defeasance of all of the Bonds. In addition, the City's obligations under this Undertaking shall terminate if those provisions of the Rule which require the City to comply with this Undertaking become legally inapplicable in respect of the Bonds for any reason, as confirmed by an opinion of nationally recognized bond counsel or other counsel familiar with federal securities laws delivered to the City, and the City provides timely notice of such termination to each NRMSIR or the MSRB and the SID.

(f) Remedy for Failure to Comply with Undertaking. As soon as practicable after the City learns of any failure to comply with the Undertaking, the City will proceed with due diligence to cause such noncompliance to be corrected.

No failure by the City or other obligated person to comply with the Undertaking shall constitute a default in respect of the Bonds. The sole remedy of any holder of a Bond shall be to take such actions as that holder deems necessary, including seeking an order of specific performance from an appropriate court, to compel the City or other obligated person to comply with the Undertaking.

(g) Designation of Official Responsible to Administer Undertaking.

The Finance Director of the City (or such other officer of the City who may in the future perform the duties of that office) or his or her designee is authorized and directed in his or her discretion to take such further actions as may be necessary, appropriate or convenient to carry out the Undertaking of the City in respect of the Bonds set forth in this section and in accordance with the Rule, including, without limitation, the following actions:

(i) Preparing and filing the annual financial information undertaken to be provided;

(ii) Determining whether any event specified in subsection (a) has occurred, assessing its materiality with respect to the Bonds, and, if material, preparing and disseminating notice of its occurrence;

(iii) Determining whether any person other than the City is an "obligated person" within the meaning of the Rule with respect to the Bonds, and obtaining from such person an undertaking to provide any annual financial information and notice of material events for that person in accordance with the Rule;

(iv) Selecting, engaging and compensating designated agents and consultants, including but not limited to financial advisors and legal counsel, to assist and advise the City in carrying out the Undertaking; and

(v) Effecting any necessary amendment of the Undertaking.

(h) Centralized Dissemination Agent. To the extent authorized by the SEC, the City may satisfy the Undertaking by transmitting the required filings using <http://www.disclosureusa.org> (or such other centralized dissemination agent as may be approved by the SEC).

Section 20. General Authorization. The Mayor and the Finance Director and other appropriate officers of the City are each authorized and directed to do everything as in their judgment may be necessary, appropriate or desirable in order to carry out the terms and provisions of, and complete the transactions contemplated by, this ordinance.

Section 21. Effective Date of Ordinance. This ordinance shall take effect and be in force from and after its passage and five days following its publication as required by law.

PASSED by the City Council and APPROVED by the Mayor of the City of Edmonds, Washington, at a regular open public meeting thereof, this 16th day of December, 2008.



Mayor Gary Haakenson

ATTEST:



City Clerk Sandra S. Chase

FOSTER PEPPER PLLC
Bond Counsel

Filed with the City Clerk:	12/12/2008
Passed by the City Council:	12/16/2008
Published:	12/23/2008
Effective Date:	12/28/2008

CERTIFICATION

I, the undersigned, City Clerk of the City of Edmonds, Washington (the "City"), hereby certify as follows:

1. The attached copy of Ordinance No. 3721 (the "Ordinance") is a full, true and correct copy of an ordinance duly passed at a regular meeting of the City Council of the City held at the regular meeting place thereof on December 16, 2008, as that ordinance appears on the minute book of the City; and the Ordinance will be in full force and effect five days after publication in the City's official newspaper; and

2. A quorum of the members of the City Council was present throughout the meeting and a majority of those members present voted in the proper manner for the passage of the Ordinance.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of December, 2008.

CITY OF EDMONDS, WASHINGTON



City Clerk