

No. 39850-8-II

---

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

---

BAINBRIDGE RATEPAYERS ALLIANCE,

Appellant,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

---

BRIEF OF RESPONDENT

---

P. Stephen DiJulio  
**FOSTER PEPPER PLLC**  
1111 Third Avenue, Suite 3400  
Seattle, Washington 98101-3299  
Telephone: (206) 447-4400  
Facsimile: (206) 447-9700  
DiJUP@Foster.com  
Attorneys for Respondent

FILED  
COURT OF APPEALS  
DIVISION II  
10 JAN 13 PM 4:58  
STATE OF WASHINGTON  
BY *ka*

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN 11 PM 4:53

ORIGINAL

## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| 1. INTRODUCTION AND NATURE OF CASE .....  | 1           |
| 2. RESPONSE TO APPELLANT’S ASSIGNMENTS OF ERROR.....  | 2           |
| 3. RESPONDENT’S RESTATEMENT OF ISSUES REGARDING<br>ASSIGNMENTS OF ERROR .....   | 2           |
| 3.1 Validity of City Bond Ordinances. ....  | 2           |
| 3.2 Utility Advisory Committee. ....  | 3           |
| 3.3 Reconsideration Properly Denied. ....   | 3           |
| 4. RESTATEMENT OF THE CASE.....   | 4           |
| 4.1 The City of Bainbridge Island. ....   | 4           |
| 4.2 The City’s System of Utilities. ....  | 4           |
| 4.3 Wastewater Treatment Plant Project.....   | 6           |
| 4.4 Financing of Project.....   | 7           |
| 4.5 Sewer System Revenues Pledged to Sewer System<br>Obligations.....   | 10          |
| 4.6 BRA Action Stops Financing of WWTP Project.....   | 11          |
| 5. SUMMARY OF ARGUMENT .....  | 12          |
| 6. ARGUMENT .....   | 14          |
| 6.1 The City’s Proposed Bond Issue Is Valid Under Washington<br>Law’s Three Part Test For Bond Validity. ....   | 14          |
| 6.2 The City Has Committed Sewer System Revenues to Pay<br>Sewer System Obligations. ....   | 22          |
| 6.3 The Non Existence Of A Non Binding Advisory Committee<br>Does Not Change The Fact That The Proposed Bond Issue<br>In This Case Is Valid Under Washington Law’s Three Part<br>Test For Bond Validity. .... | 41          |
| 6.4 The Trial Court Did Not Abuse Its Discretion in Denying<br>Reconsideration. ....  | 46          |
| 7. CONCLUSION .....   | 48          |

## TABLE OF AUTHORITIES

### Cases

|   |            |
|---|------------|
| <i>1000 Friends of Wash. v. McFarland</i> ,<br>159 Wn.2d 165, 149 P.3d 616 (2006) .....                     | 45         |
| <i>Berglund v. City of Tacoma</i> ,<br>70 Wn.2d 475, 423 P.2d 922 (1967) .....                              | 37         |
| <i>State ex rel. Billington v. Sinclair</i> ,<br>28 Wn.2d 575, 183 P.2d 813 (1947) .....                    | 43         |
| <i>Burba v. City of Vancouver</i> ,<br>113 Wn.2d 800, 783 P.2d 1056 (1989) .....                            | 36         |
| <i>City of Spokane v. J-R Distribs., Inc.</i> ,<br>90 Wn.2d 722, 585 P.2d 784 (1978) .....                  | 18         |
| <i>Clausing v. Kassner</i> ,<br>60 Wn.2d 12, 371 P.2d 633 (1962) .....                                      | 47         |
| <i>Clise v. City of Seattle</i> ,<br>153 Wash. 661, 280 P. 80 (1929) .....                                  | 10, 35, 39 |
| <i>Covell v. City of Seattle</i> ,<br>127 Wn.2d 874, 905 P.2d 324 (1995) .....                              | 23, 25     |
| <i>Dean v. Lehman</i> ,<br>143 Wn.2d 12, 18 P.3d 523 (2001) .....   | 25         |
| <i>Dearling v. Funk</i> ,<br>177 Wash. 349, 32 P.2d 548 (1934) .....  | 15         |
| <i>Ford v. Bellingham-Whatcom County Dist. Bd. of Health</i> ,<br>16 Wn. App. 709, 558 P.2d 821 (1977)..... | 15         |
| <i>Go2Net, Inc. v. C I Host, Inc.</i> ,<br>115 Wn. App. 73, 60 P.3d 1245 (2003).....                        | 48         |
| <i>Griffin v. City of Tacoma</i> ,<br>49 Wash. 524, 95 Pac. 1107 (1908).....                                | 9          |
| <i>Hillis Homes, Inc. v. Pub. Util. Dist. No. 1</i> ,<br>105 Wn.2d 288, 714 P.2d 1163 (1986) .....          | 25         |

|  |           |
|--|-----------|
| <i>King County v. Taxpayers of King County</i> ,<br>133 Wn.2d 584, 949 P.2d 1260 (1997) .....  | 1, 15, 46 |
| <i>L.D. Ragan v. City of Seattle</i> ,<br>58 Wn.2d 779, 364 P.2d 916 (1961) .....  | 10, 35    |
| <i>State ex rel. Lane v. Fleming</i> ,<br>129 Wash. 647, 225 P. 646 (1924) .....   | 39        |
| <i>Las v. Yellow Front Stores, Inc.</i> ,<br>66 Wn. App. 196, 198, 831 P.2d 744 (1992).....  | 40        |
| <i>Lopp v. Peninsula School Dist. No. 401</i> ,<br>90 Wn.2d 754, 585 P.2d 801 (1978) .....   | 46        |
| <i>Madison v. State</i> ,<br>161 Wn.2d 85, 163 P.3d 757 (2007) .....   | 17        |
| <i>Marshall v. Bally's PacWest Inc.</i> ,<br>94 Wn. App. 372, 379, 972 P.2d 475 (1999).....  | 40        |
| <i>Morse v. Wise</i> ,<br>37 Wn.2d 806, 226 P.2d 214 (1951) .....  | 13        |
| <i>Municipality of Metro. Seattle v. City of Seattle</i> ,<br>57 Wn.2d 446, 357 P.2d 863 (1960) .....  | 30        |
| <i>Samis Land Co. v. City of Soap Lake</i> ,<br>143 Wn.2d 798, 23 P.3d 477 (2001) .....  | 23        |
| <i>Scott v. City of Tacoma</i> ,<br>81 Wash. 178, 142 Pac. 467 (1914).....   | 23        |
| <i>Smith v. Spokane County</i> ,<br>89 Wn. App. 340, 948 P.2d 1301 (1997), <i>rev. denied</i> , 135<br>Wn.2d 1007, 959 P.2d 125 (1998) ..... | 25        |
| <i>Spokane County ex rel. Sullivan v. Glover</i> ,<br>2 Wn.2d 162, 97 P.2d 628 (1940) .....  | 43        |
| <i>State ex rel. Clausen v. Burr</i> ,<br>65 Wash. 524, 118 P. 639 (1911).....   | 18        |
| <i>State v. McDonald</i> ,<br>89 Wn.2d 256, 571 P.2d 930 (1977), <i>overruled on other</i>   |           |

|   |            |
|---|------------|
| <i>grounds, State v. Somerville</i> , 111 Wn.2d 524, 760 P.2d 932<br>(1988) .....   | 43         |
| <i>Storedahl Props., LLC v. Clark County</i> ,<br>143 Wn. App. 489, 178 P.3d 377 (2008).....                                    | 25         |
| <i>Tabb v. Funk</i> ,<br>172 Wash. 189, 19 P.2d 668 (1933) .....  | 39         |
| <i>Tacoma v. Fiberchem, Inc.</i> ,<br>44 Wn. App. 538, 722 P.2d 1357 (1986), <i>rev. denied</i> , 107<br>Wn.2d 1008 (1986)..... | 38         |
| <i>Teter v. Clark County</i> ,<br>104 Wn.2d 227, 704 P.2d 1171 (1985) .....   | 15, 25, 26 |
| <i>Town of Weyauwega v. Ayling</i> ,<br>99 U.S. 112, 25 L. Ed. 470 (1878) .....   | 39         |
| <i>Tukwila School Dist. No. 406 v. City of Tukwila</i> ,<br>140 Wn. App. 735, 167 P.3d 1167 (2007).....                         | 25, 26     |
| <i>Twichell v. City of Seattle</i> ,<br>106 Wash. 32, 179 P. 127 (1919) .....   | 20         |
| <i>Wash. State Farm Bureau Fed'n v. Gregoire</i> ,<br>162 Wn.2d 284, 174 P.3d 1142 (2007) .....                                 | 44         |
| <i>Weden v. San Juan County</i> ,<br>135 Wn.2d 678, 958 P.2d 273 (1998) .....   | 23, 38     |
| <i>Winston v. City of Spokane</i> ,<br>12 Wash. 524, 41 P. 888 (1895) .....   | 30         |

**Washington Constitution**

|                             |        |
|-----------------------------|--------|
| CONST. art. VIII, § 6 ..... | 16, 29 |
| CONST. art. XI, § 11 .....  | 18     |

**Statutes & Administrative Codes**

|                           |           |
|---------------------------|-----------|
| 26 C.F.R. § 1.150-2 ..... | 9, 34, 35 |
| RCW § 35.21.210 .....     | 37        |
| RCW § 35.21.870 .....     | 37        |

|                           |                    |
|---------------------------|--------------------|
| RCW § 35.34.220 .....     | 31                 |
| RCW § 35.67 .....         | 12, 15, 16, 17, 44 |
| RCW § 35.67.010 .....     | 18                 |
| RCW § 35.67.020(1) .....  | 18                 |
| RCW § 35.67.120 .....     | 19                 |
| RCW § 35.67.120-.140..... | 44                 |
| RCW § 35.67.130 .....     | 20                 |
| RCW § 35.67.140 .....     | 30                 |
| RCW § 35.67.331 .....     | 5, 12, 27          |
| RCW § 35.92 .....         | 12, 16, 17, 44     |
| RCW § 35.92.020 .....     | 18                 |
| RCW § 35.92.020(1) .....  | 18                 |
| RCW § 35.92.100 .....     | 30, 44             |
| RCW § 35.92.100(1) .....  | 16, 19, 20         |
| RCW § 35A.11.020 .....    | 37                 |
| RCW § 35A.11.050 .....    | 38                 |
| RCW § 35A.13 .....        | 4                  |
| RCW § 35A.34.220 .....    | 30, 32, 37, 39     |
| RCW § 35A.37.010 .....    | 13, 26             |
| RCW § 35A.82.020 .....    | 36                 |
| RCW § 39.46 .....         | 16, 17, 44         |
| RCW § 39.46.050 .....     | 19                 |
| RCW § 39.46.150 .....     | 45                 |
| RCW § 39.46.150(2) .....  | 19                 |
| RCW § 39.46.150(3) .....  | 20                 |

|                          |           |
|--------------------------|-----------|
| RCW § 39.46.150(4) ..... | 30        |
| RCW § 39.50 .....        | 16, 45    |
| RCW § 39.50.020 .....    | 19        |
| RCW § 39.50.030 .....    | 45        |
| RCW § 43.09.2851 .....   | 8, 34, 35 |

**Municipal Legislation and Other Authorities**

|   |               |
|---|---------------|
| BIMC § 2.33.040 .....   | 43, 45        |
| BIMC § 3.44.010 .....   | 6, 13, 27, 28 |
| City of Bainbridge Island, <a href="http://www.ci.bainbridge-isl.wa.us">www.ci.bainbridge-isl.wa.us</a> ..... | 4, 7, 38      |
| City Resolution 2009-1 .....  | 32            |
| City Resolution 2009-08 .....   | <i>Passim</i> |
| City Resolution 2009-13 .....   | 9             |
| City Ordinance 80-14 .....  | 5             |
| City Ordinance 89-50 .....  | 5             |
| City Ordinance 2009-02 .....  | <i>Passim</i> |
| City Ordinance 2009-07 .....  | <i>Passim</i> |

## 1. INTRODUCTION AND NATURE OF CASE

This is not a complex case. The City of Bainbridge Island is building a \$15 million expansion to its wastewater treatment plant to meet environmental standards. The sewer plant serves the Winslow area of the City. First, it is undisputed that the City has legislative authority to issue bonds for the wastewater treatment plant project. Second, the statutes authorizing the City's bonds were constitutionally enacted. And, third, the purpose for which the City is issuing its bonds is a public (not private) purpose. These are the three factors that the Supreme Court has established to determine the validity of municipal bonds. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 594-95, 949 P.2d 1260 (1997).

With clear statutory authority to fund the City's wastewater treatment plant ("WWTP") improvements with sewer revenue bonds, and no assertion regarding the invalidity of the statutes authorizing such bonds, Appellant Bainbridge Ratepayers Alliance ("BRA") searches in vain for a claim that does not exist. The City's legislation has authorized borrowing and has pledged sewer system revenues to pay for the obligations of that sewer system (including WWTP costs). The City has not authorized the hypothetical use of revenues from theoretical charges on other utility customers or the general taxpayers of the City to pay sewer

system obligations. The City's proposed bond issues are valid under statutory authorization and the Supreme Court's standards for validating municipal obligations. There is no basis for the BRA claims and the trial court should be affirmed. Additionally, because the issues in this case are directly addressed by controlling authority, the City seeks affirmation of the trial court by motion on the merits pursuant to RAP 18.14 (filed separately from this brief).

**2. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR**

**2.1** The Trial Court Did Not Err in Granting the City's Motion for Partial Summary Judgment. CP 387-389.

**2.2** The Trial Court Did Not Err in Denying the BRA Motion for Reconsideration. CP 525-527.

**2.3** The Trial Court Did Not Err in Entering Judgment in Favor of the City. *See* Court of Appeals Cause No. 40040-5-II, consolidated with this matter.

**3. RESPONDENT'S RESTATEMENT OF ISSUES REGARDING ASSIGNMENTS OF ERROR**

**3.1 VALIDITY OF CITY BOND ORDINANCES.**

**3.1.1** Washington law authorizes a city to borrow money by issuance of revenue bonds and to pay those bonds from specific revenues deposited in a special fund created from those revenues. The City has

provided for the payment of sewer system obligations from revenue “allocable to” its sewer system. Are the City ordinances authorizing the issuance of bonds to finance the upgrade to the sewer system invalid?

**3.1.2** The City’s WWTP upgrade will cost nearly \$15 million. May the City issue bonds to pay for all or a portion of the project cost, including reimbursement of other sources of funds for the financing of the project?

**3.2 UTILITY ADVISORY COMMITTEE.**

**3.2.1** The City’s Utility Advisory Committee had not been appointed, and was not operational or otherwise functional at the time the WWTP project was authorized or the adoption of the City’s bond ordinances were authorized. Were the City’s ordinances invalid for not being referred to a nonexistent committee?

**3.2.2** When the recommendation of an advisory committee is neither final nor binding, and when the failure of a recommendation does not carry any prescription, was absence of an advisory committee recommendation preclusive on action of the City’s legislative authority?

**3.3 RECONSIDERATION PROPERLY DENIED.**

Reconsideration is left to the sound discretion of the trial court. Did the trial court abuse its discretion in denying the BRA Motion for Reconsideration?

#### **4. RESTATEMENT OF THE CASE**

##### **4.1 THE CITY OF BAINBRIDGE ISLAND.**

The initial incorporation of a city on Bainbridge Island occurred when the town of Winslow incorporated in 1947. The Town developed water and sewer utilities, and became the Island's urban center.<sup>1</sup> The City of Winslow annexed the remainder of the Island following a 1990 election. In 1991, residents voted to change the City's name to Bainbridge Island.

As a non-charter code city, Bainbridge Island originally operated under a Mayor/Council form of government. The form of government changed following a May 19, 2009 election in which voters expressed a preference for the Council/Manager form of government. *See* Chapter 35A.13 RCW.<sup>2</sup>

##### **4.2 THE CITY'S SYSTEM OF UTILITIES.**

**4.2.1 Sewer System.** It is uncontested in this matter that the City has operated and continues to operate sewer systems, water systems and a system of storm and surface water management.<sup>3</sup> Only the storm and surface water management utility provides services throughout the City.

---

<sup>1</sup> *See* City of Bainbridge Island, *Island History*, [http://www.ci.bainbridgeisl.wa.us/island\\_history.aspx](http://www.ci.bainbridgeisl.wa.us/island_history.aspx) (last visited Jan. 8, 2010).

<sup>2</sup> *See* City of Bainbridge Island, *About Island Government*, [http://www.ci.bainbridgeisl.wa.us/island\\_government.aspx](http://www.ci.bainbridgeisl.wa.us/island_government.aspx) (last visited Jan. 8, 2010). CP 4, 11.

<sup>3</sup> CP 3, 11.

The City's water and sewer systems provide services only in certain areas of Bainbridge Island.

The component of the City's sewer system that is at issue in this case is the Winslow Sewer System, serving the older incorporated area (formerly the town of Winslow).<sup>4</sup> The wastewater treatment plant (discussed in Section 4.3 below) serves the Winslow segment of the City's sewer system.

**4.2.2 Combined Utility System.** The legislature has authorized the City to create a single, combined or "unified" waterworks utility that, by definition, provides water, sewer and stormwater services.<sup>5</sup>

The City Council exercised its policy-making authority (conferred by statute) to combine its utility systems. The sewerage system was combined into the waterworks utility by Ordinance 80-14 and the storm and surface water system was added by Ordinance 89-50. CP 340-363 (Section 2). But, having done so, the City Council also adopted an ordinance (codified in Bainbridge Island Municipal Code § 3.44.010), that

---

<sup>4</sup> CP 4; 12; 131.

<sup>5</sup> See RCW 35.67.331 ("A city or town may by ordinance provide that its water system, sewerage system, and garbage and refuse collection and disposal system may be acquired, constructed, maintained and operated jointly, either by combining any two of such systems or all three.")

the City administration “account for” the three utility systems separately.<sup>6</sup> In other words, the City Council has exercised its legislative authority to establish independent rate structures for each component utility system and has further required separate accounting for each system. As a result, each system has separate revenue and expenditure information for separate accounting and separate rate-setting.

### **4.3 WASTEWATER TREATMENT PLANT PROJECT.**

The City is making necessary multi-million dollar upgrades to its Wastewater Treatment Plant (“WWTP”).<sup>7</sup> As of August 21, 2009, construction of the WWTP upgrades was approximately 73 percent complete.<sup>8</sup> The City has been working towards implementation of these WWTP upgrades for at least eight years:

- In 2003, the State Department of Ecology approved the City’s Wastewater Treatment Plant Engineering Report, which identified upgrades to the WWTP required to meet the State’s reliability and

---

<sup>6</sup> BIMC § 3.44.010 (“The city’s unified waterworks utility, comprised of its water, sewer, and storm and surface water management utilities, shall be accounted for as though those utilities **were separate funds.**”) (emphasis added). This is admitted by BRA in the Appellant’s Opening Brief (“App. Br.”) at 4.

<sup>7</sup> CP 184 at ¶¶ 2, 3; CP 187 (Ex. A).

<sup>8</sup> Based on expenditures of total project costs. *Id.*

redundancy requirements, as well as sewer flow and capacity standards.<sup>9</sup>

- In 2005, the City Council approved the WWTP upgrade project.<sup>10</sup>
- In 2007, the City awarded the construction contract for the WWTP upgrades to the lowest bidder<sup>11</sup> and construction of the WWTP upgrades began in April 2008.<sup>12</sup>

#### 4.4 FINANCING OF PROJECT.

Over the past seven years, members of the public, including officers of BRA, have had many opportunities to be informed of, and to present their opinions about, the WWTP project.<sup>13</sup> The WWTP upgrade project was discussed or acted upon by at least 24 open public City

---

<sup>9</sup> Letter from Kevin C. Fitzpatrick, State Dep't of Ecology, Water Quality Section Manager, to Randy Witt, P.E. (Oct. 2, 2003) and attachment thereto (*City of Bainbridge Island, Winslow Wastewater Treatment Plant Engineering Report* at 1-1 (Apr. 14, 2003)), <http://www.ci.bainbridge-isl.wa.us/documents/Doc040224-002.PDF> (last visited Jan. 8, 2010); cited at CP 170.

<sup>10</sup> City of Bainbridge Island, *Special City Council Workshop Meeting Minutes* (Nov. 21, 2005), [http://www.ci.bainbridge-isl.wa.us/documents/pw/wwtp/12\\_051121\\_wwtp\\_budget\\_discussion.pdf](http://www.ci.bainbridge-isl.wa.us/documents/pw/wwtp/12_051121_wwtp_budget_discussion.pdf) (last visited Jan. 8, 2010) (approving the WWTP upgrade project currently underway); cited at CP 170.

<sup>11</sup> City of Bainbridge Island, *City Council Agenda Bill* (Dec. 12, 2007), [http://www.ci.bainbridge-isl.wa.us/documents/pw/wwtp/25\\_071212\\_wwtp\\_stan\\_palmer\\_construction\\_award.pdf](http://www.ci.bainbridge-isl.wa.us/documents/pw/wwtp/25_071212_wwtp_stan_palmer_construction_award.pdf) (last visited Jan. 8, 2010) (authorizing award of a construction contract to Stan Palmer Construction, Inc.); cited at CP 170.

<sup>12</sup> City of Bainbridge Island, *City Council Agenda Bill* (Nov. 24, 2008) (WWTP Improvements Project Accounting Document, p. 5), [http://www.ci.bainbridge-isl.wa.us/documents/pw/wwtp\\_col\\_112408.pdf](http://www.ci.bainbridge-isl.wa.us/documents/pw/wwtp_col_112408.pdf); cited at CP 170.

<sup>13</sup> CP 185 at ¶ 5.

Council meetings since 2002.<sup>14</sup> The City's records further show that BRA's officers, Sally Adams and Richard Allen, not only attended many of these meetings, they participated in them: Sally Adams and/or Richard Allen signed-in to speak at or are referenced in the meeting minutes as having participated in (a) at least four of the City Council meetings at which the WWTP upgrades were addressed since 2007 (and at least one meeting as long ago as 2002), and (b) at least 20 City Council meetings since mid-2006.<sup>15</sup>

The City experienced delays in carrying out this financing in 2008 because of turmoil in the municipal bond markets, and throughout 2009 suffered the additional delays created by this lawsuit.<sup>16</sup> To stay on schedule with the construction of the WWTP (and avoid costly delay damages), the City had to provide temporary, interim funding for construction costs from non-bond sources.<sup>17</sup> RCW 43.09.2851 authorizes interfund transfers and directs their repayment from one city fund to another. Under that authority, the City found temporary sources to bridge

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> CP 184-85 at ¶ 4; CP 264, 370-371 (letter from Cashmere Valley Bank informing the City that "the Bank has formed an opinion that this pending litigation does represent a material adverse change," triggering the bank's right to halt its purchase of the note).

<sup>17</sup> CP 184-85. The City Council authorized an interfund loan from the Water Fund that must be repaid and the City expended sewer funds not designated for use in the WWTP project. CP 265, 365-371.

the funding gap created by these delays. By Resolution 2009-01, the City declared its intention to make temporary expenditures from available funds, to be later reimbursed with bond proceeds to be issued for the WWTP upgrade project.<sup>18</sup> It thereafter used temporarily available cash from the sewer fund to pay WWTP project costs and, when that cash ran out, adopted Resolution No. 2009-13, authorizing an interfund loan from the water fund, which is to be repaid with bond proceeds.<sup>19</sup> There is no issue of fact. The City is using authorized sources of funds for the project.

By focusing its complaint on the funds necessary to pay remaining invoices for WWTP project **construction**, BRA seeks to create an illusion of impropriety. In actuality, BRA's complaints regarding the amount of the proposed bonds result solely from its desire to override the policy decisions made by the City's elected officials. BRA asks the Court to substitute BRA's policy preference (more pay-as-you-go financing and less long-term debt financing) for the City Council's determination. But

---

<sup>18</sup> CP 265, 373-374. Further, authority to make declarations of the City's intent to reimburse itself for purposes of federal reimbursement regulations applicable to tax-exempt bonds has been delegated to the Finance and Administrative Services Director of the City pursuant to Resolution 2007-19. The City's Finance and Administrative Services Director made such a declaration with respect to the WWTP upgrade project on December 12, 2007. CP 265, 376-377. *See also* Treas. Reg § 1.150-2.

<sup>19</sup> CP 265, 365-371. The authority of a city to use interfund loans as a financing tool is without question. *Griffin v. City of Tacoma*, 49 Wash. 524, 529, 95 Pac. 1107 91908); *Scott v. City of Tacoma*, 81 Wash. 178, 181-82, 142 Pac. 467 (1914) (citing Griffin: "It is a mere temporary loan to a fund with an assured income, whose sources of supply are entirely under the control of the city.")

the court will not substitute its judgment for the Council's policy judgment as to the appropriate financing structure.<sup>20</sup> BRA's disagreement with the City Council's policy decision does not amount to a legal ground for invalidating the proposed bonds.

#### **4.5 SEWER SYSTEM REVENUES PLEDGED TO SEWER SYSTEM OBLIGATIONS.**

The City has authorized the use of sewer rates to pay sewer system obligations. Section 11 of City Ordinance 2009-02, as amended by § 4(d) of Ordinance 2009-07, provides that so long as "Sewer System Obligations"<sup>21</sup> are outstanding, the City pledges to establish, maintain and collect rates and charges that will be adequate to produce sewer system revenues that are fully sufficient to provide for the punctual payment of the principal of and interest on all outstanding Sewer System Obligations and that portion of any other revenue obligations allocable to the sewer system. CP 264, 288, 304-306. The City legislation states clearly:

**"Sewer System Obligations" means Revenue Obligations payable solely from and secured by a pledge of the Sewer System Revenues. Sewer System**

---

<sup>20</sup> *L.D. Ragan v. City of Seattle*, 58 Wn.2d 779, 786, 364 P.2d 916 (1961) ("Whether the terms of an ordinance are wise or unwise is a question addressed solely to the city council."); *Clise v. City of Seattle*, 153 Wash. 661, 667, 280 P. 80 (1929) ("Nor is the court permitted to substitute its judgment for that of the members of the city council as to the wisdom or propriety of the particular expenditures, but is limited solely to the question of the legality of the particular ordinances.").

<sup>21</sup> The City's legislation authorizes obligations, including bond anticipation notes and bonds. The term "bond" and "obligation" are synonymous.

Obligations are not general obligations of the City and do not include any portion of any obligation secured by a general obligation pledge.

Ordinance No. 2009-07, CP 98, 306 (emphasis added).<sup>22</sup>

#### **4.6 BRA ACTION STOPS FINANCING OF WWTP PROJECT.**

**4.6.1** 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. CP 1, 170 (notes 3-6). BRA claimed invalidity of the City's proposed bond issues and further sought to enjoin the City from proceeding with any bond issue. The claims prevented the City from financing the plant expansion. CP 46, 119-20. The pendency of this case remains an impediment to the City's financing. *See* City of Bainbridge Island's Motion to Transfer Case and Expedite Review, and supporting pleadings, filed herein (Dec.10, 2009).

---

<sup>22</sup> Ordinance No. 2009-[02], as amended by Ordinance No. 2009-07, preserves the option of the City to pledge revenues of the City's combined Waterworks Utility to the repayment of that Utility's revenue obligations. However, the City has not made such a pledge, and has not designated its sewer revenue bonds as a "revenue obligation" of the combined Waterworks Utility. *See* Resolution No. 2009-08 at CP 106-111; and Ordinance No. 2009-07, at CP 97-98.

**4.6.2** The Complaint also included requests that the court rule on questions involving: allocation of costs related to a sewage spill; an audit of various records regarding the city's utilities; the allocation of costs related to a groundwater study, certain transactions with the school district, and other issues; and the validity of certain storm and surface water management fees (collectively, the "Other Claims"). CP 30-36.

On September 4, 2009, the Superior Court severed the Other Claims from the bond-related claims. CP 390-392. BRA did not appeal the Order severing the bond-related claims from the Other Claims. Those Other Claims are not the subject of this appeal.

**4.6.3 Summary Judgment.** Following extensive briefing by the Parties, the Court entered its Order on Summary Judgment dismissing the bond-related claims and validating the City's proposed bond issues for the WWTP project. CP 387-389. Reconsideration was denied. CP 525-527.

## **5. SUMMARY OF ARGUMENT**

Under Washington law, the City is authorized to create a single, combined or "unified" Waterworks Utility that provides water, sewer and stormwater services. RCW 35.67.331; *see generally*, Chapters 35.67 and 35.92 RCW. The authorization granted by that legislation includes city authority to "combine both its water and sewer systems, make necessary improvements and additions to either or both, and pay the cost and

expense thereof by the sale of revenue bonds, and retire those bonds by charges collected for water and sewerage service.” *Morse v. Wise*, 37 Wn.2d 806, 808-809, 226 P.2d 214 (1951). Pursuant to this authority, the City in 1980 combined its water and sewer utilities, and in 1989 added its storm and surface water utility into a single “unified waterworks utility,” as set forth in Bainbridge Island Municipal Code (“BIMC”) § 3.44.010. The City deposits sewer system revenues into a sewer fund which by State law (RCW 35A.37.010) and City Ordinance (BIMC § 3.44.010) are kept separate and apart from other utility revenues and from the general funds of the City.

The City is rebuilding its waste water treatment plant, at an estimated cost of nearly \$15 million. The costs are to be paid with both cash and borrowed money. The borrowed money includes Public Works Trust Fund Loans, as well as issuance of bonds (and/or notes). The construction of that WWTP project has been ongoing since April 2008.

The City’s ordinances identified the terms for borrowing of funds (the issuance of indebtedness) to pay for portions of the WWTP upgrades.<sup>23</sup> On April 22, 2009, the City authorized the issuance of a Sewer System Obligation.<sup>24</sup> The City’s legislation provides that so long as

---

<sup>23</sup> Ordinance 2009-02 (CP 67-90, 277-298); Ordinance 2009-07 (CP 93-102, 300-308).

<sup>24</sup> Resolution No. 2009-08 (CP 104-112, 267-275).

“Sewer System Obligations” are outstanding, the City pledges to establish, maintain and collect rates and charges that will be adequate to produce sewer system revenues sufficient to pay the obligations. The City has pledged sewer revenues to pay sewer obligations:

“Sewer System Obligations” means Revenue Obligations **payable solely from and secured by a pledge of the Sewer System Revenues.** Sewer System Obligations are not general obligations of the City and do not include any portion of any obligation secured by a general obligation pledge.<sup>25</sup>

The law authorizes the City to borrow (issue bonds and notes) to pay for its sewer system improvements, including the current upgrade to the City’s WWTP. The trial court properly rejected the challenge to the validity of that borrowing.

## **6. ARGUMENT**

### **6.1 THE CITY’S PROPOSED BOND ISSUE IS VALID UNDER WASHINGTON LAW’S THREE PART TEST FOR BOND VALIDITY.**

The Washington Supreme Court maintains a three part test for validity of a municipality’s bonds issue:

1. Did the State Legislature delegate authority to the municipality to issue those bonds?
2. Was that State statute constitutionally enacted?

---

<sup>25</sup> *Id.*, at CP 107.

3. Are the bonds issued for a public purpose, as distinguished from a private purpose?

*Taxpayers of King County*, 133 Wn.2d at 594-95. The application of this well-recognized standard of review demonstrates that the City's proposed bond issue for its sewer system passes that three part test.

**6.1.1 The City's proposed bond issue is for a public purpose.**

Washington law recognizes that providing sewer services is part of the police power under a municipal government's role in protecting public health. *E.g.*, *Teter v. Clark County*, 104 Wn.2d 227, 231, 704 P.2d 1171 (1985) (Under RCW 35.67, "the city acts pursuant to the police power granted to it to provide sewer service to protect the health of its inhabitants[.]"); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 712, 558 P.2d 821 (1977) ("Public health and public sanitation are broad objects of the police power of the State and its political subdivisions, and their protection and promotion within the various municipalities of the state constitute important and far-reaching functions of municipal government.").

Washington law accordingly recognizes that incurring debt relating to such sewer services is incurred for a public municipal purpose. *E.g.*, *Dearling v. Funk*, 177 Wash. 349, 366, 32 P.2d 548 (1934) ("indebtedness

incurred for purposes of water, artificial light, and sewers would be the incurring of indebtedness for municipal purposes”).

State statutes therefore specifically authorize municipalities to issue revenue bonds to finance municipally controlled sewer facilities. RCW 35.67.140; RCW 35.92.100(1). *Accord* CONST. art. VIII, § 6. Chapter 39.46 RCW also provides an alternative method for issuing such bonds, and Chapter 39.50 RCW authorizes borrowing through the issuance of bond anticipation notes for such bonds.

The Wastewater Treatment Plant in this case is part of the City’s publicly owned and operated sewer system. The purpose of the proposed sewer bonds is to complete the City financing of the WWTP upgrades (currently under construction). Washington law recognizes that the City’s provision of sewer service is a public (as opposed to private) purpose. Accordingly, the City’s proposed sewer bonds satisfy the public-rather-than-private purpose prong of Washington law’s three part test for determining the validity of a municipal bond issue.

**6.1.2** The State statutes authorizing the City’s proposed bond issue were constitutionally enacted. State law authorizes the City’s proposed bond issue. *See* Chapters 35.67 and 35.92 RCW (authorizing the

City's issuance of these bonds<sup>26</sup>) and Chapter 39.50 RCW (authority for the issuance of the City's bond anticipation note at Resolution 2009-08).

Washington law presumes that those statutes were constitutionally enacted, and requires a plaintiff asserting otherwise to prove unconstitutionality beyond a reasonable doubt.<sup>27</sup>

In this case, BRA does not contend that the State statutes authorizing the City's proposed bond issue were not constitutionally enacted. The City's bonds satisfy the constitutionally-enacted-statute prong of Washington's three part test for bond validity. Therefore that factor is not an issue in this case.

**6.1.3** Those State statutes delegate authority to the City for the proposed bond issue. The only remaining question under Washington's three part test for determining the validity of a proposed bond issue is whether the State Legislature delegated authority to the City to issue those bonds. The answer to that question is "yes," discussed as follows.

**A.** The State Legislature's delegation to the City.

Cities are "creatures of the state and derive all of their authority and

---

<sup>26</sup> Chapters 35.67 and 35.92 RCW also provide that the City may use the alternate provisions of Chapter 39.46 RCW for the issuance of such sewer bonds.

<sup>27</sup> *E.g., Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007) ("In general, '[a] statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.'") (quoting *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), quoting *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996)).

powers from the state constitution and the legislature.”<sup>28</sup> Washington law therefore holds that a city has legal authority to take an action if the State constitution or an enactment of the State Legislature has delegated to the city the legal authority to take that action.<sup>29</sup>

One such delegation by the State Legislature is its enactment of the previously cited State statutes delegating authority to cities to own and operate sewer utility systems and provide for (and finance) sewer system improvements such as the WWTP upgrades.<sup>30</sup>

Another such delegation by the State Legislature is its delegation of authority to finance such sewer system improvements with the issuance of revenue bonds and bond anticipation notes.<sup>31</sup> As the case of the

---

<sup>28</sup> CONST. Art. XI, § 11; *City of Spokane v. J-R Distributions, Inc.*, 90 Wn.2d 722, 726, 585 P.2d 784 (1978).

<sup>29</sup> *J-R Distributions*, 90 Wn.2d at 726 (also noting that such authority can be “found either in an express grant or by necessary implication from such a grant”). See also *State ex rel. Clausen v. Burr*, 65 Wash. 524, 526-27, 118 P. 639 (1911) (noting that Washington State Supreme Court has adopted the view that municipal corporations have such powers as have been conferred upon them by the State).

<sup>30</sup> RCW 35.67.020(1) (“Every city and town may construct, condemn and purchase, acquire, add to, maintain, conduct, and operate systems of sewerage ... together with additions, extensions, and betterments thereto, within and without its limits.”); RCW 35.92.020(1) (“A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain, and operate systems, plants, sites, or other facilities of sewerage[.]”).

<sup>31</sup> RCW 35.67.010, 35.67.120-35.67.190 (authority to issue revenue bonds to finance costs of a public utility, including sanitary sewer systems); RCW 35.92.020, 35.92.100(1) (authority to issue revenue bonds to finance costs of a public utility, including sewerage systems). The State Legislature’s delegation to cities of that bond authority includes the authority to issue notes or obligations in anticipation of issuance of a bond (*e.g.*, the bond

constitutionality of these statutes, BRA does not challenge the delegation of authority to the City.

The only remaining issue material to the validity of the City's proposed bond issue is whether the City satisfied the conditions specified by the Legislature in the statutory delegation of bond authority to the City.

**B.** The City's proposed bond issue complied with the State Legislature's delegation of authority to the City. While apparently uncontested by BRA, the City describes briefly its compliance with the special fund; "due regard;" and, local legislative enactment standards required by the Legislature's delegation to the City.

**THE PROPOSED BOND ISSUE SATISFIED THE LEGISLATURE'S CONDITION THAT THE CITY ESTABLISH A "SPECIAL FUND" FOR REPAYMENT OF THE BONDS.**

One condition the State Legislature placed on its delegation of authority to finance these Wastewater Treatment Plant upgrades with revenue bonds is a condition that the City create a special fund for repayment of the money borrowed through a bond sale.<sup>32</sup>

---

anticipation note in this case). RCW 39.50.020. The State Legislature authorizes cities to repay those bond anticipation notes from the proceeds of the bonds in anticipation of which they were issued, or from other available money. RCW 39.50.020. The State Legislature authorizes a city that issues a bond anticipation note to establish lines of credit to be drawn upon in exchange for that note. RCW 39.46.050.

<sup>32</sup> RCW 35.67.120; RCW 35.92.100(1); RCW 39.46.150(2).

The proposed bond issue in this case complied with that condition. The bond legislation passed by the City Council provided for the creation of a Debt Service Fund, which is the sole source of repayment of the bonds, and for repayment of the bond anticipation note.<sup>33</sup>

**THE PROPOSED BOND ISSUE SATISFIED THE LEGISLATURE'S CONDITION THAT THE CITY HAVE "DUE REGARD" FOR OPERATION AND MAINTENANCE COSTS AND EXISTING DEBT.**

Another condition that the State Legislature placed on its delegation of authority to issue revenue bonds and bond anticipation notes is that the City have "due regard" for its utility's operation and maintenance costs and for any utility revenues previously pledged to pay prior debt.<sup>34</sup>

Washington law holds that such a statutory provision is satisfied if the City's underlying bond ordinance shows that the City Council considered those costs and determined system revenues were sufficient to meet operation and maintenance expenses and the indebtedness payable out of system revenues.<sup>35</sup>

---

<sup>33</sup> City Ordinance 2009-02 § 17 (CP 80); City Ordinance 2009-07 § 4(e) (CP 98); City Resolution 2009-08 § 5 (CP 109).

<sup>34</sup> RCW 35.67.130; RCW 35.92.100(1); RCW 39.46.150(3).

<sup>35</sup> *E.g., Twichell v. City of Seattle*, 106 Wash. 32, 48-49, 179 P. 127 (1919) (statutory due regard requirement is satisfied by city ordinance's statement that, in the city council's judgment, system revenues would be sufficient to meet operation and maintenance expenses and to provide for the payment of other indebtedness payable out of the

The underlying bond ordinance in this case satisfied that legal standard. That bond ordinance not only expressly confirmed the City Council had “exercised due regard for Maintenance and Operation Expense of the Waterworks Utility,”<sup>36</sup> it also expressly provided that the sewer utility’s operation and maintenance expenses must be paid **before** any debt service payments on the new bonds and corresponding bond anticipation note.<sup>37</sup> Thus, the City Council did not just give operation and maintenance expenses due regard – it gave those expenses **priority**. As a result, the City’s underlying bond legislation confirms that the proposed bond issue in this case satisfied the “due regard” provision in the State Legislature’s statutory delegation of authority to the City for that bond issue.

**THE PROPOSED BOND ISSUE SATISFIED THE  
LEGISLATURE’S CONDITIONS REGARDING THE  
PROCEDURE FOR CITY APPROVAL OF A  
PROPOSED BOND ISSUE.**

The third legislative condition on its delegation of bond authority to the City is the procedure that the Legislature specified for cities when

---

system’s revenues, because such a statement in the city’s bond ordinance shows the city council kept in mind the statutory due regard requirement when determining the amount of revenues to pledge).

<sup>36</sup> City Ordinance 2009-02 § 1(6) (CP 280); City Ordinance 2009-02 § 1(4) and its Ex. A (CP 295).

<sup>37</sup> City Ordinance 2009-02, § 11 (CP 288), as amended by City Ordinance 2009-07, § 4(d) (CP 304); City Resolution 2009-08, § 5 (CP 272).

they pass bond legislation. BRA does not challenge the City's compliance with procedural standards for adoption of ordinances and resolutions. As a result, the City only refers to the record that demonstrates compliance.<sup>38</sup>

C. Conclusion regarding the State statutes' delegation of authority for the proposed bond issue in this case. The State Legislature specifically delegated authority to the City to finance its WWTP upgrades with bonds and a bond anticipation note. The City's proposed bond issue complied with the special fund, due regard, and procedural conditions that the State Legislature specified for the City's lawful exercise of that delegated authority. The City's proposed bond issue therefore satisfied the delegation (the final) prong of the Washington Supreme Court's three part test for determining the validity of a municipal bond issue under Washington law. The trial court properly entered summary judgment with respect to the validity of the bond issue.

## **6.2 THE CITY HAS COMMITTED SEWER SYSTEM REVENUES TO PAY SEWER SYSTEM OBLIGATIONS.**

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

---

<sup>38</sup> CP 53-55.

address the point of Plaintiff's claims"<sup>39</sup> and puts before this court three *policy* arguments cast as *legal* arguments. These policy arguments involve a mischaracterization or misreading of State law, the City's bond legislation, the City's municipal code, or some combination thereof, and have no bearing on the *legal* validity of the proposed bond issue.

**6.2.1 The City's Bond Legislation Does Not Authorize Use of Water or Stormwater Charges to Pay Bonds.**

The line of Washington cases addressing the characterization of a charge as a tax versus a fee (the "*Covell* cases"<sup>40</sup>) is inapplicable here. As a matter of law, the City Council has not authorized the hypothetical use of the theoretical charges to which BRA objects. "Municipal ordinances, like state statutes, are presumed constitutional, except where a suspect class or fundamental right is implicated. To rebut that presumption, it must be clear that the legislation cannot reasonably be construed in a manner that comports with constitutional imperatives."<sup>41</sup> It is undisputed that the City proposes to issue a bond anticipation note described in City Resolution 2009-08. That resolution specifically designates the note as a

---

<sup>39</sup> App. Br. at 14 ("The issue here isn't whether the City, in theory, may issue bonds to finance the proposed sewer upgrades; of course it can").

<sup>40</sup> See generally, *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995).

<sup>41</sup> *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 804, 23 P.3d 477 (2001) (citing *Weden v. San Juan County*, 135 Wn.2d 678, 690, 958 P.2d 273 (1998); *High Tide Seafoods v. State*, 106 Wn.2d 695, 698, 725 P.2d 411 (1986); *City of Tacoma v. Luvене*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992)).

“Sewer System Obligation.”<sup>42</sup> Sewer System Obligations are payable solely from and secured solely by sewer system revenues.<sup>43</sup> Thus, the *Covell* cases are completely inapplicable.

**A. City Utility Charges Are Lawful Fees and Not Impermissible Taxes.**

BRA argues at length about theoretical charges that BRA imagines are to be imposed on customers of the City’s water or stormwater utilities.<sup>44</sup> BRA alleges that these theoretical charges *might* be used to pay the WWTP bonds and, as a result of this hypothetical use, should be characterized as taxes, rather than regulatory fees.<sup>45</sup> BRA then spends many pages describing the *Covell* cases, claiming that these cases invalidate the theoretical charges.<sup>46</sup> But it is plain that nothing in the proposed bond issue before this Court gives rise to such a claim.

The City has authorized the use of sewer rates to pay sewer system obligations. BRA cannot dispute that § 11 of City Ordinance 2009-02, as amended by § 4(d) of Ordinance 2009-07, provides that so long as “Sewer

---

<sup>42</sup> Section 3 of the City’s Note Sale Resolution provides that the note “shall be designated a Sewer System Obligation.” CP 108, 271.

<sup>43</sup> Section 11 of Ordinance 2009-02, as amended by § 4(d) of Ordinance 2009-07, defines “Sewer System Obligations” to mean “Revenue Obligations payable solely from and secured by a pledge of the Sewer System Revenues.” CP 304-306.

<sup>44</sup> App. Br. 15-23.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

System Obligations” are outstanding, the City pledges to establish, maintain and collect rates and charges that will be adequate to produce **Sewer System Revenues** that are fully sufficient to provide for the punctual payment of the principal of and interest on all outstanding Sewer System Obligations and that portion of any other revenue obligations allocable to the sewer system.<sup>47</sup> These provisions do not authorize the hypothetical use of theoretical charges to water and sewer customers that apparently concern BRA. It is clear that BRA’s claim is ultimately a hollow assertion premised on a misreading of the bond legislation and fueled by unfounded speculation.

Moreover, even if the *Covell* cases were relevant, they could not be used to invalidate the bonds. BRA misconstrues the *Covell* line of cases and fails to cite the decisions in which the State Supreme Court holds that charges imposed for water, sewer and stormwater utilities are properly characterized as fees (and not invalid taxes).<sup>48</sup> The *Covell* line of cases distinguishes taxes from fees based on a balancing of three factors:<sup>49</sup>

---

<sup>47</sup> CP 304-306.

<sup>48</sup> See, e.g., *Teter*, 104 Wn.2d 227; see also, e.g., *Dean v. Lehman*, 143 Wn.2d 12, 18 P.3d 523 (2001); *Smith v. Spokane County*, 89 Wn. App. 340, 948 P.2d 1301 (1997), rev. denied, 135 Wn.2d 1007, 959 P.2d 125 (1998); *Hillis Homes, Inc. v. Pub. Util. Dist. No. 1*, 105 Wn.2d 288, 714 P.2d 1163 (1986); *Storedahl Props., LLC v. Clark County*, 143 Wn. App. 489, 178 P.3d 377 (2008); *Tukwila School Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 167 P.3d 1167 (2007).

<sup>49</sup> *Covell*, 127 Wn.2d at 879, 883.

- Is the primary purpose of the charge to pay for a regulatory scheme, to pay for a particular benefit (e.g., services rendered) or to offset a burden?
- Is the revenue restricted to the regulatory purpose (i.e., providing the particular benefit or offsetting the particular burden)?
- Is there a direct relationship (not “mathematical precision”) between the charge and the benefits received or burdens imposed by the fee payer?

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”:

- First, the purpose of the sewer charges pledged to the WWTP bond issuance is to pay for the costs of the WWTP upgrades, which are capital improvements that are needed to serve the sewer system’s customers and to offset the burden created by their generation of sewage.<sup>50</sup> The incidental public benefit of discharging cleaner water into Puget Sound does not turn the fees into a tax.<sup>51</sup>
- Second, the sewer revenues are deposited into the sewer fund, which by state law<sup>52</sup> and City ordinance<sup>53</sup> is kept separate and apart from the general funds of the City. In addition, the sewer charges pledged to the WWTP bonds are to be placed in the Note Debt Service Fund,

---

<sup>50</sup> Section 3 of the Note Sale Resolution provides that proceeds of the note are to be used “[f]or the purpose of providing the funds with which to pay costs of the Project, the costs of issuing and delivering the Note, and interest on the Note pending issuance of the Bonds ...” CP 271. The “Project” is defined in Ordinance No. 2009-02 to include the WWTP, and BRA does not contend otherwise. CP 72.

<sup>51</sup> See *Teter*, 104 Wn.2d at 234; *Tukwila School Dist. No. 406*, 140 Wn. App. at 749.

<sup>52</sup> RCW 35A.37.010.

<sup>53</sup> BIMC § 3.44.010.

which is a special fund, separate and apart from other City funds.<sup>54</sup>

- Third, it is undisputed that there is a direct relationship between the sewer rates charged and the benefit received by sewer customers by virtue of the WWTP upgrades (and, conversely, the costs to offset the burdens on the sewer system created by these customers' use thereof).

The claims of BRA to the contrary must be rejected.

**B. Combined Utility Authorized By Law.**

The fact that the legislature has authorized cities to create a single, combined or “unified” waterworks utility that, by definition, provides water, sewer and stormwater services does not alter the analysis that the City’s sewer rates and charges for sewer services are “fees” and not “taxes.”<sup>55</sup>

The City Council has exercised its policy-making authority (conferred by statute) to combine its utility systems for management and other purposes.<sup>56</sup> Having done so, it is up to the City Council to make the

---

<sup>54</sup> The Note Sale Resolution defines the “Note Debt Service Fund” to mean “that special fund of the City within the Sewer Fund, designated as the Sewer Revenue Bond Anticipation Note Debt Service Fund, 2009, established for the purpose of paying principal of and interest on the Note.” CP 107.

<sup>55</sup> See RCW 35.67.331 (“A city or town may by ordinance provide that its water system, sewerage system, and garbage and refuse collection and disposal system may be acquired, constructed, maintained and operated jointly, either by combining any two of such systems or all three.”).

<sup>56</sup> The storm and surface water system was combined into the waterworks utility by Ordinance 80-14 and the sewerage system was added by Ordinance 89-50. CP 340-363; CP 310-338

policy decision regarding how to structure the City's utility rates and charges. And the City has done so, by creating separate rate structures for each utility system. The City Council has exercised its policy-making authority in another way relevant here: it has instructed, by adopting an ordinance codified in BIMC § 3.44.010, that the City administration "account for" the three component systems separately.<sup>57</sup> In other words, the City Council has exercised its authority to establish independent rate structures for each component utility system that reflects the costs incurred by each system. And, the City has further required separate accounting for each system, so that there is separate revenue and expenditure information for each system for use in rate-setting.

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.

Further, the pledge of combined waterworks utility revenues to the repayment of bonds would not violate either state law or city policy. For purposes of state law, the City's three utility systems constitute a single utility, and the pledge of revenues from this single utility is specifically authorized for the repayment of bonds issued for capital improvements of

---

<sup>57</sup> BIMC § 3.44.010 ("The city's unified waterworks utility, comprised of its water, sewer, and storm and surface water management utilities, shall be accounted for as though those utilities were separate funds.")

the system. Although the pledge of these funds does promise that the revenues of the combined utility must be sufficient, it also directs that if at any point it became necessary to borrow funds of the water or stormwater system in order to repay WWTP debt, that such funds would be treated as an interfund loan and would be repaid by the sewer system. The Court will not decide an hypothetical case. The City Council has not determined to use water or stormwater funds to repay sewer bonds. It clearly expressed the contrary. Speculation that the City would do something contrary to this directive is inappropriate. Thus, the Ordinance clearly requires the City to repay sewer bonds entirely from the rates and charges collected from sewer system customers.

**6.2.2 The Principal Amount of the Proposed Bonds Does Not Exceed any Amount Legally Authorized.**

**A. State Law Does Not Limit the Amount of Revenue Bonds Issued by a City.**

The State Constitution contains limitations on **general** obligation debt that a city may incur, but it does not limit the amount of **revenue** obligation a city may issue.<sup>58</sup> There is no dispute that the City's bond

---

<sup>58</sup> CONST. art. VIII, § 6 (limiting debt incurred by a municipal corporation to one and one-half percent of the value of taxable property within the municipal corporation, or, with voter approval, to a total of five percent of the value of the taxable property therein); RCW 39.46.150(4) ("A revenue bond issued by a local government shall not constitute

legislation specifically states that the bonds and the bond anticipation note are not general obligations of the City.<sup>59</sup> Thus, BRA's arguments regarding constitutional limitations on general obligation debt are inapplicable.

RCW 35A.34.220 requires that proceeds received from the sale of bonds be spent only for the purposes for which those bonds were issued.<sup>60</sup> This budgetary statute does not limit the amount of debt that may be issued, so long as the proceeds are applied to the identified purpose.<sup>61</sup>

---

... a general obligation of the local government issuing the bond, but is a special obligation of the local government issuing the bond[.]); RCW 35.67.140 ("A city or town may issue revenue bonds against the special fund or funds created solely from revenues."); RCW 35.92.100 ("[Revenue] bonds or warrants and the interest thereon shall be payable only out of the special fund[.]"; Every bond or warrant and interest thereon issued against the special fund shall be a valid claim of the holder thereof only as against that fund and its fixed proportion of the amount of revenue pledged to the fund, and "shall not constitute an indebtedness of the city or town[.]"; *Municipality of Metro. Seattle v. City of Seattle*, 57 Wn.2d 446, 459, 357 P.2d 863 (1960) (finding that "[o]bligations payable from a special fund and solely from anticipated service revenue do not constitute a debt within the meaning of the constitutional debt limitation provisions"); *Winston v. City of Spokane*, 12 Wash. 524, 526, 41 P. 888 (1895) (holding that an obligation payable only from a special fund, to be funded solely with waterworks revenue, does not constitute a debt within the constitutional limitations on indebtedness).

<sup>59</sup> Ordinance No. 2009-07, CP 98, 306.

<sup>60</sup> RCW 35A.34.220 provides that money "received from the sale of bonds or warrants shall be used for no other purpose than that for which they were issued and no expenditure shall be made for that purpose until the bonds have been duly authorized. If any unexpended fund balance remains from the proceeds realized from the bonds or warrants after the accomplishment of the purpose for which they were issued, it shall be used for the redemption of such bond or warrant indebtedness."

<sup>61</sup> *Id.* In fact, the provision in 35A.34.220 that directs the use of unspent bond proceeds for redemption of those bonds indicates that the Legislature contemplated the possibility

RCW 35A.34.220 (and RCW 35.34.220) are derived from the original city budget law, at Laws of 1923, ch. 158, § 5 (part). The statute prohibits a city from incurring an obligation to make an expenditure that is to be financed from bond proceeds prior to City approval.

The purpose of this statute is to ensure that costs incurred throughout the year do not obligate a city to issue debt if the city legislative authority has not had the opportunity to evaluate those costs and authorize the issuance of debt. The statute also makes it clear that bond proceeds may not be spent unless they are first appropriated in the budget.

This statute does not prohibit what is otherwise authorized by law for a city. A city may make expenditures of properly budgeted and appropriated funds as authorized by the city legislative authority, which are then to be reimbursed by bond proceeds consistent with federal reimbursement regulations.

When the City Council authorized the WWTP upgrade project, it authorized the project to be paid for from a combination of available cash and money borrowed from several sources, including Public Works Trust Fund Loans and bonds. Thus, at the outset of the project, the City Council

---

of bonds being issued in an amount greater than needed for a project, and provided for the use of those funds.

authorized borrowing (debt). No additional authorizations were necessary. No allegation has been made that the City was required to obtain voter approval to issue bonds or other debt, or that it required the approval of any other governmental body to do so. The only task that remained was to identify the specific terms of the borrowing. Moreover, it authorized temporary expenditures for the WWTP Project to be reimbursed with bond proceeds. Such reimbursement declarations indicated clearly that the City intended to issue bonds.<sup>62</sup>

To suggest that the terms of the borrowing must be approved before the City may spend any money on a project that is authorized to be constructed using a combination of borrowed money and available cash would be contrary to a public policy in favor of keeping costs low. By using cash and the lowest interest loans to pay for construction first, the City minimized the amount of time for which its bonds would be outstanding, thus minimizing the amount of interest that the City would have to repay.

Moreover, RCW 35A.34.220 does not address whether a city may expend of properly budgeted and appropriated funds – as authorized by the City Council in its adopted budget and capital facilities plan – which are then to be reimbursed by bond proceeds consistent with federal

---

<sup>62</sup> Resolution 2009-01, CP 373-374.

reimbursement regulations. State governmental accounting statutes (*e.g.*, RCW 43.09.2851) and federal reimbursement regulations under the Internal Revenue Code 26 CFR § 1.150-2, expressly permit a city to spend available cash to be reimbursed at a later date from proceeds of bonds if the city has designated the amount of bonds to be issued and declared its intent to be reimbursed from those bond proceeds.<sup>63</sup> The City in fact followed these procedures meticulously and no allegation has been made that the City is attempting to reimburse itself for any expenditure that may not be reimbursed under these federal guidelines.

Once again, this is a policy argument masquerading as a legal argument. The BRA latches onto a budget statute in one more attempt to convince this Court to substitute the policy preference of the BRA – namely that the City should have issued bonds earlier in the construction process, thus increasing the costs to the ratepayers – for the City Council’s policy judgment that the least expensive capital (cash and low-interest Public Works Trust Fund Loans) be used before more expensive capital was obtained from the bond market.

### **Interim Financing Tools**

The City experienced delays in carrying out this financing in 2008 because of turmoil in the municipal bond markets, and in 2009 has

---

<sup>63</sup> See CP 373-374.

suffered additional delays created by this lawsuit.<sup>64</sup> To stay on schedule with the construction of the WWTP, the City had to provide interim funding for construction costs from non-bond sources.<sup>65</sup> As authorized by RCW 43.09.2851, the City found temporary sources to bridge the funding gap created by these delays. By Resolution 2009-01, the City declared its intention to make temporary expenditures from available funds in the sewer system, to be reimbursed with bond proceeds to be issued for the WWTP upgrade project.<sup>66</sup> It thereafter used temporarily available cash from the sewer fund to pay WWTP project costs and, when that cash ran out, adopted Resolution No. 2009-13, authorizing an interfund loan from the water fund.<sup>67</sup> There is no issue of fact. The City is using authorized sources of funds for the WWTP project. BRA has shown nothing to the contrary.

---

<sup>64</sup> CP 259; letter from Cashmere Valley Bank informing the City that “the Bank has formed an opinion that this pending litigation does represent a material adverse change,” triggering the bank’s right to halt its purchase of the note (CP 370-71).

<sup>65</sup> CP 259. The City Council authorized an interfund loan from the Water Fund that must be repaid and the City expended sewer funds not designated for use in the WWTP project. CP 365-367.

<sup>66</sup> Further, authority to make declarations of the City’s intent to reimburse itself for purposes of federal reimbursement regulations applicable to tax-exempt bonds has been delegated to the Finance and Administrative Services Director of the City pursuant to Resolution 2007-19. CP 373-74. The City’s Finance and Administrative Services Director made such a declaration with respect to the WWTP upgrade project on December 12, 2007. CP 376-377. *See also* Treas. Reg § 1.150-2.

<sup>67</sup> CP 365-367.

By focusing its Complaint on the remaining funds necessary to complete **construction**, BRA tries to create the illusion of a factual dispute in order to defeat the City's request for a partial summary judgment, but there is no material issue of fact. As BRA recognized in its own submissions to the trial court, the cost of the WWTP improvements far exceeded \$6 million. *See* CP 128-29, CP 146, referencing the City's capital facilities plan update and recognition of the then-estimated cost "of approximately \$13.9 million." Whether \$13.9 million or \$14.9 million, the City is still authorized by law to borrow funds to pay the costs of its sewer system improvements.

BRA's complaints regarding the amount of the proposed bonds result solely from its desire to override the policy decisions made years' ago by the City's elected officials. BRA asks the Court to substitute BRA's policy preference (more pay-as-you-go financing and less long-term debt financing) for the City's Council's policy determination. But the Court will not substitute its judgment for the legislative judgment as to the appropriate budget and financing structure.<sup>68</sup> BRA's disagreement

---

<sup>68</sup> *L.D. Ragan*, 58 Wn.2d at 786 ("Whether the terms of an ordinance are wise or unwise is a question addressed solely to the city council."); *Clise*, 153 Wash. at 667 ("Nor is the court permitted to substitute its judgment for that of the members of the city council as to the wisdom or propriety of the particular expenditures, but is limited solely to the question of the legality of the particular ordinances.").

with the City Council's policy decision does not amount to a legal ground for invalidating the proposed bonds.

**B. The City's Bond Legislation Does Not Authorize Use of Property Taxes to Pay Sewer System Obligations.**

The City's bond proposal, as detailed in the Note Sale Resolution, is to issue Sewer System Obligations, to be paid from revenues derived solely from the City's sewer system.<sup>69</sup> As such, BRA's claim regarding the legality of property taxes imposed to pay bonds fails as a matter of law because, in addition to the reasons set forth above, the proposed bond will not be paid from property taxes. There are no taxes at issue. And, therefore, no available claim of invalidity to be derived from constitutional limits on property taxation.

Regardless, BRA's argument that a city can never use general (or "current expense") revenues to support utility activities is wrong. Cities have the specific authority to levy an excise tax on utility services, including its own utility services. See RCW 35A.82.020 (authorizing excises "for regulation or revenue"). *Burba v. City of Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989) (rejecting constitutional attack on city's utility tax on services provided outside of the city); *Tacoma v. Fiberchem*,

---

<sup>69</sup> CP 108. Section 11 of City Ordinance 2009-02, as amended by § 4(d) of Ordinance 2009-07, defines "Sewer System Obligations to mean 'Revenue Obligations payable solely from and secured by a pledge of the Sewer System Revenues.'" CP 96-98.

*Inc.*, 44 Wn. App 538, 538-542, 722 P.2d 1357 (1986), *rev. denied*, 107 Wn.2d 1008, 722 P.2d 1357 (1986).<sup>70</sup> The utility tax on city utilities may be used for any municipal purpose.<sup>71</sup> In *Berglund v. City of Tacoma*, 70 Wn.2d 475, 423 P.2d 922 (1967), the Supreme Court addressed the validity of a city's general fund support for a different fund. In the course of approving that support, the court recognized specifically that "cities had statutory powers to spend general tax money for improvements to their water systems," citing RCW 35.21.210. *Berglund*, 70 Wn.2d at 478. RCW 35.21.210 applies equally to systems of sewage and storm drainage as it does to water systems. Notwithstanding that authority, the City in this case is pledging sewer revenues, not general taxes, in support of its sewer system obligations.

**C. Proceeds of the Proposed Bonds Are Not Authorized to be Used for Purposes Other than the WWTP Project.**

Neither the Constitution nor statute limits the amount of revenue obligations that the City may issue to that necessary to complete construction of the WWTP project (which has been now been under

---

<sup>70</sup> Bainbridge Island, as a non-charter "city," is entitled to exercise the broadest grant of powers provided to cities, including authority of a first-class city. RCW 35A.11.020, 35A.11.050.

<sup>71</sup> Without a vote of the public, a city's authority to levy a utility tax on electric energy, natural gas, steam energy and telephone is limited to six percent of those utilities' gross receipts. RCW 35.21.870.

construction for nearly two years<sup>72</sup>). BRA's position would create a legal cap on the amount that the City may borrow, and leave the WWTP upgrades without adequate funding.

The City Council exercised its policy discretion to determine that the costs of the WWTP project should be financed, as follows:<sup>73</sup>

|   |                     |
|---|---------------------|
| State Public Works Trust Fund Loans         | \$ 7,571,715        |
| City Revenue Bond or Bond Anticipation Note | 6,000,000           |
| Cash from Operations of City Sewer System   | <u>1,356,845</u>    |
| Total Sources                               | <u>\$14,928,560</u> |

Under BRA's "legal" argument, only about \$4 million should be financed through long-term debt (the amount necessary to complete construction of the WWTP), such as the bonds. And, the remaining \$3.3 million should be financed by the sewer ratepayers on a pay-as-you-go basis. In contrast, the City Council decided that \$6 million should be financed through long-term debt and \$1.3 million should be financed on a pay-as-you-go basis. Courts do not interfere with such legislative and budgetary determinations.<sup>74</sup>

---

<sup>72</sup> City of Bainbridge Island, *City Council Agenda Bill* (Nov. 24, 2008), [http://www.ci.bainbridge-isl.wa.us/documents/pw/wwtp\\_col\\_112408.pdf](http://www.ci.bainbridge-isl.wa.us/documents/pw/wwtp_col_112408.pdf) (WWTP Improvements Project Accounting Document, p. 5).

<sup>73</sup> CP 258, 261; the bond legislation is at CP 267-275, 277-298 and 300-308.

<sup>74</sup> *Weden v. San Juan County*, 135 Wn.2d 678, 700, 958 P.2d 273 (1998) ("[T]he wisdom, necessity and expediency of the law are not for judicial determination,' and an enactment may not be struck down as beyond the police power unless it 'is shown to be clearly unreasonable, arbitrary or capricious.'" (quoting *Homes Unlimited, Inc. v. City of*

BRA now concedes that bond proceeds are to pay for WWTP upgrades. BRA's allegation that bond proceeds will be used for purposes other than that for which they were issued in violation of RCW 35A.34.220 is unsupported by the uncontested facts before the court.<sup>75</sup> The City has not authorized (and there is nothing in the record indicating otherwise) the expenditure of bond proceeds for purposes unrelated to the WWTP Project. BRA's unsubstantiated allegation that the City would take action in the future that would violate its own ordinances and state law is a speculative position that is contrary to the governing presumption that governments will act in accordance with the law.<sup>76</sup> As demonstrated above, the principal amount of the proposed

---

*Seattle*, 90 Wn.2d 154, 159, 579 P.2d 1331 (1978)); *Clise*, 153 Wash. at 667 (finding that a court will not inquire into the wisdom of a city council's decision to exercise statutorily granted power to improve streets and acquire land, "only into the question of the legality of the procedure." And, further stating that the "question of the wisdom and advisability of these expenditures is solely and exclusively for the proper administrative and legislative authorities of the city .... It is for them to exercise their judgment and for them to reach their own conclusions" and the court is not permitted to "substitute its judgment for the members of the city council[.]").

<sup>75</sup> App. Br. at 19.

<sup>76</sup> *Town of Weyauwega v. Ayling*, 99 U.S. 112, 119, 25 L. Ed. 470 (1878) ("as the presumption always is, in the absence of any thing to the contrary, that a public officer while acting in his official capacity is performing his duty"); *Tabb v. Funk*, 172 Wash. 189, 194, 19 P.2d 668 (1933) ("In the absence of a showing that the municipal authorities acted arbitrarily or capriciously . . . , it must be presumed that they were actually justified by the conditions existing and were lawful."); *State ex rel. Lane v. Fleming*, 129 Wash. 646, 650, 225 P. 647 (1924) ("It has also been said that it is not to be assumed that the council or officer . . . will act arbitrarily or otherwise than in the exercise of a sound discretion.") (quoting *Dillon on Municipal Corporations* (5th Ed.) § 598)).

bonds does not exceed the amount the City Council has determined to be necessary to finance the WWTP.<sup>77</sup> Further, the City's own resolution authorizing the issuance of the Note provides that draws may be made against the Note only as required to finance costs of the WWTP project, and that the amount of a draw may not exceed the total amount of WWTP project costs to be paid from that draw.<sup>78</sup> The Court will not rule on a summary judgment motion based on mere conjecture by the opposing party.<sup>79</sup>

As a matter of law, BRA's mistaken assumptions about speculative City actions do not form a basis for invalidating the proposed bonds.

---

<sup>77</sup> See Resolution 2009-08 at CP 106-111; and, CP 272

<sup>78</sup> CP 272 (at § 6).

<sup>79</sup> *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) ("A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. The defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue. In response the non-moving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. Additionally, any such affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions.") (citations omitted); *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999) (the 'facts' required to defeat a summary judgment motion must be based on more than "mere theory or speculation").

**6.3 THE NON EXISTENCE OF A NON BINDING ADVISORY COMMITTEE DOES NOT CHANGE THE FACT THAT THE PROPOSED BOND ISSUE IN THIS CASE IS VALID UNDER WASHINGTON LAW'S THREE PART TEST FOR BOND VALIDITY.**

**6.3.1 The City's Ability to Act is not Conditioned Upon Action by the Utility Advisory Committee.**

The City Council is not powerless to take any utility-related action without having first received the non-binding recommendations of a memberless utility advisory committee. As BRA and its officers have long known – and as their pleadings therefore accurately concede – that advisory group was never formed.<sup>80</sup> That 10 year old fact, however, does not now make the City's proposed bond issue void or legally invalid.

In its political fervor to derail the City's financing of the WWTP upgrade, BRA has misread the plain language of Chapter 2.33 of the Bainbridge Island Municipal Code. The City's Code does provide for a utility advisory committee, and for advisory (non-binding) recommendations relating to utility matters, including financing of sanitary sewer utility capital facilities.<sup>81</sup> The Code allows the utility

---

<sup>80</sup> See Compl. ¶ 18 (CP 6) (noting that City did not establish that advisory committee); Amended Compl. ¶ 19 (CP 31) (same).

<sup>81</sup> BIMC § 2.33.040.

advisory committee to give recommendations.<sup>82</sup> But, it is the City Council, not the committee, that makes the final decision.

Moreover, what the City's Code **does not** say is more to the point. BRA asserts that the City Council is impotent to take any action with respect to utility-related matters unless the utility advisory committee has first weighed-in. But the Code contains no such provision.<sup>83</sup> In fact, the Code **does not** say that the City Council or Mayor must seek or consider the thoughts of the committee; the Code **does not** say that the City Council's ability to act is conditioned upon prior receipt of advice from the committee; and the Code **does not** say that the City's actions with respect to matters relating to utilities are void without prior receipt of advice from the committee.<sup>84</sup>

The word "shall" as it appears in the City's Code directs the actions of the committee, but it does not mandate a duty on the part of the City Council to obtain the committee's recommendations before acting. This implied duty, BRA expansively contends, should be deemed a new legal precondition on the City Council's ability to take valid action with respect to almost any matter relating to utilities, and should strip the City Council of the legal authority granted to it by the State Legislature. This

---

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

contention is simply untenable given the relevant language (or, more accurately, lack thereof) in the Code.<sup>85</sup>

The standards of legislative construction recognize that there is “no well-defined rule by which directory provisions are ... distinguished from those which are mandatory.”<sup>86</sup> As the Court knows, the prime object is to ascertain legislative intent.<sup>87</sup> Here, the best expression of legislative intent is that the 1999 City Council that initially provided for a utility advisory committee did not create such a committee, or refer matters to it. Further, in authorizing the advisory committee the City Council did not provide for any “consequences” or prescriptions arising from the failure of committee action. Having not prescribed consequences for such action, the ordinance provides for nothing more than an unenforceable direction, and not a mandatory control.<sup>88</sup>

Further, the Supreme Court has recognized the well established general rule that one legislature cannot divest a succeeding legislature of

---

<sup>85</sup> To the extent that the Utility Advisory Committee is intended to encourage public participation in decisions regarding the City’s utilities, the City held over 24 open public meetings at which the WWTP upgrade project was discussed. Not only did members of the Plaintiff organization attend many of these meetings, they also participated. CP 259.

<sup>86</sup> *State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 580, 183 P.2d 813 (1947).

<sup>87</sup> *State v. McDonald*, 89 Wn.2d 256, 262-63, 571 P.2d 930 (1977), *overruled on other grounds*, *State v. Sommerville*, 111 Wn.2d 524, 760 P.2d 932 (1988); *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940).

<sup>88</sup> *See id.*

its power to legislate.<sup>89</sup> “[A]bsent contractual protection or some other form of constitutional restriction, nothing prevents one legislature from amending the work of a previous legislature.”<sup>90</sup> The 1999 City Council that adopted the ordinance codified at BIMC § 2.33.040 could not limit a future City Council’s power to legislate.<sup>91</sup> Even if the language of BIMC § 2.33.040 were interpreted to control actions of that City Council, it would be ineffective to abridge the present City Council’s authority to make legislation regarding utility matters.

### **6.3.2** City Acts Through Legislative, Not Advisory Authority.

Even if the City Code provision BRA cites could be interpreted to restrict the Legislature’s broad delegation of bond and bond anticipation note authority to the City, Washington law would **not allow** that interpretation to stand.

The State Legislature delegated the authority at issue specifically to the City’s **legislative authority**.<sup>92</sup> That is significant because

---

<sup>89</sup> *Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 301, 174 P.3d 1142 (2007) (quoting *Gruen v. State Tax Comm’n*, 35 Wn.2d 1, 54, 211 P.2d 651 (1949), *overruled on other grounds*, *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963)).

<sup>90</sup> *Id.* at 301-02 (quoting Kristen L. Fraser, Method, Procedure, Means, and Manner: Washington’s Law of Law-Making, 39 GONZ. L. REV. 447, 478 (2003-04)).

<sup>91</sup> *See id.*

<sup>92</sup> Chapter 35.67 RCW grants the authority to the city’s “legislative body” (RCW 35.67.120-35.67.140); Chapter 35.92 RCW grants the authority to the city’s “corporate authorities” (RCW 35.92.100); Chapter 39.46 RCW grants the authority to the city’s

Washington law holds that when the State Legislature grants a power specifically to the **legislative authority** of a municipal entity, that municipal entity cannot lawfully restrict the State Legislature’s delegation of that power.<sup>93</sup> Stated otherwise, a city council lacks the power to abdicate any part of its responsibility to issue bonds by delegating authority to a non-elected advisory board. As the State Supreme Court holds, one reason that Washington law invalidates such local restrictions is that if the municipal entity were allowed to restrict the State Legislature’s grant of power to that municipal entity, the added restriction would frustrate the broader mandate of the people of the State as expressed through their Constitutionally designated representatives in the State Legislature.<sup>94</sup>

In short, Washington law does not allow the City Code provision BRA relies upon to restrict the legal authority that the State Legislature delegated to the City for the proposed bond issue in this case. That City

---

“governing body” (RCW 39.46.150); Chapter 39.50 RCW grants the authority to the City’s “governing body” (RCW 39.50.030).

<sup>93</sup> *Taxpayers of King County*, 123 Wn.2d at 611 (when the State Legislature “has granted a power to the legislative authority of a municipality, the municipality may not limit the scope of that power, or surrender any of it”).

<sup>94</sup> *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 168, 173, 149 P.3d 616 (2006) (explaining that a local government may not limit the authority granted to it by the State Legislature; any provision that purports to limit a grant of authority to a local legislative authority from the State Legislature is invalid).

Code provision accordingly cannot render the City's proposed bond issue void or invalid under Washington law.

Finally, if BRA's contentions regarding the advisory committee were correct, this court would have to invalidate virtually every decision made by the City Council regarding any of its utilities since 1999 – including the decision to undertake the WWTP upgrades in the first place. However, the BRA's officers attended over 20 public hearings at which the WWTP upgrades were discussed, and never once raised the question of forming a utility advisory committee during that time. It simply would be untenable for this Court to allow BRA to raise a claim now that could have been raised at any point during the last eleven years to challenge any number of actions by the City Council.<sup>95</sup>

#### **6.4 THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RECONSIDERATION.**

**6.4.1 Motion Not Supported by Record.** This action does not contain contested issues of fact. It is a case challenging municipal legislation authorizing borrowing to pay for a wastewater treatment plant expansion. BRA knew the facts and the law months (or years (in the case of the utility advisory committee)) before it filed its complaint in

---

<sup>95</sup> See *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 585 P.2d 801 (1978) (barring action against bonds when plaintiff had earlier, reasonable opportunity to bring challenge).

April 2009. *See* CP 161, 3. The principal legislation was contained in both the City's motion and the response to summary judgment. BRA had months to gather information regarding its complaint against the City, both before and after the City sought summary judgment. In fact the City's motion for Summary Judgment was filed on July 17, long before the trial court hearing on September 4, 2009. BRA's Complaint showed extensive knowledge of the City's utility systems. CP 3-5. BRA's own declarations to the trial court presented financial estimates regarding the cost to the City and its sewer rate payers for upgrading the WWTP. *See* CP 128-29, 146. BRA had access to, and cited, records pertinent to its claims. *See* CP 121-122. BRA, as did the City, cited to the City website for authority. *See, e.g.*, CP 44-45, 128-29. It is disingenuous for BRA to argue that it was not prepared for hearing on summary judgment. If BRA claimed prejudice, it should have timely moved for a continuance. It did not, as the trial court recognized. CP 256. There was no basis for reconsideration, and the trial court's discretionary determination should be affirmed.

Further, BRA offers nothing that it claimed on reconsideration would impact the analysis that the court provided on the issues of law it decided at summary judgment. *See Clausing v. Kassner*, 60 Wn.2d 12, 18-19, 371 P.2d 633 (1962) (it was not error for the trial court to deny

reconsideration when the party offered nothing more at trial that was not before the superior court on summary judgment).

**6.4.2 Motion Not Supported Procedurally Or Substantively.** The trial court's ruling on reconsideration was not an abuse of discretion. The decision denying reconsideration was not "manifestly unreasonable or based upon untenable grounds or untenable reasons." *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). In response to the extensive public record before the trial court, BRA's reconsideration papers simply regurgitated the same points that were fully addressed and considered by the trial court. Indeed, BRA simply repeated its contention that the City was without authority to incur debt (through bonds or bond anticipation notes) to complete the financing of the \$15 million upgrade to the City's WWTP. Rather than provide grounds for reconsideration, BRA's submissions only further supported the foundation for the trial court's dismissal of this action.

## **7. CONCLUSION**

The City has all legal authority to operate and improve its public sewer system, including the system's WWTP. And, as BRA admits, the City has the authority to issue bonds for the system's costs, including the WWTP upgrade. The trial court properly rejected the BRA challenge to

the City's bond legislation and dismissed the bond-related claims. The summary judgment of dismissal should be affirmed by this Court.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of January, 2010.

FOSTER PEPPER PLLC

A handwritten signature in black ink, reading "P. Stephen DiJulio", written over a horizontal line.

P. STEPHEN DiJULIO, WSBA No. 7139  
Attorneys for Respondent  
City of Bainbridge Island

No. 39850-8-II

---

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

---

BAINBRIDGE RATEPAYERS ALLIANCE,

Appellant,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

---

DECLARATION OF SERVICE

---

P. Stephen DiJulio  
**FOSTER PEPPER PLLC**  
1111 Third Avenue, Suite 3400  
Seattle, Washington 98101-3299  
Telephone: (206) 447-4400  
Facsimile: (206) 447-9700  
DiJUP@Foster.com  
Attorneys for Respondent

FILED  
COURT OF APPEALS  
DIVISION II  
10 JAN 13 PM 12:00  
STATE OF WASHINGTON  
BY \_\_\_\_\_

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2010 JAN 11 PM 4:53

Susan G. Banner declares:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein. Today, I caused the following documents to be served to the following counsel as follows:

1. Brief of Respondent;
2. and this Declaration of Service

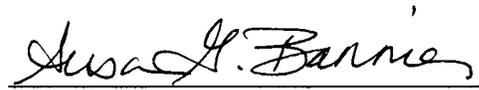
upon

Mr. Richard M. Stephens  
Mr. Brian D. Amsbary  
Groen Stephens & Klinge LLP  
11100 NE 8<sup>th</sup> Street, Suite 750  
Bellevue, WA 98004  
[stephens@gsklegal.pro](mailto:stephens@gsklegal.pro)  
[amsbary@gsklegal.pro](mailto:amsbary@gsklegal.pro)

|                                     |
|-------------------------------------|
| <input checked="" type="checkbox"/> |
| <input type="checkbox"/>            |
| <input type="checkbox"/>            |
| <input checked="" type="checkbox"/> |

Via U.S. Mail  
Via Facsimile  
Via Messenger  
Via Electronic Mail

EXECUTED at Seattle, Washington this 11th day of January,  
2010.

  
\_\_\_\_\_  
Susan G. Banner