

64492-1

64492-1

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 APR 21 PM 3:53

No. 64492-1

---

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

---

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

---

**CITY OF EDMONDS' RESPONSE BRIEF**

---

William H. Patton, WSBA No. 5771  
Hugh D. Spitzer, WSBA No. 5827  
Attorneys for Respondent,  
City of Edmonds

**FOSTER PEPPER PLLC**  
1111 Third Avenue, Suite 3400  
Seattle, Washington 98101-3299  
Telephone: (206) 447-4400  
Facsimile No.: (206) 447-9700

**ORIGINAL**

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE .....	3
A. Procedural background.....	3
1. Bonds were authorized – but not yet issued – to expand the City’s fiber optic network and provide wireless reading of water meters .....	3
2. The City then filed this declaratory judgment action under ch. 7.25 RCW .....	4
3. Edmonds moved for summary judgment, and the Superior Court ruled in the City’s favor.....	5
B. Factual background .....	6
1. Edmonds began considering the economic development potential of high speed broadband as early as 2003 .....	6
2. Edmonds was then presented with an unexpected opportunity to make its fiber optic system a reality .....	7
3. The City’s fiber optic backbone now consists of three existing segments with a fourth segment planned pending this litigation .....	8
4. The fiber optic system has already provided internal benefits to Edmonds .....	9
5. In addition, the City’s fiber optic system provides benefits to other public agencies .....	10
6. Excess capacity is now available on the City’s fiber optic system for the use by others in Edmonds .....	11
7. The City’s fiber optic system offers significant advantages for private individuals and business users with high capacity demands .....	13
a. Europe Through the Back Door.....	14
b. Dewar, Meeks & Ekrem, CPA .....	16
c. Procom Industries, Inc. ....	18

8.	The City’s ultra high bandwidth communication system can also foster general economic development..	19
IV.	ARGUMENT.....	21
A.	Introduction .....	21
B.	Standard of review.....	22
C.	Edmonds has broad “home rule” powers to legislate.....	23
1.	<i>Winkenwerder v. Yakima</i> is the classic precedent for a city’s right to contract with private parties.....	24
2.	Recent Supreme Court decisions reinforce those broad legislative powers.....	25
3.	<i>Issaquah v. Teleprompter</i> provides nearly an exact parallel to this case upholding the power of code cities to offer telecommunication services to the public .....	27
a.	<i>Chemical Bank</i> does not void home rule powers of cities .....	28
b.	<i>Issaquah v. Teleprompter</i> was not overruled by <i>Chemical Bank</i> .....	30
c.	The Supreme Court has cited <i>Chemical Bank</i> as <u>support</u> for expansive home rule authority .....	31
4.	In contrast to the home rule powers of cities, a PUD’s authority to provide telecommunication service is limited by statute to internal and wholesale transmission.....	32
5.	The Attorney General affirms the power of <u>cities</u> to provide telecommunication services to private parties ..	33
6.	McQuillin also provides authority for cities to offer telecommunication services.....	34
7.	The U.S. Supreme Court likewise acknowledges the broad powers of home rule cities to offer telecommunication services.....	34
D.	In addition to home rule, Edmonds has express statutory authority to engage in economic development programs.....	36
E.	Municipal bonds issued for public purposes may include providing a public service to private parties .....	39
1.	Code cities have alternate sources of authority to issue bonds for municipal purposes.....	40

2.	“Municipal purpose” is far broader than Appellant’s forced interpretation .....	41
3.	The issue of providing services to the public as well as to a city itself was decided nearly 100 years ago .....	46
V.	CONCLUSION .....	48

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<i>Anderson v. State Farm Mut. Ins. Co.</i> , 101 Wn. App. 323, 2 P.3d 1029 (2000).....	23
<i>Bowles v. Dep't of Ret. Sys.</i> , 121 Wn.2d 52, 847 P.2d 440 (1993).....	33
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	24
<i>Chandler v. City of Seattle</i> , 80 Wash. 154, 141 P. 331 (1914) .....	46, 47, 48, 50
<i>Chemical Bank v. Washington Public Power Supply System</i> , 99 Wn.2d 772, 666 P.2d 329 (1983).....	28, 29, 30, 31
<i>Citizens for More Important Things v. King County</i> , 131 Wn.2d 411, 932 P.2d 135 (1997).....	43, 45, 49
<i>City of Issaquah v. Teleprompter Corp.</i> , 93 Wn.2d 567, 611 P.2d 741 (1980).....	27, 28, 30, 31, 49
<i>City of Lockhart v. United States</i> , 460 U.S. 125, 103 S. Ct. 998 (1983) .....	35
<i>CLEAN v. State</i> , 130 Wn.2d 782, 928 P.2d 1054 (1996).....	36, 37, 43, 44, 49
<i>Everett Concrete Prods., Inc. v. Dep't of Labor &amp; Indus.</i> , 109 Wn.2d 819, 748 P.2d 1112 (1988).....	33
<i>GTE Northwest, Inc. v. Oregon Public Utility Com'n</i> , 179 Or. App. 46, 39 P.3d 201 (2002) .....	34
<i>Heinsma v. Vancouver</i> , 144 Wn.2d 556, 29 P.3d 709 (2001).....	24, 26, 31
<i>In re City of Lynnwood</i> , 118 Wn. App. 674, 77 P.3d 378 (2003).....	41, 42
<i>Kightlinger v. Public Utility Dist. No. 1 of Clark County</i> , 119 Wn. App. 501, 81 P.3d 876 (2003).....	32
<i>King County v. Taxpayers of King County</i> , 133 Wn.2d 584, 949 P.2d 1260 (1997).....	41, 43, 45, 46, 50
<i>Lassila v. City of Wenatchee</i> , 89 Wn.2d 804, 576 P.2d 54 (1978).....	22

<i>Lawson v. City of Pasco</i> , Wn.2d ____, P.3d ____, 2010 WL 1492807 (April 15, 2010).....	26, 27
<i>Leskovar v. Nickels</i> , 140 Wn. App. 770, 166 P.3d 125 (2007).....	24
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 166 Wash.2d 264, 208 P.3d 1092 (2009) .....	30
<i>Nixon v. Missouri Municipal League</i> , 541 U.S. 125, 124 S. Ct. 1555 (2004) .....	35, 36
<i>State v. Kerwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	26, 27
<i>Tacoma v. Nisqually Power Co.</i> , 57 Wash. 420, 107 P. 199 (1910) .....	47, 48
<i>Tacoma v. Taxpayers of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	30, 31, 45
<i>Thompson v. Peninsula School District</i> , 77 Wn. App. 500, 892 P.2d 760 (1995).....	22
<i>United States v. Town of North Bonneville</i> , 94 Wn.2d 827, 621 P.2d 127 (1980).....	41, 44
<i>Washington State Convention Center v. Evans</i> , 136 Wn.2d 811, 966 P.2d 1252 (1998).....	48
<i>Winkenwerder v. Yakima</i> , 52 Wn.2d 617, 328 P.2d 873 (1958).....	24, 25, 42

### CONSTITUTION & STATUTES

Const. Art. VIII, §6.....	41
47 U.S.C. § 253 .....	34
RCW § 7.25 .....	2, 4, 41, 45
RCW § 7.25.020 .....	4
RCW § 35.21.703 .....	6, 21, 36, 38, 39, 49
RCW § 35.22.280(4) .....	40
RCW § 35.37.040 .....	40
RCW § 35.97 .....	43
RCW § 35.97.030 .....	43
RCW § 35A .....	6, 21, 23
RCW § 35A.01.010 .....	24
RCW § 35A.11.020 .....	40

RCW § 35A.21.160 .....	23
RCW § 39.36.020(2)(a)(ii) .....	41
RCW § 43.52 .....	29
RCW § 43.105.370 .....	38
RCW § 54.16.330 .....	32, 34
Ch. 509, Laws of 2009.....	37, 38, 39, 48, 49

**ADDITIONAL AUTHORITY**

AGO 2001, No. 3.....	32
AGO 2003, No. 11.....	5, 28, 31, 33, 49
McQuillin, <i>Municipal Corporations</i> .....	34, 41, 42

## **I. INTRODUCTION**

In June 2005, the City of Edmonds was presented with a sudden and unexpected opportunity to acquire the first leg of a City-owned fiber optic system when the State Department of Transportation and the U.S. Department of Homeland Security rushed to build a fiber optic connection to the Edmonds/Kingston ferry terminal. Thereafter the City gained access from the Seattle consortium of governments to six fiber strands running from the Snohomish/King County line to the main Pacific Northwest communication hub at the Westin Building in downtown Seattle. Edmonds then connected that second fiber leg to the City's first leg at the City's public works facility.

The City is now poised to build the fourth leg of its fiber optic backbone into the north end of the City in order to allow wireless reading of all the City's water meters throughout the City and to provide other communication enhancements for the City itself.

Significant excess capacity remains on the City's fiber optic system, which means that the City is also capable of offering ultra high bandwidth broadband access to both individuals and private organizations in the City in order to offset the City's own costs and to support general economic development in the City.

To affirm the validity of doing so, the City filed this declaratory judgment action under RCW 7.25 in Snohomish County Superior Court. On October 22, 2009, the presiding judge of that court granted Edmonds' motion for summary judgment, upheld the City's authority to offer telecommunications services to the public, and affirmed the validity of the bonds authorized to fund the fourth leg of the fiber optic system in all respects. The appointed public representative then appealed.

The City of Edmonds now respectfully asks this Court to affirm that order on summary judgment.

## **II. ASSIGNMENTS OF ERROR**

While numbering them as two (Appellant's Br. at 1), the appellant really identifies three issues for consideration by this Court on which the trial court ruled in Edmonds' favor:

1. May Edmonds lawfully offer the use of excess capacity on its expanded high speed fiber optic communication system to private individuals and non-governmental businesses and organizations pursuant to its broad home rule authority as a code city?

2. Does Edmonds have express statutory authority to offer excess capacity on its ultra high bandwidth fiber optic communication systems as an investment in economic development?

3. Is Edmonds authorized to issue bonds to fund the fourth and final leg of the backbone for its fiber optic system and provide ultra high bandwidth broadband services to public as well as to the City itself?

### **III. STATEMENT OF THE CASE**

For the benefit of the Court in understanding the underlying issues presented in this declaratory judgment action, Edmonds offers its own statement of the case. While appellant's statement is not necessarily wrong, it is so compressed that it does not fully explain the procedural background of the case and factual background that led to the filing of this declaratory judgment action and the legal issues presented.

#### **A. Procedural background**

##### **1. Bonds were authorized – but not yet issued – to expand the City's fiber optic network and provide wireless reading of water meters**

On December 16, 2008, the Edmonds City Council authorized the bonds that are the subject of this declaratory judgment action. (Ordinance No. 3721; CP 622-637) The \$4,200,000 of bonds authorized by the ordinance will allow the City to extend its fiber optic network that serves the City's utility operations and public safety operations and purchase the equipment to allow wireless reading of the City's water meters. (Ordinance 3721, §§ 1.1, 1.2, and 1.4; CP 624)

The ordinance also notes that the extension of the City's fiber optic network creates excess capacity that may be used to provide access to ultra high capacity internet and other telecommunications services that can accommodate the demand for expanding technologies and faster internet services to educational and health institutions as well as other members of the public. (Ordinance 3721, § 1.3; CP 624)

**2. The City then filed this declaratory judgment action under ch. 7.25 RCW**

While the bonds were authorized by the City on December 16, 2008, the actual issuance of the bonds remains pending until this declaratory judgment action is decided. (Complaint ¶¶ 1, 2, and 5; CP 614-615)

The complaint for declaratory judgment was filed pursuant to ch. 7.25 RCW in Snohomish County Superior Court on December 23, 2008. (CP 614) In accordance with RCW 7.25.020, notice of the pending litigation and the opportunity to intervene by interested parties was published in The Herald, the City of Edmonds' designated newspaper of record on December 24 and December 26, 2008. (CP 605) No interested parties filed to intervene within the time allowed by RCW 7.25.020. (Patton dec., March 5, 2009, ¶ 5; CP 602)

Upon motion of the City, the Superior Court then appointed a designated representative of all interested parties, Rowena B. Rohrbach, to

be the defendant in the declaratory judgment action. (Order, March 24, 2009, ¶ 1; CP 601). In turn, the Superior Court appointed Bruce E. Jones to represent Ms. Rohrbach and all interested parties. (Order, March 24, 2009, ¶ 2; CP 601) The case was then pre-assigned to the presiding judge, Larry E. McKeeman. (Order, March 30, 2009; CP 599)

Defendant formally answered the City's complaint on September 18, 2009. (CP 597-598) The defendant admitted most of the allegations, in the complaint but denied that the City has the authority to issue bonds for the purpose of providing high band –width communication facilities and denied that the City is authorized to provide telecommunication services to private persons. (Answer, ¶ 1.2, CP 598) The defendant also denied that AGO 2003, No. 11 provides authority for a city in Washington to provide telecommunication services. (Answer, ¶ 1.3; CP 598)

### **3. Edmonds moved for summary judgment, and the Superior Court ruled in the City's favor**

Edmonds filed its motion for summary judgment on September 24, 2009. (CP 565- 596) Defendant responded with a brief opposing summary judgment on October 14, 2009 (CP 24-32) Edmonds in turn filed a reply brief on October 19, 2009 (CP 14-23)

Oral argument was heard by the presiding judge on October 22, 2009. (RP 1:8-16:17; CP 11,13) Immediately following oral argument, Judge McKeeman ruled in favor of the City. (RP 16:18-RP 17:6) The

2009, ¶ 14; CP 169) The CTAC forwarded its first issue paper to the City Council in March 2005. (*Id.*, ¶ 16; CP 170). The paper, entitled “Edmonds CTAC WI-FI Issue Paper,” outlined in broad terms the vision of the committee with regard to a municipally owned public access wireless network. (CP 196-211) The CTAC noted that “Many communities had long ago determined that universal and affordable access to broadband service is essential to their community’s long term economic vitality.” (CP 196)

**2. Edmonds was then presented with an unexpected opportunity to make its fiber optic system a reality**

In June 2005 the Washington State Department of Transportation (WSDOT) approached the City requesting expedited approvals for use of City right-of-way in order to install fiber optic cable that terminated at the Edmonds Ferry Terminal, and interconnected to WSDOT’s main fiber backbone that runs along Interstate 5. (Jeness dec., September 21, 2009, ¶ 17; CP 170). WSDOT constructed its fiber link in partnership with the U.S. Department of Homeland Security as a part of their combined transportation infrastructure security initiative, that was designed to carry digital surveillance video and data from a variety of sensors being installed at the terminal. (*Id.*, ¶ 18; CP 170) In exchange for expedited approvals by the City, WSDOT agreed to provide Edmonds with access to 24 of the 36 fiber strands that were being installed and to work with the

City in order that the placement and installation of the fiber was done in a way that allowed Edmonds to easily utilize those strands for its municipal purposes. (*Id.*; CP 170)

Installation of the WSDOT fiber was completed in September of 2005 and the City terminated its 24 strands at the Public Works administration building, near the eastern border of the City and at the Public Safety Building in Downtown Edmonds. (*Id.*, ¶ 19; CP 171 and map at CP 346)

**3. The City's fiber optic backbone now consists of three existing segments with a fourth segment planned pending this litigation**

In late 2005, the City became aware of a 256 strand fiber optic cable that ran underground from downtown Seattle to the King/Snohomish County Line along the centerline of Hwy 99. (*Id.*, ¶ 21; CP 171). This fiber optic cable is one of several major pieces of fiber optic infrastructure that has been built and maintained by a group consisting of the City of Seattle, King County, the University of Washington and numerous smaller cities in King County, known as the "Fiber Consortium". (*Id.*, CP 171) It was determined that six (of 256) strands of this cable were not allocated to any other consortium member, and Edmonds requested membership in the consortium in order to gain control of those six strands by paying the consortium (managed by the City of Seattle) for the pro-rata cost of the six

fiber strands. (*Id.*, ¶ 22; CP 171) This six-strand connection became the second leg of the Edmonds' fiber system.

The City then built the third leg of its system when it joined the six-strand fiber lines leased from the Seattle consortium with a 24-fiber strand connection between the termination of the consortium's fiber at the county line and the City's public works facility. (*Id.*, ¶ 26; CP 172; and map at CP 346)

With money from the bonds that are the subject of this declaratory judgment action, the City now plans to complete its fiber optic backbone system with a fourth, 24-strand segment running from the public works facility to a wireless tower in the north end of the City. (*Id.*, ¶¶ 37-39; CP 174; and map at CP 346) A detailed time-line listing significant events in the City's broadband planning and physical construction of its fiber optic backbone is contained in Jenness dec., Exhibit 2. (CP 185-190)

**4. The fiber optic system has already provided internal benefits to Edmonds**

Several of the initial WSDOT strands were used immediately to replace T-1 lines that were being leased from Verizon to connect the Public Works administration building to the City's internal network and phone system. Additional T-1's were displaced in later months at a savings of approximately \$500/month for each T-1 or about \$44,000 through April of 2009. (Jenness dec. ¶ 20; CP 171)

The City's decision to acquire the six strands of Seattle consortium fiber was arrived at after considering the modest investment required against the immediate savings the City would realize by making its internet connection via the new fiber instead of its existing Internet Service Provider. Since the fiber strands connect to the main internet connection point for the Pacific Northwest at the Westin Building in downtown Seattle, the City realized significant internet performance improvements in addition to the cost savings. (*Id.*, ¶ 23; CP 171).

The new fourth segment to be financed with the bonds will provide "transport" to radio towers that will provide wireless broadband connectivity to police, fire and other City employees working in the field, as well as allowing the City to convert all of its water meters over to wireless meters that are read from centralized receivers connected to the fiber backbone. (*Id.* ¶¶ 37-38; CP 174).

**5. In addition, the City's fiber optic system provides benefits to other public agencies**

The Edmonds fiber optic system has already been utilized not only for the benefit of the City itself, but for a number of other large public agencies in the City that also have a need for ultra high bandwidth communication access. In June 2007, the Edmonds School District (which serves not only Edmonds, but Woodway, Lynnwood, Mountlake Terrace and other adjacent communities) entered into an agreement with the City

in which the City will provide the District with back-up internet connectivity at the District's communications hub in the Edmonds-Woodway High School. (Jenness dec. ¶ 34; CP 173-174) In January 2008, Stevens Hospital (Public Hospital District No. 2 of Snohomish County) likewise entered into an agreement for the City to provide the Hospital with back-up internet connectivity. However, that agreement was then suspended in June 2008 when the Hospital launched a system upgrade internally within its hospital facility. (*Id.* ¶ 35; CP 174). Then in July 2008, Edmonds Community College signed a similar agreement for back-up connectivity where the City would connect to the College network at the City's Public Works Administration building. (*Id.* ¶ 36; CP 174)

**6. Excess capacity is now available on the City's fiber optic system for the use by others in Edmonds**

Capacity of the fiber network is measured in Giga (Billion) bits per second ("Gbps"). Using current electronics technology, each strand of fiber can transmit and receive 10 Gbps simultaneously. (Jenness dec. ¶ 28; CP 172) The overall capacity of the network is defined as the capacity of it's smallest segment which is the Seattle link. The 6 fiber strands to the Westin is now limited to 60 Gbps due to the current state of optical electronics technology. Within a very few years, however, 100 Gbps electronic components (already developed) will become widely

“commoditized” making it economically feasible for those same 6 strands to carry an aggregate 600 Gbps. (*Id.* ¶ 29; CP 172-173)

The Edmonds fiber optic network is able to provide any individual user a symmetric (bi-directional and equal) 1 Gbps connection (1,000 Mbps both directions). For comparison purposes, Comcast’s maximum business service provides asymmetrical bandwidth of 50 Mbps down and 10 Mbps up. Verizon’s FIOS best business service provides asymmetrical bandwidth of 50 Mbps down and 20 Mbps up. Verizon DSL service is significantly less than either of these as it is being discontinued in favor of FIOS in the Edmonds area. (*Id.* ¶ 30; CP 173). Since no user would ever use a continuous 1 Gbps in both directions, a network with 60 Gbps capacity can support many more than (60) 1 Gbps users. The industry uses the term “over-subscription rate (“OSR”) to describe this effect. At this point, it is estimated that the Edmonds network could easily accommodate a 10 to 1 OSR with users never experiencing an appreciable decrease in throughput. (*Id.* ¶ 31; CP 173)

Currently, the City plans to install a standard, 24-strand fiber optic cable along the 4<sup>th</sup> segment. Public use will occur immediately for water meter reading as well as for City and public safety communication. At most, the City’s use would be 10-20 Mbps of the capacity, leaving 239,980 Mbps (99.9916%) capacity still available for use by other public

and private organizations as well as individuals. (*Id.* ¶ 39; CP 174) Installing 24 strands may seem overkill considering the City’s needs, but 24 strand fiber cable is considered the most economical size to install due to its increased durability, wide availability and commodity-like pricing. (*Id.*) . This is the same size (24-strand) cable that the City installed in the third leg of its system, connecting the six strands leased from the Seattle consortium with the 24 strands of the first leg of the system at the public works facility. (*Id.* ¶ 26; CP 172) And, with the addition of this fourth segment of the City’s fiber backbone, the excess capacity of the entire backbone now becomes accessible to many more businesses and residents within the City, which then provides the opportunity to meet the growing demands of the business and residential communities in Edmonds to have access to a ultra high bandwidth internet connection. (*Id.* ¶ 40; CP 174-175)

**7. The City’s fiber optic system offers significant advantages for private individuals and business users with high capacity demands**

The reason that ultra high bandwidth is important is that internet connections today are requiring ever more bandwidth to accommodate high definition visual content, two-way video applications and the need to quickly transport huge data files or ultra high definition images. (Jenness dec. ¶ 41; CP 175) Because the current broadband providers in Edmonds,

Comcast and Verizon, provide asymmetric service (faster download for TV and web browsing, but significantly slower uploads) they do not provide comparable ultra high speed, symmetric internet connections that the City would be able to provide with its fiber backbone. Currently, Comcast's best business package offers only 50 Mbps downstream with 10 Mbps upstream. The Verizon FIOS system offers only 50 Mbps downstream with 20 Mbps upstream. The normal connection speed on the Edmonds Fiber Network is 1Gbps in both directions. (1 Gbps = 1,000 Mbps). (*Id.* ¶ 42; CP 175). This ultra high bandwidth symmetric internet connection is important for any business that is a content provider itself, such as Rick Steves' Europe Through the Back Door, or any other business that wishes to host their own website, take advantage of two-way video conferencing, or utilize central server data back up or other central server record storage services that medical professionals and other data-centric businesses are increasingly using. (*Id.* ¶ 43; CP 175). Examples include:

**a. Europe Through the Back Door**

A prime example of a business headquartered in Edmonds that has a critical need for access to ultra high bandwidth communication is Rick Steves' Europe Through the Back Door ("ETBD"). Rick Steves founded ETBD in 1976 and located the company in Edmonds where he grew up.

(Wilmot dec., September 24, 2009, ¶ 3; CP 562) ETDB is a \$45 million per year enterprise that offers assistance to independent travelers and leads more than 150 tours throughout the European continent annually. (*Id.* ¶ 2; CP 562) ETBD's 75 employees teach travel seminars, research and write European guidebooks, produce a public television video series, and offer travel consulting and numerous bus tours. (*Id.* ¶ 4; CP 562) In addition to being known through the company's website and travel books, ETDB has come to be known to many people throughout the United States and other parts of the world through the public television and public radio travel series ETBD created. (*Id.* ¶ 5; CP 562-563)

The company's headquarters in Edmonds also serves as the ETBD storefront for selling travel merchandise such as luggage; European rail passes; and, a variety of travel guides in print, audio and video formats. Most of ETBD's 75-person staff work in the headquarters building in Edmonds. The company also maintains a well-frequented web site where ETBD sells travel merchandise including European rail tickets and a host of travel accessories. (*Id.* ¶¶ 7-8; CP 563)

The ETBD website is a very popular source of travel information, and the increasing demand for downloadable audio guides and video clips now requires that the website be hosted at a co-location facility in Tukwila that can provide the ultra high speed internet connection required by a site

that serves rich video and audio content to so many visitors. While Tukwila is the best location ETBD has found so far to locate that website system, the Tukwila location requires at least a 45-minute drive each way through Seattle to access the site from the ETBD headquarters in Edmonds. (*Id.* ¶¶ 9-10; CP 563) If the company had access to the City of Edmonds' ultra high speed symmetrical internet services, ETBD could then potentially host the website at its Edmonds' headquarters, and use the remote Tukwila facility as the back-up location. (*Id.* ¶ 11; CP 563-564)

**b. Dewar, Meeks & Ekrem, CPA**

Another business in Edmonds that would greatly benefit from access to the City's fiber system is Dewar, Meeks & Ekrem, CPA ("DME"). DME is a full service CPA firm providing auditing, tax preparation and a full array of financial planning services from their offices in Edmonds and Marysville. (Meeks dec., September 24, 2009, ¶ 3; CP 556)

In 2003, DME introduced "Our-CPA.com" a new accounting service that uses the Internet to give clients more time to grow their businesses by finding new customers, or providing more value to the ones they have. Using one of several popular accounting packages DME can issue invoices, pay bills and employees and prepare client financial statements. Clients can choose from Quicken, QuickBooks, Master

Builder, MAS90, Peachtree, Great Plains, and others. DME performs all the bookkeeping functions on-site and clients have full on-line access to their financial information on a 24/7 basis. Access is over the internet so that clients can view the financial status of their enterprise from their office, home or favorite vacation spot. (*Id.* ¶¶ 4-7; CP 556-557)

DME is thus actively embracing a new paradigm in business computing known as “Software as a Service” (“SAAS”) or sometimes referred to as “Cloud Computing”. Almost all of DME’s software products are hosted at the software vendor or at a third party hosting company and accessed by DME employees over the internet. The benefit of this model is that DME does not require extensive technical support at DME’s own offices to manage the various software packages, databases and hardware platforms, nor does DME purchase or need to install any software or associated upgrades on its local computers. Instead, DME pays a low monthly fee for use of the various software packages it requires on a per user basis. (*Id.* ¶¶ 8-9; CP 557). But having all business software located remotely makes having a reliable, ultra high speed bandwidth connection to the internet imperative so that users can achieve the same speed and responsiveness they would experience if the software were installed locally. (*Id.* ¶ 11; CP 557)

**c. Procom Industries, Inc.**

Rick Jenness, the City's fiber optic consultant, also owns his own company located in Edmonds which has an increasing need to connect to ultra high bandwidth communication. Procom Industries, Inc. ("Procom"), is a small, home-based information technology consulting firm that does business with both public and private sector clients across the United States and Western Canada. (Jenness-Procom dec., September 21, 2009, ¶ 2; CP 559)

Procom partners with three other independent consultants - located respectively in Issaquah, Honolulu and Williamsburg, Virginia - to deliver specialized IT consulting services to their clients. Procom's largest clients are the US Department of Justice and the US Department of Homeland Security, both of which are headquartered in Washington, D.C. In addition to its work for the City of Edmonds, Procom also provides consulting services to such other public agencies as the Departments of Public Safety for the States of California, Utah, Ohio, Missouri, New York, and Virginia. (Jenness-Procom dec. ¶¶ 4-6; CP 559)

Though much of Procom's work for these clients can be performed from its office in Edmonds, Jenness is often required to make presentations and attend meetings with the two federal agencies listed above once or twice every month. The meetings are necessary for the two

Federal agencies to have face-to-face contact with the agency employees and the consultants working for them. Ironically, more than half the people in those meetings participate via video conferencing, even though most of them have offices within 30 minutes of the meeting room itself in the Washington D.C. area. (*Id.* ¶¶ 7-10; CP 560)

Unfortunately for Jenness and his company, the minimum necessary bandwidth (50 Mbps–bidirectional) is not economically available in the Edmonds area. But if ultra high speed internet capability was available to Procom from the City’s fiber optic system, Jenness would be able to participate in perhaps 60 percent of these meetings by video conference in the same way that other participants “attend” from close by in Washington D.C. (*Id.* ¶¶ 12-13; CP 560)

**8. The City’s ultra high bandwidth communication system can also foster general economic development**

Beyond the three individual examples of the increasing value of access to ultra high bandwidth communication noted above, the development of high speed broadband system is increasingly recognized to be an effective economic development program for the whole community.

James Baller, whose declaration on the issue of economic development was submitted in support of this summary judgment motion, is “widely recognized as the nation’s most experienced and knowledgeable

attorney on public broadband matters.” (Baller dec., July 2, 2009, ¶ 6; CP 34) . Baller is also the founder and president of the US Broadband Coalition, a large and diverse group of organizations that is working to develop consensus on the components of a national broadband strategy. The group includes communications providers of all kinds, high technology companies, utilities, state and local governments, educational institutions, labor unions, equipment manufacturers, public interest groups, and many other stakeholders in America’s broadband future. (Baller dec. ¶ 8; CP 35) As the Federal Communications Commission stated in “Bringing Broadband to Rural America: Report on a Rural Broadband Strategy,” 2009 WL 1480862 at 25, (F.C.C.) (rel. May 22, 2009), broadband is “the interstate highway of the 21st century for small towns and rural communities, the vital connection to the broader nation and, increasingly, the global economy.” (*Id.* ¶ 9; CP 35-36)

In June 2008, Baller was the principal author of a white paper entitled, “Bigger Vision, Bolder Action, Brighter Future: Capturing the Promise of Broadband for North Carolina and America.” (*Id.* ¶ 10; CP 36; and Attachment B.; CP 45-143) The white paper contains an extensive discussion of the importance of high-capacity broadband networks to the success of America’s communities, and to the United States as a whole, in the increasingly competitive knowledge-based global economy. While

some of the data in Baller’s white paper for the State of North Carolina have been superseded by more recent data, the new data are consistent with – indeed, they reinforce – the trends, relationships, and conclusions reflected in that white paper. The white paper demonstrates that the United States has fallen far behind the leading Asian and European nations on most of the widely-accepted criteria of success in broadband deployment. (*Id.*, ¶ 11; CP 36-37)

#### IV. ARGUMENT

##### A. Introduction

Similar to its compression of the procedural and factual background of this case, appellant has likewise compressed the discussion of the legal issues that were decided by the Superior Court.

While assigning error to the trial court’s underlying ruling, appellant provides no argument or briefing directly challenging the Court’s declaration that (1) as a home rule code city organized under Title 35A RCW, Edmonds has the authority to offer telecommunications services to private parties, and (2) Edmonds has explicit statutory authority to invest in broadband services to the public as an economic development program pursuant to RCW 35.21.703. (Order granting summary judgment ¶2; CP 11) Instead, appellant’s legal argument

challenges the third part of the Court's ruling that (3) the City's bond ordinance is in all respects valid. (*Id.*, ¶3; CP 11)

Having failed to provide argument challenging the trial court's determination of the first two issues decided in ¶2 of the Court's order granting summary judgment (CP 11), those issues should be considered conclusively determined. *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 809, 576 P.2d 54 (1978). ("At the outset we note appellant has not argued or briefed six of the challenged findings of fact. Thus, he is deemed to have abandoned any claim of error as to them") However, it is difficult to discuss appellant's attack on the validity of the bonds – whose purpose is to fund the fourth leg of a broadband system that has been conclusively determined by the Court to be an authorized public purpose – without also discussing the underlying legal issues that led the trial court to that conclusion. At the risk of making this brief longer than would otherwise be required, Edmonds therefore addresses those issues as well.

**B. Standard of review**

The standard of review on appeal of a summary judgment is de novo. "When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court." *Thompson v. Peninsula School District*, 77 Wn. App. 500, 504, 892 P.2d 760 (1995).

In a summary judgment proceeding, the trial court is required to view the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). Summary judgment, however, is appropriate where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The answer of the public representative in this case (CP 597-598) admits all factual allegations in the complaint, but challenges the assertion that the City of Edmonds has the legal authority to offer telecommunications services to the public. As a consequence, there are no material issues of fact in dispute, and summary judgment on the issues of law presented to the trial court was appropriate.

**C. Edmonds has broad “home rule” powers to legislate**

The City of Edmonds is a “code city” organized under Title 35A RCW, and as such has the full range of authority granted to any other class of city. RCW 35A.21.160. Code cities thus have the same “home rule” powers as first class charter cities. “A first class city may make and enforce within their limits ‘regulations [that] are not in conflict with general laws.’ Thus, a first class city may, without sanction from the legislature, legislate

regarding any local subject matter.” *Leskovar v. Nickels*, 140 Wn. App. 770, 776, 166 P.3d 125 (2007); internal footnotes omitted, citing *Heinsma v. Vancouver*, 144 Wn.2d 556, 560, 29 P.3d 709 (2001) (upholding city’s authority to provide employee benefits to domestic partners).

In addition, code cities have a broad power to enter into contracts for the benefit of the city. “The power to contract, like other specific and general powers conferred upon optional code cities ‘shall be liberally construed in favor of the municipality.’ RCW 35A.01.010. A city may enter into any contract so long as it does not conflict with the constitution, a statute, or a city’s own charter or ordinances.” *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007) (adjacent code cities have the authority to contract with the City of Seattle to agree to forgo their right to create their own electric utility during the term of a franchise in which Seattle agreed to supply those cities with electric service).

**1. *Winkenwerder v. Yakima* is the classic precedent for a city’s right to contract with private parties**

The general power to contract also extends to a city’s right to contract with private parties for use of the city’s property. The classic case upholding the powers of cities to contract with private parties is *Winkenwerder v. Yakima*, 52 Wn.2d 617, 328 P.2d 873 (1958). In *Winkenwerder*, a local hardware store owner challenged the right of the city to lease out the top of its parking meters to an advertising company

for the purpose of displaying advertising signs on those meters. The Supreme Court upheld the city's contract as one example of the city's broad powers to lease its property to private parties and rejected the contention that advertising contract for use of the parking meters represented a utility franchise for private use of the streets upon which a vote must be taken under the city's charter.

*Winkenwerder* affirms the general principle upholding expansive city powers to lease its property that was already established in Washington law: "It is generally recognized that a sovereign may lease its property to private parties, so long as there is no interference with the public use." *Winkenwerder*, 52 Wn.2d at 624, citations omitted.

Edmonds' plan to allow private access to the City's fiber optic system follows from this general rule. Providing private citizens access to ultra high bandwidth communication will not in any way interfere with the public use of that system. The City's investment in its base, 24-strand fiber optic system creates associated excess capacity that may be used by other parties without any interference with the City's own use of its telecommunication system. (Jeness dec. ¶ 39; CP 174)

**2. Recent Supreme Court decisions reinforce those broad legislative powers**

A recent expression of these general principles of local authority was provided by the Washington Supreme Court in the context of a

criminal case involving a challenge to a search incident to an arrest where the local City of Olympia ordinance imposed a criminal sanction for littering, whereas the corresponding State statute imposes only a civil sanction for the same offense. *State v. Kerwin*, 165 Wn.2d 818, 203 P.3d 1044 (2009). The Supreme Court upheld the local ordinance as not in conflict with the general state law. The Court underscored the broad principles of local legislative authority. First, “We presume an ordinance is valid unless the challenger can prove the ordinance is unconstitutional.” *State v. Kerwin*, 165 Wn.2d at 865. Second, “An ordinance may be deemed invalid in two ways: (1) the ordinance directly conflicts with a state statute or (2) the legislature has manifested its intent to preempt the field.” *Id.* Third, “However, we ‘will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that is clearly the legislative intent.’” *Id.*, at 826, citing *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001).

The same rule was also reinforced in *Lawson v. City of Pasco*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 1492807 at 4 (April 15, 2010) (upholding Pasco’s ordinance prohibiting recreational vehicles in trailer parks as valid and not in conflict with the state’s Manufactured/Mobile Home Landlord-Tenant Act, ch. 59.20 RCW).

**3. *Issaquah v. Teleprompter* provides nearly an exact parallel to this case upholding the power of code cities to offer telecommunication services to the public**

In accord with the principles reiterated in *State v. Kerwin* and *Lawson v. City of Pasco*, the operation of a fiber optic or other telecommunication system by a City is not in conflict with any general laws of the State. In fact, the Supreme Court previously ruled that a code city may take over, own and operate a cable telecommunications system in that city. *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 611 P.2d 741 (1980). Issaquah – a code city like Edmonds – had entered into a franchise agreement with the cable company, Teleprompter, which provided that Issaquah could purchase and take over the ownership and operation of that cable TV function. When the city did just that, Teleprompter sued claiming that Issaquah had no authority to operate a cable communication system, because there was no express statutory authority to do so, as there is for example for water or electric service under Ch. 35.92 RCW.

The Supreme Court in *Issaquah v. Teleprompter* concluded that since there was no general law restricting the general authority of Issaquah, that the City's decision to own and operate the cable TV system did "not exceed the broad powers granted by the optional municipal code." 93 Wn.2d at 575. In a formal opinion discussed below, the Attorney

General found this decision to be controlling: “*Issaquah* establishes that ‘home rule’ cities and counties do not need express statutory authority to exercise their legislative authority.” AGO 2003 No. 11, at 3.

The Supreme Court also noted that access to cable TV was not a necessity, and therefore not a utility. *Issaquah v. Teleprompter*, 93 Wn.2d at 574. The Court observed that there were other ways to receive television signals, including rooftop antennas. *Id.* Similarly in Edmonds, access to the City’s ultra high bandwidth communication system is not a necessity. There are other ways to access the internet, including the Comcast and Verizon systems noted in the record (Jeness dec. ¶ 42; CP 175), or even by means of a wireless connection through a cell phone.

**a. *Chemical Bank* does not void home rule powers of cities**

Appellant argued in the trial court that *Chemical Bank v. Washington Public Power Supply System*, 99 Wn.2d 772, 666 P.2d 329 (1983) is a “giant blunderbuss” waiting to blow any case of implied powers out of the water at the whim of the courts, and that *Chemical Bank* therefore overruled *Issaquah v. Teleprompter*. (Response Brief at 5:3-20; CP 28.) In reality, however, *Chemical Bank* is limited to its facts and limited in scope. The case dealt with the unique power purchase contracts in which the “participants” had agreed to pay for purchase power, even if it were not produced – thus incurring a dry hole risk without the control

over the investment that an owner would have had. Moreover, the participants had further agreed to “step up” and assume both the shares and the dry hole risks of other participants, should those participants fail in their obligations under the purchase contracts. This unfettered risk, the Supreme Court ruled, was unlawful without specific statutory authority, especially in light of the state’s legislative control over joint operating agencies under RCW 43.52. *Chemical Bank*, 99 Wn.2d at 798 (summarizing its holding). In other words, the WPPSS participants neither agreed to purchase electricity when it was produced, as in a normal purchase power contract, nor did they retain the control that an owner would have in developing a new project – where there is obviously a dry hole risk, but where the owner has direct control over the risk of its investment. *Id.*

The fact that the Supreme Court in *Chemical Bank* rejected the argument that home rule allowed municipal entities to enter into this unique kind of power purchase contract therefore does not create a blunderbuss to shoot down any home rule argument. *Chemical Bank* was instead a rifle shot used to shoot down unique participant agreements which threatened to make municipal utilities in the State of Washington liable for much of the \$7.2 billion in principal and interest owed to bondholders for construction of the dry holes represented by the

termination of two nuclear plants that WPPSS never completed. In fact, only four years after its decision in *Chemical Bank*, the Washington Supreme Court rejected the view that its *Chemical Bank* decision reflected a literal interpretation of municipal statutory authority and emphasized the narrowness of that ruling. “To reach its conclusion, the *Chemical Bank* I court did not resort to maxims of statutory construction requiring literal interpretation of statutory terms. . . . Rather, the court concluded that the express proprietary authority to supply residents with electricity did not include the power to unconditionally guarantee to pay for no electricity.” *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 698, 743 P.2d 793 (1987) (upholding the authority of municipal electric utilities to pay for cost-effective conservation measures installed within private property as being the equivalent of investing in new generation).

**b. *Issaquah v. Teleprompter* was not overruled by *Chemical Bank***

*Issaquah v. Teleprompter* was neither discussed nor even cited in *Chemical Bank*. Accordingly, *Chemical Bank* cannot be read as overruling that precedent. “Although *stare decisis* limits judicial discretion, it also protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims. Therefore, overruling prior precedent should not be taken lightly.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wash.2d 264, 278, 208 P.3d 1092 (2009)

(reaffirming general rule of retroactive application of change in precedent).

It is therefore not at all surprising that neither the Attorney General in AGO 2003 No. 11, nor the City of Edmonds in its opening trial court brief, cited to *Chemical Bank*. As noted above, the Supreme Court in *Tacoma v. Taxpayers* emphasized the narrow holding of its *Chemical Bank* decision. *Chemical Bank* is unique to the narrow issue of power purchase contracts and does not overrule the *Issaquah v. Teleprompter* precedent regarding communications systems and home rule authority. The Attorney General therefore did not ignore any relevant intervening precedent in stating that “*Issaquah* establishes that ‘home rule’ cities and counties do not need express statutory authority to exercise their legislative authority.” AGO 2003 No. 11, at 3.

**c.     The Supreme Court has cited *Chemical Bank* as support for expansive home rule authority**

Not only did *Chemical Bank* neither mention nor overrule *Issaquah v. Teleprompter*, but the Supreme Court later cited *Chemical Bank* in support of the principle that municipal home rule powers are expansive. “Vancouver is a ‘home rule’ city; it ‘may exercise powers that do not violate a constitutional provision, legislative enactment, or the city’s own charter.’” *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 560 n.2, 29 P.2d 709 (2001); citing *Chemical Bank*, 99 Wn.2d at 792

(upholding the right of Vancouver to extend the health insurance benefits to its employees' domestic partners).

**4. In contrast to the home rule powers of cities, a PUD's authority to provide telecommunication service is limited by statute to internal and wholesale transmission**

Public utility districts, in contrast to cities and counties, do not have broad general powers. As special purpose districts, they have been traditionally limited to the powers specifically granted by statute. “[C]ourts have not allowed PUDs to stray far from their express authority.” *Kightlinger v. Public Utility Dist. No. 1 of Clark County*, 119 Wn. App. 501, 509, 81 P.3d 876 (2003).

In 2000, however, the State Legislature did grant express power to public utility districts to operate telecommunications systems, but that authority is limited to providing internal communications for the PUD's own operations and to wholesale telecommunications services. RCW 54.16.330. The Attorney General has formally interpreted this authority to prohibit PUDs from providing telecommunication services to end users. AGO 2001 No. 3.

In contrast to the express and limited grant of authority to PUDs, however, the State has not placed any statutory limitation on the general home rule powers of code cities, such as Edmonds, to offer telecommunication services.

**5. The Attorney General affirms the power of cities to provide telecommunication services to private parties**

Two years after the Attorney General emphasized the lack of authority of PUDs to offer telecommunication services to end users, the Attorney General determined that first class charter cities, code cities and charter counties do have the legal authority under Washington law to own and operate a telecommunications system available for private as well as government use. AGO 2003 No. 11. (CP 592-595) “First class and code cities and charter counties may offer telecommunications services to their residents to the extent not specifically barred by state statute.” *Id.* at 1.

While the formal opinions of the Attorney General are not binding on the courts, they are generally accorded deference. “Although not controlling, we give Attorney General opinions ‘considerable weight.’” *Bowles v. Dep’t of Ret. Sys.*, 121 Wn.2d 52, 63, 847 P.2d 440 (1993) (quoting *Everett Concrete Prods., Inc. v. Dep’t of Labor & Indus.*, 109 Wn.2d 819, 828, 748 P.2d 1112 (1988)). Moreover, an AGO constitutes notice to the legislature of the department’s interpretation of the law, and greater weight attaches to an agency interpretation when the legislature acquiesces in that interpretation. *Bowles*, 121 Wn.2d at 63-64, 847 P.2d 440. In the intervening six years since AGO 2003 No. 11 was issued, the Legislature has taken no action to limit the broad authority of cities to operate telecommunication systems recognized in the AGO.

**6. McQuillin also provides authority for cities to offer telecommunication services**

The leading treatise on municipal law, McQuillin, *Municipal Corporations*, likewise states that as a general proposition municipalities are authorized to offer telecommunications services, even if there are competing companies that already do so. “A city or county is authorized to provide telecommunication services to its own residents even if that means the county is competing with another telecommunications provider.” 12 McQuillin, *Municipal Corporations*, 3<sup>rd</sup> Ed. Rev., 72, § 34:13, citing *GTE Northwest, Inc. v. Oregon Public Utility Com’n*, 179 Or. App. 46, 39 P.3d 201 (2002).

**7. The U.S. Supreme Court likewise acknowledges the broad powers of home rule cities to offer telecommunication services**

The Telecommunications Act of 1996 was passed by Congress to promote the expansion of telecommunications services and competition for those services. The federal act preempts any state and local laws or regulations expressly or effectively “prohibiting the ability of any entity” to provide telecommunications services. 47 U.S.C. § 253. As a result of this sweeping federal preemption, the question inevitably arose as to whether a state’s limitation on the authority of one of its local government subdivisions to provide telecommunication services - such as the prohibition on retail telecommunication services in RCW 54.16.330 – was

a violation of the federal preemption of any law that curtailed the power of “any entity” to provide those services.

In 2004, the U.S. Supreme Court answered that question in the negative, holding that the federal statute was not meant to override a state’s power to define the powers of its own political subdivisions. *Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S.Ct. 1555 (2004). In doing so, however, the Supreme Court, acknowledged the distinction between a “general law” city which would require affirmative statutory authority, and a home rule city which would have the broad authority to provide telecommunications services without specific statutory authority. “In contrast to a general law city, a home rule city has state constitutional authority to do whatever is not specifically prohibited by state legislation.” *Nixon v. Missouri Municipal League*, 541 U.S. at 135, n.3, citing *City of Lockhart v. United States*, 460 U.S. 125, 127, 103 S.Ct. 998 (1983).

But even though the federal act does not automatically ordain municipal subdivisions of all states with the power to provide telecommunication services, the Supreme Court noted that “the Chairman of the FCC and Commissioner Tristani minced no words in saying that participation of municipally owned entities in the telecommunications business would ‘further the goal of the 1996 Act to bring the benefits of

competition to all Americans . . . ’ ” *Nixon v. Missouri Municipal League*, 541 U.S. at 131.

**D. In addition to home rule, Edmonds has express statutory authority to engage in economic development programs**

In addition to the general power of code cities to legislate and otherwise act in all areas where they are not specifically preempted from doing so by State law, Washington cities are expressly granted the authority to engage in economic development programs:

“It shall be in the public purpose for all cities to engage in economic development programs. In addition, cities may contract with nonprofit corporations in furtherance of this and other acts relating to economic development.”

RCW 35.21.703.

What is considered to be “economic development” is wide ranging, and deference is given to legislative determinations. In a challenge to partial public funding of the Mariner’s new stadium, the Supreme Court pointed out that “the presence in a community of a professional sports franchise provides jobs, recreation for citizens, and promotes economic development . . . ” *CLEAN v. State*, 130 Wn.2d 782, 796, 928 P.2d 1054 (1996). But the Court also admitted that there could be disagreement about that public benefit. Yet any “disagreement that underlies that debate, however, is best resolved by the people’s elected representatives in the

Legislature. In our judgment, they are in a superior position to evaluate the extent to which a public purpose is served by the realization of the perceived benefits. In deciding this question, we believe it was appropriate for the Legislature to consider that the concept of what is public purpose is not a static concept. Rather, it is a concept that must necessarily evolve and change to meet changing public attitudes.” *CLEAN v. State*, 130 Wn.2d at 796-797.

Just as Safeco Field is a valued economic development tool for Seattle and King County, the ultra high bandwidth communication offered by the City of Edmonds will be an economic development tool of the City that can provide jobs and promote economic development in its own community. The Edmonds’ fiber system will allow individuals and businesses in Edmonds to reach the broader world of ultra high bandwidth communication through access to the City’s excess fiber capacity. As a result, those individual entrepreneurs and businesses will be able to remain in Edmonds and grow their businesses in their own home town. (Wilmot dec. ¶ 13; CP 564; Meeks dec. 13; CP 558)

In the 2009 legislative session, the Washington Legislature adopted and the Governor signed a bill promoting the development of broadband internet service in the State as an effective program of economic development. ESSHB 1701, Ch. 509, Laws of 2009; CP 544-

555. Section 1(1) of Ch. 509 explicitly endorses the deployment of high-speed broadband as an enhancement to economic development. “The legislature finds that *the deployment and adoption of high-speed internet services and technology advancements enhance economic development and public safety for the state’s communities.*” (CP 544; emphasis added) The legislative findings are now reported by the code reviser following the text of RCW 43.105.370. Subsection (2) of the legislative findings also supports a strategic partnerships with public and private entities to expand broadband. “The legislature intends to support strategic partnerships of public, private, nonprofit, and community-based sectors in the continued growth and development of high-speed internet services and information technology.” (CP 545) And in subsection (3), the legislature further recognizes the central importance of high-speed internet service to the State’s economy. “In recognition of the importance of broadband deployment and adoption to the economy, health, safety, and welfare of the people of Washington, it is the purpose of this act to make high-speed internet service more readily available throughout the state . . .” (CP 545)

In sum, RCW 35.21.703 gives cities express statutory authority to engage in economic development programs. Therefore, to the extent that a particular activity is acknowledged to be - or indeed defined to be - an aspect of “economic development”, a city has express authority to engage

in that particular activity. In Ch. 509 Laws of 2009, the Legislature recognized access to broadband not only as being critical to the health, safety, and welfare of the people of Washington, but as being a way to "enhance economic development." Ch. 509, Laws of 2009, § 1(1). (CP 544) Developing access to broadband is thus explicitly defined by the legislature to be a particular aspect of economic development. This in turn then brings the offering of broadband services to the public within the express statutory authority of Edmonds to engage in economic development under RCW 35.21.703.

**E. Municipal bonds issued for public purposes may include providing a public service to private parties**

Despite waiving argument regarding Edmonds' home rule powers and its express statutory authority to engage in economic development programs that were upheld by the trial court, Appellant attacks the legality of the City's bonds because, in its view, they will not be issued for "strictly municipal purposes." (Appellant's Br. at 12-16) But Appellant has adopted a constricted view of Washington that is unwarranted. Appellant misinterprets what is a "public purpose," under Washington law, and likewise misinterprets case law that Appellant itself cites in support of its argument. Further, Appellant ignores nearly 100 years of Washington precedent affirming the validity of municipal general

obligation bonds used to provide services to the public as well as to the city itself.

**1. Code cities have alternate sources of authority to issue bonds for municipal purposes**

Code cities, such as Edmonds, have the broadest possible home rule powers under Washington law. Omnibus authority under RCW 35A.11.020 provides that “The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. . . In addition and not in limitation, the legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state . . . ”

Accordingly, code cities not only have authority under RCW 35.37.040, applicable to “Every city and town . . .”, to issue bonds for strictly municipal purposes. Through the omnibus powers of RCW 35A.11.020, code cities also have authority under the enumerated powers of first class cities in RCW 35.22.280(4) “. . .to borrow money for corporate purposes on the credit of the corporation, and to issue negotiable bonds therefore . . .”

Moreover, the Washington Supreme Court has looked beyond statutes to reason that the State Constitution provides cities and counties with independent authority to issue councilmanic bonds. “The state

constitution, however, permits counties to incur indebtedness without a public vote if the indebtedness does not exceed 1.5 percent of the assessed value of property in the county. . . The positive corollary to CONST. art VIII, § 6 and the statute [RCW 39.36.020(2)(a)(ii) – requiring a vote for debt issues above 1.5 percent] is that a county *may* incur indebtedness of *less* than 1.5 percent of the assessed value of property in the county, without a vote of the people, by issuance of councilmanic bonds.” *King County v. Taxpayers of King County*, 133 Wn.2d 584, 608, 949 P.2d 1260 (1997); emphasis by the Court; (upholding the validity of King County councilmanic bonds to finance a new major league baseball stadium in a declaratory judgment action testing the validity of the bonds under RCW 7.25).

**2. “Municipal purpose” is far broader than Appellant’s forced interpretation**

The underlying question that Appellant poses is whether creating a telecommunications system for the use by the public as well as the city represents a municipal purpose. As this Court reiterated in *In re City of Lynnwood*, 118 Wn. App. 674, 684, 77 P.3d 378 (2003), “What is a public municipal purpose is not susceptible of precise definition, since it changes to meet new developments and conditions of time.” (Quoting *United States v. Town of North Bonneville*, 94 Wn.2d 827, 833, 621 P.2d 127 (1980), which in turn quoted from 15 Eugene McQuillin, MUNICIPAL

CORPORATIONS § 39.19 AT 32 (3<sup>rd</sup> ed. 1970.)). In *City of Lynnwood* the Court upheld the validity of continuing to run a private shopping center by the public facility district which was created by the city to eventually establish the Lynnwood Convention Center. The Court concluded that the shopping center was being operated in what was then a surplus of usable space. “That area would lie vacant pending Phase III of the project, if it were not being rented out, which would serve no public purpose whatsoever, and which would be fiscally stupid.” *City of Lynnwood*, 118 Wn. App. at 688.

Similarly, if Edmonds were prohibited from offering excess capacity on its broadband system to individuals and private businesses, that surplus capacity would serve no municipal purpose and it likewise would be “fiscally stupid.” If Appellant’s argument were accepted, it would mean, that not only would Lynnwood have been prevented from earning money from its shopping center property in *City of Lynnwood*, but no bond proceeds could be used by a city for the purchase and installation of parking meters if any of those parking meters were intended to produce advertising revenue, as the Supreme Court long ago endorsed in *Wikenwerder v. Yakima*.

Appellant’s constricted reading of the what is a “corporate” or “strictly municipal” purpose is further highlighted by reference to

RCW 35.97 which provides municipalities with statutory authority to create heating systems. RCW 35.97.030 authorizes a municipality to purchase and maintain a system of heating “for the purpose of supplying its inhabitants and other persons with heat.” The statute goes on to declare that the operation of a heating system – for individuals and private businesses – is a “public use” and a “*strictly municipal purpose.*” (Emphasis supplied.) There is no requirement in that statute, however, that the heat produced by such a heating system be supplied to public buildings at all. Yet this public service business is still declared to be a “strictly municipal purpose.” And this declaration prevails even though RCW 35.97.030 also states that private companies may not be prevented from offering their own competing heating systems to the public.

The Supreme Court has also weighed in on the issue of municipal purpose. The challenges to King County’s construction of the Mariner’s baseball stadium and its financing represent an exhaustive examination of the “public purpose” question. In fact, the Supreme Court considered the issue in three different challenges to the baseball stadium and its financing. *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996); *Citizens for More Important Things v. King County*, 131 Wn.2d 411, 932 P.2d 135 (1997); and *King County v. Taxpayers of King County*, 133 Wn.2d 584, 949 P.2d 1260 (1997).

In *CLEAN v. State*, the Supreme Court held that construction of the baseball stadium confers a benefit of a “reasonably general character.” 130 Wn.2d at 795-796. The Court also noted that “we are not unmindful of the fact that the Seattle Mariners may also reap benefits as the principal tenant of the publicly owned stadium. . . .” But the Court found “That fact is not fatal to the act, however, as long as a public purpose is being served. The fact that private ends are incidentally advanced is immaterial to determining whether legislation furthers a public purpose.” 130 Wn.2d at 796; citing *United States v. Town of North Bonneville*. The fact that a single private party – the Seattle Mariners – was a primary beneficiary of the public investment in the stadium did not deter the Court from upholding the public purpose of the investment. Indeed the Court cited *North Bonneville* as support. Accordingly, the argument of Appellant that the public investment in *North Bonneville* was valid only because specific beneficiaries of the Town’s investment were unknown (App. Br. at 9) misstates that precedent. Appellant’s misreading of *North Bonneville* is further underscored by the fact that building a major league baseball stadium was obviously not “necessary” for the continuing viability of King County. In fact, the Court found that the degree to which the stadium will enhance the economy and quality of life of King County “is debatable.” *Id.*

In the next stadium case, the Supreme Court confirmed that the expenditure of preconstruction costs on the stadium – without yet having a contract from the Mariners to occupy the stadium – was for a valid public purpose. *Citizens for More Important Things v. King County*, 131 Wn.2d at 416.

In the third stadium case, the Supreme Court - in a declaratory judgment action under RCW 7.25 similar to this case - declared that the municipal bonds issued to finance the stadium were for a valid public purpose and that the bonds did not provide unconstitutional aid to the Mariners. *King County v. Taxpayers of King County*, 133 Wn.2d at 416. In arriving at this determination the Supreme Court explicitly addressed and rejected the core argument made by Appellants here – that any benefit to a private party makes the Edmonds bonds invalid as not being for a “corporate” or “strictly municipal” purpose” and therefore an unconstitutional lending of credit. The Court noted that “At oral argument, counsel for the Taxpayers advanced the view that *any* benefit to a private organization may be violative of these constitutional provisions. We disagree. As we stated in *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987), . . . .An incidental benefit to a private individual or organization will not invalidate an otherwise valid public transaction.”

*King County v. Taxpayers of King County*, 133 Wn.2d at 596; emphasis by the Court.

**3. The issue of providing services to the public as well as to a city itself was decided nearly 100 years ago**

Whether proceeds from municipal bonds used to fund municipal infrastructure may also be used to provide services for the benefit of private parties is, in fact, a question that was answered by the Washington Supreme Court more than 95 years ago. The Supreme Court affirmed that use. *Chandler v. City of Seattle*, 80 Wash. 154, 141 P. 331 (1914). In *Chandler*, the Supreme Court rejected a challenge to Seattle's use of general obligation bonds to finance a steam plant to augment its existing hydro generation where the output of that investment would produce electricity for sale to private individuals as well as for the city's own use. The Court held that it was a legitimate use of bond proceeds and a legitimate public purpose for the city to sell electricity to private individuals to offset the costs of the city's own use of the electricity. *Chandler v. City of Seattle*, 80 Wash. at 157.

Relying on an earlier eminent domain case where the City of Tacoma had condemned property for the purpose of generating electricity, including sales to private individuals, the Court declared the anticipated use of the Seattle bond proceeds to be valid. *Id.*, 80 Wash. at 158. Quoting from the earlier Tacoma case, the Supreme Court noted that "A private use

incidentally included will not defeat the right to condemn for public use so long as the public use is maintained.” *Id.*, 80 Wash. at 159, quoting *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 428, 107 P. 199 (1910).

Appellant’s citation to *Lasilla v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978) for support of its position (App. Br. at 10-11) is thus inapposite. In *Lasilla*, the City of Wenatchee had condemned certain property for the purpose of reselling that same property to a private buyer. The condemned property was therefore never put to public use at all. A far different situation exists here. The City of Edmonds’ primary purpose in constructing the fourth segment of its fiber backbone is to allow the remote reading of water meters throughout the City. (Jeness dec ¶¶ 37-39; CP 174) This is the same circumstance as in *Chandler v. City of Seattle* and in *Tacoma v. Nisqually Power Co.* The telecommunication infrastructure will be used first for the City’s own use and secondly for providing a public service to the City’s residences and businesses.

Indeed, if Appellant’s argument were to prevail, then no part of a city park and no part of a city convention center funded with municipal bonds or obtained through condemnation could ever be rented or leased by private entities. Yet, the Washington Supreme Court has held otherwise. “The constitution prohibits the taking of private property for a private use. However, this language does not create a blanket prohibition on the

private use of land condemned by the State. As long as the property was condemned *for the public use*, it may also be put to a private use that is merely incidental to that public use.” *Washington State Convention Center v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998); emphasis by the Court; citing both *Chandler v. City of Seattle*, and *Tacoma v. Nisqually Power Co.* (upholding the condemnation of property for the Washington State Convention Center).

In fact, in *Chandler*, the Supreme Court went beyond approving the use of bond proceeds to pay for a plant to augment electricity supply where the surplus would be used for the sale of electricity to private parties as well as the use of electricity for the city’s own use. The Court found that, independent of the city’s use, “It has also been held, and we think correctly, that furnishing current for lights for the people in their private homes is a public service.” *Chandler v. City of Seattle*, 80 Wash. at 160; citation omitted.

## V. CONCLUSION

Access to ultra high bandwidth communication has come to be recognized as an increasingly important component of economic development, as well as an important attribute of providing basic city services. In 2009, the Legislature explicitly endorsed the expansion of high-speed broadband services throughout the state in Ch. 509, Laws of

2009. Accordingly, the City of Edmonds' plan to offer excess capacity on its ultra high bandwidth communication system to private individuals is an economic development tool expressly authorized under the authority of RCW 35.21.703.

Beyond that express statutory authority for economic development, the City of Edmonds is a code city with broad powers to engage in any activity that is not otherwise prohibited by general laws. Over 25 years ago, the Washington Supreme Court upheld the authority of a similarly situated code city under that general authority to both own and operate a TV cable system for the benefit of its residents. *City of Issaquah v. Teleprompter Corp.* Further, the Washington Attorney General issued AGO 2003 No. 11 confirming that first class cities, code cities and charter counties have the authority to provide telecommunication services to their residents. In the intervening time between the issuance of that formal Attorney General opinion and now, the Legislature has not modified any general law that would cut back on this authority.

Appellant's attempt to prevent the City of Edmonds from using excess capacity on its fiber optic system to provide broadband access to individuals and businesses in the City is thus based on a pinched reading of "public purpose." In the three Mariners' stadium cases - *CLEAN v. State*, *Citizens for More Important Things v. King County*, and *King*

*County v. Taxpayers of King County* – the Supreme Court interpreted public purpose far more broadly, noting that “an incidental benefit to a private individual or organization will not invalidate an otherwise valid public transaction.” Indeed, as far back as 1914, the Supreme Court in *Chandler v. City of Seattle* held that it was a legitimate use of bond proceeds and a legitimate public purpose for the city to sell electricity to private individuals to offset the costs of the city’s own use of electricity.

The City of Edmonds therefore asks this Court to affirm the order on summary judgment entered by the Presiding Judge of the Snohomish County Superior Court.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of April, 2010.

**FOSTER PEPPER PLLC**



---

William H. Patton, WSBA No. 5771  
Hugh D. Spitzer, WSBA No. 5827  
Attorneys for Respondent,  
City of Edmonds