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**I.**  
**INTRODUCTION AND PRELIMINARY MATTERS**

The Alliance and the City are in full agreement that (a) the upgrade City's Waste Water Treatment Plant ("WWTP") must be completed, and (b) debt financing is an appropriate source of funding. Accordingly, this appeal boils down to just three issues. One, can the City authorize the issuance of bonds for the completion of the WWTP sewer system upgrade that pledges revenues from the water utility and the storm water utility—utilities which have different customer bases? Two, can the City authorize those bonds in the absence of the procedural safeguard of having recommendations from the Utility Advisory Committee before issuing debt to be secured by utility revenues? Three, does the authorization for the bonds exceed the cost of completing the project purpose—the WWTP upgrade?

As will be revealed below, the CBing buries these three simple issues under multiple layers of complexity, lengthy arguments on issues not in dispute, and insinuations that the Ratepayers have ulterior motives. In deciding the issues in this appeal, the Court should resist the distraction by the City toward non-issues.

**A. THE CITY'S DEFENSE OF RESOLUTION NO. 2009-08 SAYS NOTHING REGARDING THE VALIDITY OF ORDINANCES 2009-02 AND -07, BECAUSE THE**

**ORDINANCES' TERMS DIFFER SIGNIFICANTLY FROM  
THE RESOLUTION'S TERMS.**

It is essential to understand the distinction between City Ordinances 2009-02 and 2009-07 on the one hand,<sup>1</sup> and City Resolution 2009-08 on the other.<sup>2</sup> The Alliance's challenge under *Covell v. City of Seattle*, 127 Wn. 2d 874, 905 P.2d 324 (1995) is focused upon the ordinances. Conversely, the bulk of the City's briefing regarding *Covell* – both before the trial court and here – has focused on the resolution.<sup>3</sup> The reason for the City's focus is clear: unlike the ordinances, the terms of the resolution appear to be unobjectionable under *Covell*. The resolution authorizes interim financing – via the issuance of a “bond anticipation note” – for the wastewater treatment project to be paid by “Sewer System Revenues” (or proceeds from the eventual sale of the City's long-term bonds).<sup>4</sup> Because the bond anticipation note resolution seems to be limited to using sewer rates to pay for the project, it appears to pose no issue under *Covell*.

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<sup>1</sup> See CP 67-90 (City Ord. No. 2009-02), and 92-102 (City Ord. No. 2009-07).

<sup>2</sup> See CP 104-11 (City Res. No. 2009-08).

<sup>3</sup> See CB at 10-11, 13-14 (discussing terms of City Resolution No. 2009-08); 23-24 (asserting that “the *Covell* cases are completely inapplicable” to City Resolution No. 2009-8); 26 n.50 (arguing that City Resolution No. 2009-08 meets the first *Covell* criterion); 27 n.54 (arguing that City Resolution No. 2009-08 meets the second *Covell* criterion). See also CP 246-48 (same arguments proffered in City's reply brief on summary judgment).

<sup>4</sup> CP 109-110 (City Res. No. 2009-08, § 7).

But the bond anticipation note authorized by the resolution is only temporary in nature.<sup>5</sup> The authorized terms of the City’s permanent, long-term bond financing are set forth in the ordinances. And these terms differ significantly from those in bond anticipation note resolution. The ordinances expressly authorize the use of water and storm water charges to pay for the wastewater treatment project bonds:

The Bond Sale Resolution may provide that, for as long as any of the Project Bonds are outstanding, **the City pledges to establish, maintain and collect rates and charges for water, sewer and drainage services** that will be adequate to produce Waterworks Utility Revenue fully sufficient to provide . . . for punctual payment of the principal of and interest on all outstanding Revenue Obligations . . . [and] Subordinate Obligations . . . .

The Project Bonds may be Subordinate Bonds or Revenue Obligations (including Sewer System Obligations).<sup>[6]</sup>

Thus, while the ordinances provide the flexibility to classify the bonds as “Sewer System Obligations” (payable solely from “Sewer System Revenues”), they also plainly authorize the use of water and storm water charges to pay the bonds if the City so desires<sup>7</sup> – a point the City concedes

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<sup>5</sup> See CP 106 (“[T]he City has authorized the issuance of the Note, as a short-term obligation issued in anticipation of permanent financing. . . .” City Res. No. 2009-08, § 1(a).) See also CP 114-116 (lender’s terms for bond anticipation note, including three-year term).

<sup>6</sup> CP 96 (City Ord. No. 2009-07, § 4(d) (amending City Ord. No. 2009-02, § 11) (emphasis added)).

<sup>7</sup> See CP 93-94 (“The purpose of adopting this amendatory ordinance is to permit the structuring of the interim or permanent borrowing for the Project to be secured by a pledge of Net Revenue of the Waterworks Utility or, alternatively, to be secured by a

in its brief.<sup>8</sup> It is this use of water and storm water charges that the Alliance objects to, and that violates *Covell*. Moreover, the City's defense of the ordinances (as opposed to the bond anticipation note resolution) is exceptionally minimal<sup>9</sup> and, as is explained in greater detail below, ultimately inadequate. Accordingly, in considering this case, it is imperative to distinguish between the ordinances and the resolution.

**B. THE COURT SHOULD NOT DISMISS THE ALLIANCE'S COVELL CHALLENGE AS UNRIPE.**

The City repeatedly refers to “hypothetical use of revenues from theoretical charges on [non-sewer] utility customers or the general taxpayers of the City to pay sewer system obligations.”<sup>10</sup> But, as just shown above, City Ordinances 2009-02 and -07 expressly authorize the use of water and storm water charges to pay for the wastewater treatment project bonds. Thus, the City's repeated references to “theoretical charges” are a bit curious.

The Alliance can only surmise that these references allude to the

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pledge of revenues from the Sewer System only.” City Ord. No. 2009-07, § 1(4); CP 97-98 (City Ord. No. 2009, § 4(d) (defining “Sewer System Revenues” and “Sewer System Obligations”).

<sup>8</sup> See CB at 11 n.22 (“[The ordinances] preserve[] the option of the City to pledge revenues of the City's combined Waterworks Utility to the repayment of that Utility's revenue obligations” – obligations which by definition may include the wastewater treatment project bonds. See CP 95 (City Ord. No. 2009-07, § 4(b) providing that project bonds “may be Revenue Obligations secured by” waterworks utility revenues)).

<sup>9</sup> See CB at 23-27.

<sup>10</sup> CB at 1-2; see also *id.* at 23, 24, and 25.

fact that the City hasn't yet passed a resolution authorizing the actual issuance of its long-term bonds. The ordinances did not actually issue the bonds; they only set the parameters of the bonds and provided that the City could pass a resolution to approve their issuance:

No Bonds may be issued and sold except pursuant to a Bond Sale Resolution approving the terms of such sale.<sup>[11]</sup>

The City hasn't enacted a resolution approving the issuance of any long-term project bonds. Thus, because of this, the use of the water and storm water charges is, in some sense, "hypothetical."

It could be argued that this makes the Alliance's challenge premature or unripe. But the CB doesn't go this far, and the Court should decline to accept such an argument.<sup>12</sup> Dismissing this case now on ripeness grounds only invites another suit once the City actually issues the bonds – a suit in which the Alliance would make largely the same arguments it's making now. Thus, dismissing on ripeness grounds would both waste judicial resources and unnecessarily prolong the uncertainty surrounding the legality of the City's bonds. Indeed, dismissal on ripeness grounds would simply force judicial resolution of the dispute to a time

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<sup>11</sup> CP 95 (City Ord. No. 2009-07, § 4(b) (amending City Ord. No. 2009-02, § 3)).

<sup>12</sup> See *King County v. Taxpayers of King County*, 133 Wn.2d 584, 589-93 (1997) (action to settle validity of proposed bond issue brought before bonds actually issued). See also *Peterson v. Hagan*, 56 Wn.2d 48, 65 (1960). ("[T]he test of the constitutional validity of a law is not what has been done under it, but what may by its authority be done." (internal quotations omitted)); *id.* at 66 ("[A] declaratory judgment action will lie to determine the

much closer to the need for the issuance of the bonds and would not be in anyone's interest. A race to the courthouse would not be appropriate, especially given precedent that any challenge to the ordinance authorizing bonds would require naming all the bond holders as parties. *Henry v. Town of Oakville*, 30 Wn. App. 240, 633 P.2d 892 (1981).<sup>13</sup>

**C. OTHER ERRONEOUS FACTUAL ASSERTIONS BY THE CITY**

As noted in the introduction, the Alliance has no objection to the WWTP upgrade, and, contrary to the repeated assertions in the City's Brief at 9, 35, 38, the Alliance is not seeking legal imposition of more "pay-as-you-go financing and less long-term debt financing policy." Rather, the Alliance is simply opposed to the pledging of utility rates from water customers and storm water utility users to underwrite a sewer project given the fact that they cover separate groups of people.

Additionally, the City lists out several facts about the history of the project which may be true, but the implications are false.

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validity of rights under a statute, even though no steps have been taken to enforce it....").

<sup>13</sup> At the same time, if the Court does determine that the Alliance's *Covell* claim should be dismissed as unripe, it should say so expressly and dismiss without prejudice, so as leave no doubt over the Alliance's ability to challenge the City's bonds once it passes its bond sale resolution. *See, e.g.*, Charles Alan Wright & Arthur R. Miller, 13B FEDERAL PRACTICE & PROCEDURE § 3532.1 (3d ed.2004) ("[I]t should be clear that dismissal for lack of ripeness is not a decision on the merits for purposes of preclusion by judgment."); *Asarco*, 145 Wn.2d at 763 (holding preemptive challenge to Ecology enforcement action to be unripe, and remanding "without prejudice to either party to raise the same issues in any appropriate further proceeding.").

BRA filed its Complaint on April 22, 2009, more than six years after the State Department of Ecology approved the City's engineering report identifying the upgrades to the WWTP required to meet the state's reliability and redundancy requirements; more than three years after the City Council authorized the WWTP upgrades currently under construction; and, one year after the construction of the WWTP upgrades began.

CB at 11. While the dates may be accurate, the implication that the Alliance was dilatory in asserting its position is simply false. First, the Alliance has no opposition to the WWTP upgrade. To the contrary, the Alliance has supported and continues to support the WWTP upgrade. Similarly, the Alliance has no criticism of Ecology's action, the City's engineering report or the authorization of the upgrades. The Alliance supports them. Rather, the Alliance opposes the pledge of water and storm water rates to underwrite the financing for a sewer project and the proposed excess bond that increases the debt burden of ratepayers. *See* CP 28 (Amended Complaint at 2).

Second, the suggestion that the Alliance was dilatory has no basis. The Alliance challenged the excessive bonding and saddling of water and stormwater utility ratepayers with sewer related debt in a letter from the Alliance's counsel on February 19, 2009. CP 161. This was prior to the enactment of Ordinance 2009-02 on March 11, 2009. (CP 298). The Alliance filed suit the very day the City enacted Ordinance 2009-07, on

April 22, 2009. CP 1 and CP 100.

The City also asserts that the Alliance “sought to enjoin the City from proceeding with any bond issue.” CB at 11. Once again, the assertion is false. The Alliance seeks to enjoin the City from proceeding with a bond issue which pledges waterworks utility revenues and which skips review and recommendation (one way or the other) from the Utility Advisory Committee.

**II.**  
**THE CITY’S PROPOSED BOND ISSUE FAILS THE THREE  
PART TEST FOR BOND VALIDITY**

In regard to the three part test from *King County v. Taxpayers of King County*, 133 Wn.2d 584, 949 P.2d 1260 (1997) only the first part is really at issue. The Alliance has never claimed that the statutes authorizing sewer bonds were unconstitutional, nor that the sewer upgrade was for a private purpose. Hence, while the City’s argument on pages 15 through 17 of its brief might be interesting from an academic perspective, it is irrelevant to the issues in this appeal.

The real question is whether the City has the authority to issue the bonds as it did. The City’s briefing on this question, beginning at page 17 of the City’s Brief, repeatedly uses the reference to **statutory** authority. But the first part of the test from *Taxpayers of King County* is not so limited. That the Legislature has authorized the issuance of bonds for

sewer projects does not answer the question. Rather, the first part of the test asks all questions related to authority. The question here is whether the City is authorized to issue bonds to be paid by utility ratepayers of an unrelated utility and in violation of the City's own procedural requirements of having a recommendation from its Utility Advisory Committee. Therefore, the argument in CB 17-19 is equally irrelevant.

Similarly, the City's argument about the City having "due regard" for costs and revenues is beside the point. CB at 20-21. The Alliance never argued that this requirement was not met. Likewise, the City's argument in CB at 21-22 that it followed procedures required by the Legislature is equally irrelevant.

In Section 6.2 of the CB, the misleading nature of the City's argument deepens. It asserts:

Instead of making arguments within the legal framework established by the Supreme Court in *King County v. Taxpayers*, BRA declares that the Supreme Court's legal framework "completely fails to address the point of Plaintiff's claims" and puts before this court three policy arguments cast as legal arguments.

CB at 22-23 (footnote and emphasis omitted). Clearly, the insinuation is that the Alliance is criticizing the Supreme Court's framework in *Taxpayers*, but the insinuation is false. The City does not identify where the "completely fails" quotation comes from, but it is a direct, but partial,

quotation from Appellant's Opening Brief at page 14. The context is this:

The City argued to the trial court that RCW 35.67 and RCW 35.92 authorize the issuance of bonds to finance sewer projects, CP 50-55, that these statutes are constitutional, *id.* at 49, and that sewer systems are a public purpose, *id.* at 48-49.

The problem with this argument it completely fails to address the point of the Ratepayers' claims.

Appellant's Opening Brief at 14. Contrary to the City's representation to this Court, the Alliance contends that the City's **argument** completely fails to address the point of its claims. It does not contend that the test from *Taxpayers* fails to address its point.

Rather, the Alliance has made clear that all of the issues in this case pertaining to the validity of the bonds are properly analyzed under the three-part test recited above. *See King County*, 133 Wn.2d at 595 (addressing multiple subjects related to the validity of the bonds at issue, including "the validity of taxes to pay" the bonds). Appellant's Opening Brief at 14-15.

With amazing chutzpa, the City declares that the "City's Bond Legislation Does not Authorize Use of Water or Stormwater Charges to Pay Bonds." CB at 23. It then notes that it proposes to have a bond anticipation note described in City Resolution 2009-08. *Id.* Further, the bond anticipation is to be secured solely from sewer system revenues. *Id.* at 24. So far, that is true.

As noted above, the Alliance is not challenging the bond anticipation note on the basis that it pledges water or storm water utility revenues. It is challenging the authorization of the bonds in the ordinances, not the interim financing mechanism –the bond anticipation note. The challenged bond ordinances authorize the pledging of water and storm water revenues and the bond anticipation note pledges only sewer revenues. The City’s focus on the latter is simply misleading.

In response to the argument that using water rates to finance sewer projects would violate *Covell*, the City repeats its position that the bond ordinances pledge sewer revenues to pay sewer obligations. CB at 24-25 (citing CP 304-06). It even asserts that “**these provisions do not authorize** the hypothetical use of theoretical **charges to water and sewer customers** that apparently concern” Ratepayers. CB at 25 (emphasis added). As addressed above, these provisions do authorize charges to water and sewer customers.

The City argues that, if *Covell* applies, the bonds as authorized are valid. CB at 25. First, it cites six cases in a footnote for the proposition that charges for water, sewer and stormwater utilities are fees and not taxes. CB at 25 n. 48. The Alliance does not dispute that properly constituted charges for utility services paid by the consumer of those services are fees and not taxes. That a monetary charge for water service

paid by water users is a fee and not a tax is not at issue. What is at issue is whether the City can authorize bonds to finance a **sewer** system project to be paid for by **water** and storm water service customers.

Second, after paraphrasing the three factors from *Covell*, the City asserts:

Here, each factor weighs unquestionably to the conclusion that the City's sewer charges (the only charges relevant to the proposed bond issue) are "fees," and not "taxes.

CB at 26.

The Alliance agrees that sewer charges to repay bonds for sewer infrastructure are fees and not taxes. But, as stated many times, the Alliance does not agree that the City's sewer charges are the only charges relevant to the proposed bond issue. *See, e.g.*, Appellant's Opening Brief at 22, 14. Therefore, the City's entire analysis on pages 26-27 of the CB on sewer charges is irrelevant, if not calculated to mislead the Court into thinking that sewer charges were at issue.

The City then turns to its next obfuscation with the proposition that it is authorized to have a combined utility. CB at 27. This too is not disputed. It then asserts that the City Council has "exercised its policy-making authority in another way relevant here: it has instructed ... that the City administration 'account for' the three component systems

separately.” CB at 28 (referring to BIMC § 3.44.010).

The City goes on:

These policy choices simply do not present a legal issue for this Court to decide. BRA’s claims related to bond validity are supported by no statute or decision, and must be rejected.

CB at 28. Apparently, the City’s view is that policy choices that are incorporated into the City’s code somehow remain aloof from being binding on the City. *See Swartout v. City of Spokane*, 21 Wn. App. 665, 676, 586 P.2d 135 (1978) (city must follow its own code). Moreover, the notion that the separate accounting of the three utilities was a mere policy choice is just as disingenuous as the assertion that the Alliance’s claims “are supported by no statute.” CB at 28.

In stark contrast to the City’s assertion is RCW 43.09.210, which does not give the City the option to make the policy decision on whether to account for the utilities separately or not. The policy choice was made by the Legislature to keep water finances separate from sewer projects.

The City claims that revenues from the sewer system are pledged to repay the bonds (CB at 28) and admits that water or storm water revenues are authorized to be pledged as well. CB at 29. However, it asserts that the City Council has expressed that it will treat any payments from the water or stormwater utilities as interfund loans that will be paid back with sewer system revenues. CB at 29. While that inclination is

expressed in the ordinance (CP 304), it is carefully crafted in a way that is not binding on the City. “[T]he City **intends** to repay ... from revenues of the sewer system and [if other revenues are used] the City **intends** to treat such use as an interfund loan that shall be repaid.” CP 304 (emphasis added).

The Court should not assume that the City’s choice of words to stated what it “intends” as opposed to binding provision such as “obligations” is accidental or merely stylistic. The ordinances authorize the bonds to be paid by water and storm water utility rates coupled with a promise to keep the waterworks rates high enough to pay for the bonds, interest and the cost of issuance. CP 78. A mere statement of intent about treating these repayments as loans does not eliminate the obligation being authorized. *See Elliot Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5,13, 98 P.3d 491 (2004) (“An intention to do a thing is not a promise to do it.”).<sup>14</sup>

The City argues that it can issue bonds to repay project costs that were paid either by the sewer fund directly or through a loan from the water fund. CB at 31-32. As addressed above, the City cannot use bond

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<sup>14</sup> The City argues that the State Constitution limits general obligation debt, but that the bonds at issue here are not general obligations. CB at 29-30. “Thus, BRA’s arguments regarding constitutional limitations on general obligation debt are inapplicable.” *Id.* at 30. Of course, the CB provides no citation to the Alliance’s arguments regarding constitutional limitations on debt because the Alliance never made any such arguments.

proceeds for purposes not authorized by the ordinance and the three purposes in Ordinance 2009-02 (CP 279) and Ordinance 2009-07 (CP 302) include paying off loans, but not these loans.

In its section entitled “Interim Financing Tools,” the City notes that the Alliance’s lawsuit has caused “delays.” CB at 34. It immediately thereafter notes that “[t]o stay on schedule with the construction of the WWTP,” the City engaged in a variety of funding sources. *Id.* It apparently seeks to paint a picture that the Alliance’s lawsuit has created this need, even though resolutions it cites were passed prior to the Alliance’s suit.

The issue of fact is whether the City is issuing bonds for the WWTP that exceed the cost of the project. There are only two possible reasons for doing so. One is to provide a contingency in the event the project costs more. However, the lower cost for the WWTP already includes a contingency amount and the City has never suggested that the amount it seeks to borrow is to provide a greater cushion. The only other possible reason for borrowing more is to use the funds for purposes other than the WWTP upgrade. While the City asserts that such use is speculative, the parties should know before the bonds are issued whether the City can issue bonds that exceed the remaining cost.

In discussing the difference between \$13.9 million and \$14.9

million in the CB at 35, the City highlights a central dispute between the parties. It asserts that regardless of the total project cost, the “City is still authorized by law to borrow funds to pay the costs of its sewer system improvements.” CB at 35. In other words, the City’s position is that, even if the project is completely financed through other sources, such as state and federal grants, the City can still issue bonds for whatever the total construction costs are, even if those costs were paid from other sources.

This argument runs counter to RCW 35A.34.220 which mandates that “moneys received from the sale of bonds ... shall be used for no other purpose than that for which they were issued.” Ordinance 2009-02 spells out the purposes of the bond as

(a) carrying out the Project; (b) carrying out the Refunding Plan with respect to the refunding of all or a portion of the 1998 Bonds; and (c) paying the costs of issuance of the bonds.

CP 279. (The 1998 Bonds in part (b) above are not the loan from the water utility which the City contends can be repaid with bond proceeds. CP 281). Repaying a loan from the water utility and from the sewer utility is not a purpose authorized by the ordinance. The cost appropriate to bond for carrying out the Project, however, is subject to disputes of fact as explained in Appellant’s Opening Brief, at 29-30.

The assertion that the Alliance’s complaints “result solely from its desire to override the policy decisions made years’ [sic] ago” (CB at 35) is

again untrue. The policy decisions made years ago were to upgrade the WWTP—which the Alliance fully supports. The decision made that the Alliance challenges is the decision to borrow more than necessary to complete the project and to repay unidentified loans with bond proceeds.

In its next section, the City sets out to refute the Alliance’s “claim regarding the legality of property taxes imposed to pay bonds.” CB at 36. Once again, the City attempts to drag the Court into refereeing its fight against a nonexistent opponent. The Alliance has made no claim that property taxes cannot be used to repay bonds or that property taxes cannot fund the sewer system upgrade. *See CP 27, et seq.*

It takes the non-existent fight to the next round—the Alliance’s “argument that a city can never use general (or ‘current expense’) revenues to support utility activities is wrong.” CB at 36. The Alliance has never argued that the City cannot use revenue from its current expense funds to support utility services. Rather, its argument is clear that the City cannot use water rates to fund sewer projects, especially when the boundaries are not co-extensive.<sup>15</sup>

In making this response to the argument never made by the

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<sup>15</sup> A different legal conclusion might result if the water and sewer utilities were both City-wide or at least had the same boundaries. In that event, everyone paying for water would also be paying for sewer and keeping the two separate many not be as critical as the present case where the boundaries are not co-extensive. *See CP 131 (sewer utility), 159 (water utility) and BIMC 13.24.010-.020, -.060 (stormwater utility is Island-wide).*

Alliance, it asserts that the City can impose utility taxes on its own utilities and impose such taxes for revenue raising purposes. CB at 36-37.

Although not arguing it clearly, one might believe the City was arguing that it can tax its water or stormwater utility customers and then use that money for a different public purpose, namely paying sewer bonds.

If that was the intended argument, such a scheme violates the Supreme Court's analysis in *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003). In *Okeson*, the Court found that a fee for streetlights was really a tax. When the legislature amended the statute to authorize including the cost of streetlights in electric ratepayers' bills, the Court held that this authorization still did not authorize a tax and that the charge remained a tax at its core. *Id.* at 557-58. Similarly, even if the City could **tax** its water customers to pay for sewer improvements, the waterworks utilities revenues being pledged here are not taxes.

The City next argues that there is no limit to the amount of revenue obligations it can issue and that the Alliance's position "would create a legal cap on the amount that the City may borrow, and leave the WWTP upgrades without adequate financing." CB at 37-38. To the contrary, the Alliance contends that the cap is the amount remaining to complete the project and, hence, would neither leave the WWTP upgrade without adequate financing, nor leave the ratepayers with excessive debt not

appropriately authorized under RCW 35A.34.220.

### **III. THE UTILITY ADVISORY COMMITTEE CLAIM**

The City raises several responses to the Alliance's argument about the Utility Advisory Committee. First, it asserts that the "Code allows the utility advisory committee to give recommendations. But, it is the City Council, not the committee, that makes the final decision." CB at 41-42. The notion that the code simply **allows** recommendations renders the code superfluous—anyone can always make recommendations, a result the Court should avoid. *See City of Seattle v. McCreedy*, 123 Wn.2d 260, 280, 868 P.2d 314 (1994). At the same time, the Alliance agrees that it is the City Council which makes the final decision. The code simply provides that there must be a recommendation from the Utility Advisory Committee which the City Council is free to adopt or reject in whole or in part. What it cannot do—as it did in this case—is simply dispense with the role of the Utility Advisory Committee. As addressed in Appellant's Opening Brief at 33, the advisory committee is like a Planning Commission, a necessary part of the process even though it is not the final decision-maker.

In its following point, the City notes several different ways the City code could have reinforced the Utility Advisory Committee's role in

utility financing. Additional language to emphasize the mandatory nature of the Utility Advisory Committee can always be imagined. But the Court is not faced with imaginary language. The wording at issue in BIMC 2.33.040 is “shall,” which historically indicates a mandate. *State v. Stivason*, 134 Wn.App 648, 656, 142 P.3d 189 (2006).

The City also argues that its own code establishing the duties of the Utility Advisory Committee would “strip the City Council of the legal authority granted to it by the State Legislature.” CB at 42. It is odd that the City would argue that its own code provision is pre-empted by state law.

More importantly, however, is that Utility Advisory Committee provision does not strip any legal authority from the City Council. It is free to adopt or disregard the recommendations of the Utility Advisory Committee as it sees fit.

Wrapped in the robes of divining legislative intent, the City argues that the “best expression of legislative intent” is the fact that the City Council which established the Utility Advisory Committee requirement did not establish the Committee. CB at 43. There is no authority for this proposition that the intent of the code provision can be determined by the violation of it. Additionally, the task of the Court is not to determine some free-floating intent of the City Council, but the intent of the Council as

expressed in the adopted Code.

Similarly, the City argues that the lack of any specified consequences for failure to have recommendations of the Utility Advisory Committee evidences that it is merely an optional, “unenforceable direction.” CB at 43. The absence of a code provision spelling out consequences does not make the code merely advisory. *See, e.g. Lauterbach v. City of Centralia*, 49 Wn.2d 550, 304 P.2d 656 (1956).

The City then argues that one city council cannot divest the next city council of the power to legislate. CB at 43-44. But, the City ordinance adopting the Utility Advisory Committee recommendation requirement has not divested the City Council of the power to legislate. It remains free to repeal the Utility Advisory Committee ordinance. It is not free to simply ignore the code provision.

The City also argues that the Legislature has given the authority to issue bonds specifically to the City’s legislative authority, and not to a committee. CB at 44 (citing *Taxpayers of King County*, 123 Wn.2d at 611; *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 168, 173, 149 P.3d 616 (2006)). It argues that the City cannot restrict power given by the Legislature to the City Council.

The City’s argument breaks down because these cases are dealing with the grant of legislative power, not self-imposed processes. For

instance, in *1000 Friends of Washington*, the Court held that King County could not give the power to decide whether a critical area ordinance should be adopted to the voters through the referendum process. *Id.* at 169. It did not say that King County could not create a layer of process not specified in state law when deciding the substance of the critical area ordinance. In fact, it appears that King County did add multiple layers of process in implementing the state law. *Id.* at 169-70.

Here, the Utility Advisory Committee recommendation requirement in BIMC 2.33.040 does not take legislative authority away from the City Council and give it to the committee, analogous to giving the legislative authority to the voters via the referendum process. It is merely adding a procedural safeguard, but leaving the entire legislative decision whether to act and in what manner, to the City Council.

Again, if the City believes that having recommendations from this committee is bad public policy prior to deciding to construct a \$15 million project, it can repeal this section of its ordinance. Until then, the Court should not render this portion of the Code meaningless by not requiring compliance in this case.

**IV.  
THE TRIAL COURT ABUSED ITS DESCRETION IN  
DENYING RECONSIDERATION**

The City seeks to salt its argument with claims that the Alliance

knew for months and years before filing its complaint. CB at 46. The truth, however, is that the City proposed a particular bond (Ordinance 2009-02) for over \$7 million dollars on February 25, 2009. CP 69. The Alliance immediately voiced its concerns to the City, just days later, on March 9, 2009. CP 164. The City responded with a new ordinance (Ordinance 2009-07) that magically reduced the necessary bond amount to \$6 million. CP 93. The Alliance filed suit the same day. CP 1. The Alliance challenged exactly what it claims is illegal on the very day it was adopted. The City's desperate attempt to paint the Alliance as dilatory should be rejected.

The City then goes into discussion about how well aware the Alliance was of issues relating to the City's utility financing, having cited public records and websites, etc. CB at 47. Therefore, the City argues, it is "disingenuous for [Ratepayers] to argue that it was not prepared for hearing on summary judgment." CB at 47.

But the Alliance is not claiming that it was not prepared for the hearing on summary judgment based on the City's moving papers, but rather the City saved for reply a declaration that is not clear and which should have entitled the Alliance to conduct discovery related to the declaration. In applying the principle that evidence is viewed in the nonmoving party's favor and that all inferences are to be made in the

nonmoving party's favor, then reconsideration may not be necessary. But if the Court finds that the Declaration of Mark Dombroski says anything definitive about the unpaid costs of the WWTP upgrade, the discovery regarding that declaration should have been allowed

The City then asserts that the Alliance "offers nothing that it claimed on reconsideration would impact the analysis that the court provided on issues of law it decided at summary judgment." CB at 47 (citing *Clausing v. Kassner*, 60 Wn.2d 12, 18-19, 371 P.2d 633 (1962)). Of course not. Reconsideration to allow discovery relates to factual issues, not issues of law.

Finally, the City argues that the reconsideration motion merely "regurgitated the same points" made in regard to the motion. CB at 48. To the contrary, the Alliance's reconsideration motion focused on the implications of the Dombroski Declaration, a last minute declaration not provided with the City's moving papers in violation of CR 56 and *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991). That the impact of the declaration affected legal issues already addressed in the summary judgment papers does not render the reconsideration motion into nothing more than the repeat of earlier argument.

This Court should not encourage parties to lie in wait by holding back evidence to support summary judgment motions and allow them to

bring it forward in reply papers, without at least giving the nonmoving party a chance to address the new evidence through reconsideration.

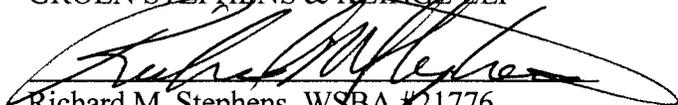
### CONCLUSION

The City has authorized the issuance of bonds to pay for a sewer project to be financed in part by charges imposed for water and storm water utility services. It has ignored its own code providing a procedural safeguard related to utility financing with the Utility Advisory Committee. And it seeks to authorize bonds for paying for more than the costs authorized in the bond ordinance. The Court should reverse the trial court's grant of summary judgment against the Alliance.

RESPECTFULLY submitted this 16<sup>th</sup> day of February, 2010.

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