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SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re:

BOND ISSUANCE OF GREATER WENATCHEE  
REGIONAL EVENTS CENTER PUBLIC FACILITIES DISTRICT

\* \* \* \* \*

GREATER WENATCHEE REGIONAL EVENTS CENTER PUBLIC  
FACILITIES DISTRICT,

Appellant,

v.

CITY OF WENATCHEE, WASHINGTON,

Respondent.

RESPONSE BRIEF OF TAXPAYER REPRESENTATIVE

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December 5, 2011

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## I. INTRODUCTION

Intervenor-Appellant The Greater Wenatchee Regional Events Center Public Facilities District (“PFD”) appeals the Chelan County Superior Court’s declaratory judgment that the City of Wenatchee (“City”) would violate constitutional and statutory debt limitations if the City entered into the financing scheme proposed by the PFD for payment on the PFD’s bonds (“2011 Interlocal Agreement”).

The PFD and Amicus Washington Treasurer claim that broad proclamations regarding the meaning of “debt” could call into question the validity of financing schemes used by governments across the state of Washington. No evidence of these other financing schemes exists in the record. Thus they are not properly before the Court, and Respondent Taxpayer Representative (“Taxpayer”) has no grounds to discuss their validity. Taxpayer asserts only that the proposed 2011 Interlocal Agreement would contractually obligate the City to make deficiency payments to the PFD in amounts that far exceed the City’s legal debt capacity and that the Superior Court should be affirmed.

## II. ASSIGNMENTS OF ERROR AND ISSUE STATEMENTS

The PFD fragments the two issues succinctly presented to the Court for declaratory judgment into seven assignments of error and nine accompanying issues. The two issues raised in the City's complaint and in both the City and PFD's motions for summary judgment are:

- (1) whether the City's obligations under the proposed 2011 Interlocal Agreement to provide security for bonds issued by the PFD constitutes debt of the City within the meaning of RCW 39.36 and Washington Constitution Article VIII, § 6; and
- (2) whether the City has the right and authority to pledge its full faith and credit to provide security for the bonds under the 2011 Contingent Loan Agreement.

CP 92, 97, 726, 248-49.

The Superior Court's written order answered two ancillary questions: (1) that the 2011 Interlocal Agreement created indebtedness consisting of principal and interest and (2) that the indebtedness included the total anticipated amount to be paid over the lifetime of the bonds. RP 4, 72-73; CP 664-665.

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

#### **A. Procedural Background**

The City passed Resolution No. 2011-52 on July 14, 2011 that approved the form of the 2011 Interlocal Agreement subject to a legal determination that the City has the right and authority to agree to the 2011 Interlocal Agreement. CP 216-17. The City filed a complaint seeking declaratory judgment. CP 92-98.

The City and the PFD both moved for summary judgment. CP 722-53; CP 235-65. The Superior Court appointed a taxpayer representative. CP 87-88. The City took a “neutral” position throughout the Superior Court proceedings. RP 16, 18, 48-49; CP 722-53. Only the Taxpayer has taken an adverse position against the PFD. CP 682-709. The Superior Court granted the City’s motion and denied the PFD’s motion. RP 52-73; CP 663-65.

#### **B. The City created the PFD to construct and operate the Center.**

Officials elected by Wenatchee taxpayers joined with representatives of six neighboring municipalities and two counties in June 2006 to create the PFD. CP 11-12; CP 101-15. The parties created the PFD for the sole purpose of constructing and operating the Greater

Wenatchee Regional Events Center (“Center”). CP 11-12. The Center is a 167,531 square foot arena that can seat approximately 4,300 people. CP 321. Construction of the Center occurred between September 2006 and November 2008. CP 321. The PFD presently operates the Center, but in three years has yet to generate sufficient revenues to finance its operations, let alone its debt liabilities. CP 674-75.

**C. The September 2006 Interlocal Agreement limits the City’s payment obligations to the City’s debt capacity.**

On September 6, 2006, the City and the PFD executed an Interlocal Agreement (“2006 Interlocal Agreement”). CP 166-172. The 2006 Interlocal Agreement requires the City to execute a loan agreement that would provide security for financing bonds issued by the PFD. CP 168-69. The City agreed to make deficiency payments in amounts sufficient to pay the bond principal and interest expenses that exceeded the Center’s income. CP 168-69. The City pledged its “full faith and credit to the repayment of such bonds” and agreed to execute other financing documents as necessary. CP 169.

Instead of issuing long-term bonds as intended under the 2006 Interlocal Agreement, the PFD issued short-term Bond Anticipation Notes (“2008 Notes”) for \$41,770,000 in November 2008 to purchase the Center.

CP 94, 301-40. The PFD used these short-term bonds as a temporary funding mechanism because of an unfavorable bond market in 2008. CP 94, 301-40. Payments on these notes were interest only. CP 301. The 2008 Notes matured and became due on December 1, 2011. CP 147.

Pursuant to the 2006 Interlocal Agreement, the City and the PFD entered into a "Contingent Loan Agreement" on November 13, 2008 that required the City to make debt service payments to the PFD for interest on its 2008 Notes. CP 184, 186. Sections 2.02(d) and 2.03(c) of the Contingent Loan Agreement expressly limited the City's commitment to make deficiency loans only up to the City's debt capacity. CP 186-87.

In three years, the Center has failed to generate sufficient revenues to pay its operating expenses and the interest due on the 2008 Notes. CP 674-75. Consequently, as of June 1, 2011, the City has made payments of \$2,617,521.63 to cover the interest that the PFD was unable to pay, and anticipates paying an additional \$967,465.63 on November 1, 2011. CP 675, 94. The City expects to make future payments for the life of the new bonds, given the Center's insufficient revenue-generating capacity and the PFD's lack of revenue (CP 675, 94), and more importantly, the long-term bonds are not marketable without the City obligating itself to make the

payments. *Declaration of Peter Fraley in Support of PFD's Emergency Motion for Accelerated Review*, Wash. Sup. Ct. Cause No. 86552-3, p.5 (Oct. 19, 2011).

The PFD's General Manager claims that the Center's operating revenues exceeded its operating expenses in 2009 and 2010. CP 546. What the General Manager's statement does not account for is the Center's inability to make interest payments on the 2008 Notes held by the PFD. CP 546. In addition, the General Manager's statement that the Center's 2011 operating revenues should exceed its 2011 operating expenses does not account for the interest payments due and owing on the 2008 Notes or the PFD's legal fees incurred in 2011. CP 545-46.

**D. The PFD's proposed 2011 Interlocal Agreement absolutely and unconditionally obligates the City to make deficiency payments in amounts exceeding the City's debt capacity.**

The proposed 2011 Interlocal Agreement was presented by the PFD to the City because the PFD needed to issue Revenue and Special Tax Bonds ("2011 Bonds") to refinance its 2008 Notes.<sup>1</sup> CP 196, 198-

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<sup>1</sup>Under the proposed 2011 Interlocal Agreement, there is no provision requiring execution of a separate contingent loan agreement. Instead, the 2011 Interlocal Agreement has incorporated language from the 2008 Contingent Loan Agreement.

214. While the PFD did not include language that the City pledge its full faith and credit (as was in the 2008 Contingent Loan Agreement (CP 186)), § 1.01(f) of the 2011 Interlocal Agreement imposes an “absolute and unconditional” obligation on the City to make deficiency payments to the PFD. CP 203. The 2011 Interlocal Agreement also requires the City to pay the deficiency payments “regardless of whether the Regional Center is operating at any particular time.” CP 203.

Section 1.01(g) states that the City and the PFD consider the 2011 Interlocal Agreement “to be a binding contract” and acknowledge that bondholders and financial institutions “will rely on the terms of this Agreement,” including the City’s commitment to make deficiency payments. CP 204. Section 6.06 provides that the “Registered Owners” of the bonds “are intended to be and shall be third-party beneficiaries of this Agreement.” CP 212.

The proposed 2011 Interlocal Agreement also removed an important limitation that existed in the 2008 Contingent Loan Agreement. The 2011 Interlocal Agreement does not limit the City’s payment obligations to the City’s debt capacity. *Compare* CP 186 *with* CP 198-214. Instead of recognizing the City’s constitutional debt capacity, the

PFD added language in the 2011 Interlocal Agreement that “[t]he City and the District recognize that the City’s obligations hereunder do not constitute City “debt” subject to constitutional or statutory limitations.” *Compare* 186 at § 2.02(d) *with* CP 203. Further, § 6.10 provides that the proposed 2011 Interlocal Agreement would supersede the 2006 Interlocal Agreement if and to the extent of any conflict between those provisions. CP 212.

The proposed 2011 Interlocal Agreement provides that the PFD would issue 30-year Bonds that mature in 2041. CP 205. The parties do not dispute that the City’s available non-voted debt capacity equals approximately \$23 million to \$25 million. CP 676-77; RP 5. If the City entered the 2011 Interlocal Agreement, the City would be obligated to make principal and interest payments on the 30-year Bonds in the amount of approximately \$85,000,000. CP 677.

The proposed 2011 Interlocal Agreement makes additional relevant changes. Section 1.02 requires the PFD to repay the City’s payments, but not before the PFD first has paid its maintenance and operating expenses, bonds, and other creditors. CP 224-25. The 2011 Interlocal Agreement provides the City with “remedies” if the PFD fails to repay the “loaned”

amounts, (CP 226-27), but these “remedies” only consist of calling the Bonds for redemption, an accounting and inspection of the PFD’s books, and requesting that the PFD pursue taxing options. CP 226-27. In addition, if the City is not repaid, under the proposed 2011 Interlocal Agreement, the City will receive a percentage tenancy-in-common interest in the Center. CP 225 at § 102(e). Finally, Article II(e) provides that the City can request the PFD to transfer ownership of the Center to the City. CP 227.

The parties do not dispute that the City could not issue refinancing bonds in the City’s own name without exceeding the City’s debt capacity. The PFD argues nonetheless that the City can make deficiency payments on those bonds, even if the Center is not operating, because of the financing scheme it has developed. *PFD’s Br.* 1-2 (Nov. 15, 2011).

#### IV. AUTHORITY AND ARGUMENT

\_\_\_\_\_The Court reviews de novo summary judgments of the Superior Courts. *Flight Options, LLC v. State Dept. of Revenue*, 172 Wash.2d 487, 494, 259 P.3d 234 (2011). The PFD argues that a municipal corporation’s legislative enactment carries a presumption of constitutionality that must be overcome beyond a reasonable doubt. *PFD’s Br.* 20 (Nov. 15, 2011).

Such a presumption and burden do not apply here because the City has not undertaken a legislative enactment. CP 95, 127. The City abstained from entering into the 2011 Interlocal Agreement pending outcome of the declaratory judgment action to address the City's constitutional concerns. CP 95, 127. The Court should review the 2011 Interlocal Agreement to determine whether it would "clearly conflict" with the constitution. *Dept. of Ecology v. State Fin. Comm.*, 116 Wash.2d 246, 804 P.2d 1241(1991) (citing *State ex rel. Wittler v. Yelle*, 65 Wash.2d 660, 665, 399 P.2d 319 (1965)).

**A. The 2011 Interlocal Agreement would obligate the City's citizen taxpayers to pay on indebtedness that exceeds constitutional and statutory limitations.**

The Washington State Constitution prohibits a city from becoming "indebted in any manner" in excess of one and one-half per centum of the city's taxable property. Wash. Const. art. VIII, § 6. The legislature enacted statutory protections that further restrict a city's ability to accrue large debts that must be paid by future taxpayers. RCW 39.36.020. All orders, authorizations, allowances, contracts, payments or liabilities to pay in violation of these debt limitations are "absolutely void." RCW 39.36.040.

These constitutional restraints on incurring municipal indebtedness “are intended for the protection of minorities, for the protection of posterity, and to protect majorities against their own improvidence, and it is the duty of the courts to enforce them.” *State ex rel. Potter v. King Co.*, 45 Wash. 519, 528, 88 P. 935 (1907). The protections prevent abuse of taxpayer credit and the consequent oppression of burdensome, if not ruinous, taxation. *Chemical Bank v. Wash. Pub. Power Supply Sys. (“WPPSS I”)*, 99 Wash.2d 772, 801, 666 P.2d 329 (1983) (Dore, J., concurring) (*citing* 56 Am.Jur.2d *Municipal Corporations*, § 599, 651 (1971); 15 E. McQuillin *Municipal Corporations* § 41.02 (3d ed. 1970)). Constitutional debt limitations protect taxpayers from politicians who might abuse a government’s credit for short-term gains while ignoring the long-term adverse effects of burdensome debt obligations. Robert S. Amdursky & Clayton P. Gillette, *Municipal Debt Finance Law* § 4.1.1, 160-161 (Little, Brown and Co., 1992 & Supp. 2002).

Politicians and their attorneys have devised financing schemes that attempt to circumvent the constitutional and statutory debt limitations. *State ex rel. State Capitol Commn. v. Lister*, 91 Wash. 9, 17, 156 P. 858 (1916); *Ecology*, 116 Wash.2d at 261, 804 P.2d 1241. Parties have called

upon the Court to analyze whether these financing schemes comply with the constitutional and statutory safeguards. For example, the Court in *State Capitol Commission v. State Board of Finance* struck down a financing scheme that incurred debts against the general state fund even though the debts would “possibly or even probably” be relieved by funds derived from the sale of capitol lands. 74 Wash. 15, 132 P.861 (1913). See also *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash.2d 645, 654-55, 384 P.2d 833 (reiterating that “the mere guaranty of the principal and interest . . . even though there appeared to be more than ample revenues . . . contravened the constitutional debt limitations”).

Similarly, the Court in *Lister* struck down a financing scheme that allowed the State to levy taxes to pay interest as a “loan” on issued bonds subject to repayment from the state’s general fund to the capitol building fund. 91 Wn. at 17, 156 P. 858. The Court has also rendered void as ultra vires contracts entered by public entities that exceeded the entities’ statutory authority. *WPPSS I*, 99 Wash.2d at 798-99, 666 P.2d 329; *Chemical Bank v. Wash. Pub. Power Supply Sys.* (“*WPPSS II*”), 102 Wash.2d 874, 893-94, 691 P.2d 524 (1984).

**1. The clear and plain constitutional language that limits municipal indebtedness “in any manner”**

**encompasses all forms of indebtedness, including the contractual obligation to pay in the 2011 Interlocal Agreement.**

Article VIII, § 1 of the Washington Constitution governs “State Debt” and defines “debt” as “borrowed money.” Section 1(d) expressly excludes cities and other municipal corporations from that definition. Wash. Const. art. VIII, § 1(d).

Article VIII, § 6, titled “Limitations Upon Municipal Indebtedness,” governs cities. Section 6 prohibits cities such as Wenatchee from becoming “indebted in any manner” in excess of one and one-half per centum of the city’s taxable property. *Id.* at § 6.

Constitutional drafters used different language in Article VIII, § 1 (relating to state “debt”) and in Article VIII, § 6 (relating to city “indebtedness”). Courts assume that constitutional drafters intended different meanings when drafters use different language to address the same or similar subjects. *Harmelin v. Mich.*, 501 U.S. 957, 978, n. 9, 111 S. Ct. 2680 (1991); *accord State v. Costich*, 152 Wash.2d 463, 475-76, 98 P.3d 795 (2004) (reciting the “firmly established” principle of statutory interpretation that the legislature intends different meanings where it uses different language in the same statute). The Washington Constitution

drafters evidenced intent to create different meanings by setting the state and municipal debt limitations in separate sections of the same article. *Compare* Wash. Const. art. VIII, § 1 *with* Wash. Const. art. VIII, § 6.

The Court gives words in the Constitution their ordinary meaning unless the Constitution otherwise defines the words. *Zachman v. Whirlpool Fin. Corp.*, 123 Wash.2d 667, 670, 869 P.2d 1078 (1994). The common and ordinary meaning of “indebted in any manner” encompasses a broad range of forms of indebtedness, that should include pledges, guarantees, warrants, loans, and contractual obligations that create a “condition of owing money.” Bryan A. Garner, *Black’s Law Dictionary* 836 (9th ed. 2009) (defining “indebtedness” as “the condition or state of owing money”). Had the drafters of the Washington Constitution intended to confine municipal debt limits to “borrowed money,” they would have used language similar to that in Article VIII, § 1. Instead, they used the all-encompassing “in any manner” language in Article VIII, § 6.

Article VIII, § 6 does not include the words “debt” or “borrowed money.”<sup>2</sup> The use of different language, the separated placement of the

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<sup>2</sup>The PFD’s textual argument based on its representation that “Article VIII, § 6 limits municipal borrowing” is misleading. *PFD’s Br.* 31 (Nov. 15, 2011) (emphasis in original). No where in Article VIII, § 6 does the word “borrowing” appear.

provisions, and the common and ordinary meaning of the language, supports a broad interpretation of the limitation in Article VIII, § 6 that includes *all manners* of indebtedness, including pledges, commitments, and binding contractual obligations to make deficiency payments like that proposed in the 2011 Interlocal Agreement.

The clear language and nature of the 2011 Interlocal Agreement, as proposed by the PFD, creates a binding contractual obligation that would require the City to make payments to the PFD. The relevant provisions provide:

1. Section 1.01 requires the City to make debt service payments to cover the bond's principal and interest when the PFD has insufficient funds. For the last three years, the PFD has been unable to make the interest-only payments on the Notes. CP 202, 675.
2. Section 1.01(a) requires these debt service payment be paid on June 1 and December 1 of each year. CP 202.
3. Section 1.01(c) requires the City to pay the total deficiency amount in immediately available funds and disclaims any requirement regarding the source of the funds. CP 203.
4. Section 1.01(f) makes the City's obligation "absolute and unconditional" and not "subject to diminution by setoff, counterclaim, abatement or otherwise." CP 203.
5. Section 1.01(f) requires the City to make the payments "regardless of whether the Regional Center is operating at any particular time." CP 203.

6. The City's obligation terminates only "upon payment in full of the principal and interest" on all bonds. CP 203.
7. Section 1.01(f) recites that the City's obligation does "not constitute City "debt" subject to constitutional or statutory limitations" (despite express acknowledgment in the 2008 Contingent Loan Agreement that the City's debt service payments were subject to the City's debt capacity).  
*Compare CP 203 with CP 186 at § 2.02(d).*
8. Section 1.01(g) states that the City and PFD consider the 2011 Interlocal Agreement "to be a binding contract" and acknowledge that bondholders "will rely on the terms of this Agreement," including the City's commitment to make deficiency payments. CP 204.

The City will become "indebted" by the plain and clear contractual language of the provisions used in the 2011 Interlocal Agreement. The provisions create an "absolute and unconditional" obligation to make the deficiency payments presently and until the entire principal and interest of the loans has been paid off. CP 202-03. The plain and clear language identifies the 2011 Interlocal Agreement as a "binding contract." CP 204. The 2011 Interlocal Agreement does not allow the City to withhold funds, even if the Center stops operating or other circumstances arise. CP 203. The 2011 Interlocal Agreement does not permit future elected City officials to prioritize funding for police, firefighting, roads, parks, and other municipal needs over these deficiency payments to the PFD.

The “binding contract” that would be created by the 2011 Interlocal Agreement would create City “indebtedness” under most any definition of the word. A “look to the constitution itself” makes clear that this contractual obligation easily constitutes a form of municipal indebtedness prohibited by Article VIII, § 6’s broad proscription against becoming “indebted in any manner” in excess of the established limits. *Wittler*, 65 Wash.2d at 665, 399 P.2d 319.

**B. The PFD’s financing scheme attempts to circumvent the constitutional debt limitation by elevating form over substance.**

The PFD’s argument that the City has an unlimited lending capacity violates the “spirit and the letter” of the Constitution. *State Capitol Commn.*, 74 Wash. at 27, 132 P. 861.

**1. The PFD’s “city-as-lender-not-borrower” argument has no foundation in the text or purpose of the Constitution or caselaw.**

The PFD’s attempt to distinguish between “debts” and “loans” or “borrowing money” and “lending money” constitutes a distinction without a difference for purposes of determining whether the 2011 Interlocal Agreement would cause the City to become “indebted in any manner” under Article VIII, § 6. The ten authorities cited by the PFD to support its

argument that the City can lend limitlessly either do not apply or have reached incorrect conclusions. *PFD's Br.* 21-26 (Nov. 15, 2011) (citing *Wittler*, 65 Wash.2d at 668-69, 399 P.2d 319, *State ex rel. Troy v. Yelle*, 36 Wash.2d 192, 217 P.2d 337 (1950), *Ecology*, 116 Wash.2d at 254, 804 P.2d 1241, a treatise, two legal opinion letters, an article, two foreign cases, and an attorney general opinion).

*Wittler*, *Troy*, and *Ecology* discuss state “debt” (under Article VIII, § 1), not municipal indebtedness (under Article VIII, § 1) and otherwise do not stand for the proposition that a city can loan limitlessly without violating Article VIII, § 6. The secondary legal authorities cited by the PFD also do not apply in the factual context of this dispute. To the extent that the legal opinion letters apply, they have incorrectly interpreted the text of the Washington Constitution, overlooked distinctions in constitutional language, misinterpreted this Court’s caselaw, and erroneously concluded that the City could contractually obligate itself to unlimited lending without violating the spirit and the letter of Article VIII’s debt limitations. *Wittler*, 65 Wash.2d at 665, 399 P.2d 319 (stating that while the Court is mindful of the parties “advocacy and scholarship,” it must nevertheless “look to the constitution itself for ultimate guidance”).

The City itself recognized the infirmity of those legal opinions and sought declaratory judgment in the courts of Washington. CP 216-17.

The PFD's varied citations also evidence the fact that no case has definitively interpreted the meaning of Article VIII, § 6 indebtedness. 1952 Wash. AG Lexis 393; 1951-1953 Op. Atty Gen. Wash. No. 345 (expressing uncertainty whether the Court would extend the narrow "borrowed money" definition of debt to Article VIII, § 6 municipal indebtedness). Our Courts have historically considered the substance, and not merely the form, of financing schemes to determine whether those schemes comply with debt limitations. 15 E. McQuillin, *Municipal Corporation* §§ 41.15-17 (3rd ed. 1995). Courts have also historically disallowed parties to evade the debt limit provisions by "indirect methods" or "subterfuge." *Id.* The Court has measured financing schemes against both the "spirit and the letter" of Article VIII to determine whether they comply with the debt limitations. *State Capitol Commn.*, 74 Wash. at 27, 132 P. 861.

The Chelan County Superior Court relied on *Martin*, 62 Wash.2d at 661, 384 P.2d 833, for the conclusion that municipal indebtedness means "any obligation which in law must be paid from any taxes levied

generally.” RP 69. Though the *Martin* decision dealt with state “debt” under Article VIII, § 1, the *Martin* definition reasonably resonates with Article VIII, § 6’s broad mandate that “[n]o . . . city . . . shall for any purpose become indebted in any manner” in excess of established limits.

The PFD faults the Superior Court for using the *Martin* definition because the PFD believes the *Martin* definition to be too broad. *PFD Br.* 24 (Nov. 15, 2011). The Superior Court’s use of the *Martin* definition finds support, however, in the plain meaning of the word “indebtedness,” in this Court’s caselaw, and in secondary authority. “Indebtedness” means “the condition or state of owing money.” Garner, *Black’s Law Dictionary* 836. The Court has considered as a test of indebtedness whether a financing scheme creates an unconditional obligation or promise to pay. *Ecology*, 116 Wash.2d at 255, 804 P.2d 1241; *Comfort v. Tacoma*, 142 Wash. 249, 255, 252 P. 929 (1927). Consistent with this approach, McQuillin provides that “indebtedness” and “indebted” mean “a promise by the municipality, grounded in a valid consideration, to pay . . . money now due and payable, or to become due and payable at a future day.” 15 McQuillin § 41.18; *see also Nelson v. Wilson*, 81 Mont. 560, 264 P. 679,

683 (1928) (stating that the “term ‘indebtedness’ means under legal liability to pay in the present or at some future time”).

This Court in *Wittler* stated that regardless whether labeled a “contingent liability, a contingent debt, a contractual obligation, a commitment, a moral duty coupled with an enforceable right, or a solemn covenant,” the Court must ultimately determine whether the financing scheme complies with Article VIII. *Wittler*, 65 Wash.2d at 668, 399 P.2d 319. Even though the PFD prefers to refer to the 2011 Interlocal Agreement as a “loan,” it still creates indebtedness that falls squarely within the protections of Article VIII, § 6.

Section 1.01 of the 2011 Interlocal Agreement acknowledges that the parties would enter a “binding contract” that creates an “absolute and unconditional” obligation for the City to make deficiency payments. CP 202-203. That contractual obligation has the same force and effect of any other indebtedness secured by any other written contract. Despite the PFD’s “lender-not-borrower” argument, a contractual obligation to “lend” money cannot be distinguished from a contractual obligation to repay “borrowed” money for purposes of Article VIII, § 6.

**2. The PFD is attempting to circumvent the Constitution.**

The 2011 Interlocal Agreement provision that best encapsulates the PFD's studied effort to circumvent the constitutional limitations is § 1.01(f). CP 203. Section 1.01(f) declares that the:

City and the District recognize that the City's obligations hereunder do not constitute City "debt" subject to constitutional or statutory limitations. CP 203.

Fortunately, no individual, entity, or municipality can use contractual language to "control the constitution's meaning," "shape the significance of the constitution's language," or "bind the courts to [the PFD's] views as to what is intended by the words of the constitution." *Wittler*, 65 Wash.2d 667-68, 399 P.2d 319. The constitution "would soon derive its meaning from individual and varying viewpoints and lose its status as a basic and fundamental law" if the Court allowed parties to say what the law is by contractual provision. *Id.*, 399 P.2d 319.

The inevitable conclusion that must be reached from the plain language of the 2011 Interlocal Agreement is that the PFD has created a "third party conduit financier scheme" that would contractually bind the City to make deficiency payments for 30 years in total amounts far

exceeding the City's debt capacity. *WPPSS I*, 99 Wash.2d at 804, 666 P.2d 329. No reason exists to insulate the financing scheme created by the 2011 Interlocal Agreement from the constitutional safeguards of debt limitation. *Id.*, 666 P.2d 329.

**3. The 2011 Interlocal Agreement constitutes a long-term lease/purchase agreement prohibited by this Court's precedent.**

This Court has previously rejected financing schemes that disguise purchase agreements as long-term lease agreements in an attempt to circumvent the constitutional debt limitations. This Court in *State ex rel. Washington State Building Financing Authority v. Yelle*, 47 Wash.2d 705, 715, 298 P.2d 355 (1955) concluded that the state building finance authority's purchase-leaseback of properties violated constitutional debt limitations. The Court recognized "the housing problem with which the state [was] confronted," but concluded that the Court could "not permit the exigency of the situation to override the constitutional safeguard against improvidence and the integrity of the state's economy." *Id.* at 715, 298 P.2d 355.

The Court refused to "resort to dexterity of judicial thinking in order to assist the state in its problem" or to close its "eyes to what is

actually being attempted.” *Id.*, 298 P.2d 355. The Court stripped “the plan down to fundamentals” and concluded that the financing scheme constituted, “not a leasing arrangement . . . but the installment purchase by the state of certain buildings and facilities with the state’s moneys raised by taxation, far in excess of the constitutional limitation.” *Id.*, 298 P.2d 355.

The Court similarly upheld the Constitution in *Lister* by penetrating a financing scheme that violated constitutional debt limits. 91 Wash. at 17, 156 P. 858. The Court concluded that “[t]he act upon its face bears unmistakable evidence of a studied effort to circumvent the constitution,” and refused “to give judicial approval to a subterfuge.” *Id.* at 17, 156 P. 858.

The Supreme Court of Arizona has similarly refused to allow politicians and bondholders to craft their way around constitutional protections by concluding that a lease-to-own agreement between a city and its municipal association to build and operate a city civic center payable over 35 years constituted a purchase agreement, regardless of what the parties called the transaction. *City of Phoenix v. Phoenix Civic*

*Auditorium & Conv. Ctr. Assn.*, 99 Ariz. 270, 408 P.2d 818, 831 (Ariz. 1965).

The 2011 Interlocal Agreement facilitates the City's purchase of the Center. Article II(e) provides that "[o]nce the Bonds, the Sales Tax Bonds and any other debt of the [PFD] are no longer Outstanding, the City may require that the [PFD] transfer the ownership of the Regional Center to the City." CP 459. The 2011 Interlocal Agreement also acknowledges the PFD's own constitutional debt limitations and provides that any "loans" paid by the City in excess of those constitutional limits "shall be deemed an equity payment by the City" in exchange for an interest in the Center. CP 458. While the PFD asserts that it will repay the City by imposing a "sales and use tax," this overlooks that its statutory authority to impose such a tax expires in 25 years, long before the bonds would mature in 2041. RCW 82.14.390(4); RP 39-40.

The financial scheme created by the City and the PFD constitutes a "studied effort to circumvent the Constitution," *Lister*, 91 Wash. at 17, 156 P. 858, by disguising a purchase agreement as a so-called "contingent loan agreement." The illegal financing scheme should not be given "judicial approval." *Id.*, 156 P. 858

**4. City taxpayers bear the risk if elected officials can enter debt-obligating contracts despite constitutional and statutory proscriptions.**

The PFD argues that formation documents and the proposed 2011 Interlocal Agreement include clauses that state that the PFD's liabilities shall not be liabilities of the City. The existence of these provisions alone do not eliminate the liability exposure to the City's general tax fund now and in the future. These provisions also do not eliminate provisions like § 1.01(g), which states that the City acknowledges that the bondholders will rely on the City's commitment to make deficiency payments on the bonds, or like § 6.06 that creates third-party beneficiary status of the bondholders. CP 203-04, 212. The PFD cannot even issue the bonds without the City's financial backing, which demonstrates that the bondholders would look to the City for payments. Fraley Declaration, *supra*, 5.

This Court and others have looked to whether the risk of loss in a financing scheme fell on the bondholders or on the public entity. *Ecology*, 116 Wash.2d at 254, 804 P.2d 1241; *Button v. Day*, 205 Va. 629, 139 S.E.2d 91, 100 (Va. 1964) (concluding that debt limitations prohibited the financing scheme when the city would have to assume the risk of bonds issued by the port authority). This approach advances the intended

protections of the debt limitations: “[i]f a project’s failure immunize the public treasury from further payments to bondholders, the concerns that motivated adoption of the limits are not triggered,” but “if bondholders can reach the public treasury . . . then the very concerns that underlie the debt provisions arise.” Amdursky, *Municipal Finance Law* § 4.1.1, 169.

The 2011 Interlocal Agreement exposes the City’s tax funds to liability on the bonds issued by the PFD and requires the City to make payments out of its general tax funds. CP 203. Section 1.01(f) requires the City to make deficiency payments “regardless of whether the Regional Center is operating at a particular time.” CP 203. If not paid, bondholders could sue the PFD, who in turn could sue the City. CP 203.

Section 1.01(g) states that the City recognizes that the PFD’s pledge “will be material to the offer and sale of the Bonds, and will be disclosed to potential purchasers and purchasers of the Bonds.” CP 204. That section further provides that the City and the PFD consider the 2011 Interlocal Agreement “to be a binding contract” and acknowledges that bondholders and financial institutions “will rely on the terms of this Agreement, including the commitment by the City to make the Loans.” CP 204.

Further, § 6.06 of the 2011 Interlocal Agreement creates “third party rights” in “the Registered Owners” who are “intended to be and shall be third-party beneficiaries” of the 2011 Interlocal Agreement “for so long as the Bonds are Outstanding.” CP 464. As third-party beneficiaries, bondholders could sue the City directly, exposing all of the City’s resources or property to payment of the bonds. CP 464.

In addition to the direct contractual claims and third-party beneficiary claims to which the City would be exposed, the Superior Court concluded that the financing scheme could subject the City to actions in equity. RP 71. Section 4.02 provides that the PFD can sue the City at equity or law, including actions for mandamus and specific performance. CP 209. Bondholders also may hold the City liable by raising theories of promissory estoppel, equitable estoppel, or specific performance. *See eg. WPPSS II*, 102 Wash.2d at 899-912, 691 P.2d 524.

The 2011 Interlocal Agreement creates several avenues of legal recourse against the City and requires the City to bear the risk of loss against its general tax fund. This is the reason why there are constitutional protections - to protect precisely against improvident decisions that would put the taxpayer’s at risk of loss. *Potter*, 45 Wash. at 528, 88 P. 935

(1907); *State ex rel. Jones v. McGraw*, 12 Wash. 541, 543-45, 41 P. 893 (1895) (stating that the debt limitations constitute an “impassable barrier” intended “to protect municipal corporations from being loaded with debt beyond a certain limit”).

**C. Municipal indebtedness includes obligations paid from current year taxes and contractual obligations to make future payments.**

The PFD argues that debt is not incurred if a municipality pays its obligations out of current-year taxes, rather than borrowing against future taxes. *PFD's Br.* 26-29 (Nov. 15, 2011). The PFD only briefly discusses *Wittler* for its argument. *Id.* at 26-27. The case of *Wittler* does not support the PFD's argument because *Wittler* held only that the legislature validly exercised its power when it admonished future legislatures to fund teacher pension plans without issuing bonds or borrowing money. 65 Wash.2d. at 668, 671, 399 P.2d 319. The 2011 Interlocal Agreement, in contrast, contemplates issuing bonds for over \$37 million and would obligate the City to make immediate debt service payments on those bonds. CP 677, 203-204.

*State ex rel. Troy v. Yelle* is the only case cited by the PFD that contains a discussion of the distinction between expenses paid from

current taxation and expenses paid from future taxation. 36 Wash.2d at 195, 217 P.2d 337 (stating that “the framers of the constitution had in mind two types of obligations, those for current expenses and those for the repayment of money borrowed”). That distinction made in *Troy* applies only for calculating debt under the original text of Article VII, § 1 (repealed in 1930 by the fourteenth amendment) and Article VIII, § 1 (repealed in 1972 by amendment 60). *Id.* at 195-196, 217 P.2d 337.

The *Troy* discussion of the original framer’s intended meaning of “debt” in Article VII and VIII supports Taxpayer’s argument in § IV.A. of this brief that municipal “indebtedness” carries a different and broader meaning than state “debt.” No constitutional provision like Article VII, § 1 exists to govern a city’s management of “estimated ordinary expenses.” Rather, Article VIII, § 6 establishes a broad prohibition against becoming “indebted in any manner.”

The cases cited by the PFD in support of its “current-year” taxes argument do not mention Article VIII, § 6 municipal indebtedness. The cases stand for the principle that debt generally does not include contingent obligations (*see, infra*, § IV.D.2 of this brief) and that currently accounted-for or discharged debts do not count against a city’s debt

limitation. *Comfort*, 142 Wash. at 257, 252 P. 929; *State ex rel. Atty. Gen. v. McGraw*, 13 Wash. 311, 318-19, 43 P. 176 (1895) (*citing Cloud v. Lawrence*, 12 Wash. 163, 40 P. 741 (1895)).

Rather than discuss the caselaw, the PFD resorts to a credit card analogy. *PFD's Br. 27* (Nov. 15, 2011). The PFD's analogy erroneously assumes that the City has both a credit card account and a separate "monthly income or savings" account. *Id.* An accurate analogy would show that the City has only one (credit card) account, that the taxpayer gave the City the credit card, and that the taxpayer put a spending limit on the credit card.

In this case, the City's credit card account has a limit of about \$35 million. CP 676. The City has already accrued a balance of about \$12 million dollars, leaving approximately a \$23 million balance on its credit limit. CP 676. At any snapshot in time, the City cannot spend more than the credit card's limit. Wash. Const. art. VIII, § 6. The PFD's analogy confuses the credit card's "credit limit" with the credit card's "minimum monthly payment due." Article VIII, § 6's broad proscription against a city becoming "indebted in any manner" should not be extended to mean that a city can borrow until its "minimum monthly payment" equals "one and

one half per centum of the [city's] taxable property.” Wash. Const. art. VIII, § 6.

The distinction between current year and future obligations that the Court made in *Troy* does not apply because the distinction was based on Article VII, § 1 and the original text of provisions that have been repealed. *Troy*, 36 Wash.2d at 193-200, 217 P.2d 337. The PFD’s “current-year taxes” argument lacks foundation and support in the caselaw and runs contrary to the history, spirit, and letter of Article VIII.

**D. The 2011 Interlocal Agreement creates an immediate, absolute, and enforceable obligation against the City’s general tax fund.**

The Court recognizes three situations where financing schemes do not constitute debt: (1) obligations payable solely from a special fund and from anticipated service revenues, *Winston v. Spokane*, 12 Wash. 524, 41 P. 888 (1895) (“special fund” doctrine); (2) contingent obligations that incur only upon the happening of some predetermined event, *Comfort*, 142 Wash. 249, 252 P. 929 (“contingency” doctrine”); and (3) financing schemes that neither require governments to pledge their full faith and credit nor obligate future generations to appropriate funds for repayment, *Ecology*, 116 Wash.2d at 261, 803 P.2d 1241 (“nonappropriation clause”

doctrine). These three situations evidence the underlying principle that the Constitution does not limit financing schemes that do not create absolute obligations that immediately bind taxpayers.

**1. The PFD has not raised its “special fund” argument on appeal.**

The special funds doctrine removes a financing scheme from the constitutional limitations only when (1) the government entity establishes a special fund, (2) the obligation must be paid solely out of the special fund, and (3) the municipality cannot otherwise be held liable. *Martin*, 62 Wash.2d at 661-663, 384 P.2d 833; *Allen v. Grimes*, 9 Wash. 424, 37 P. 662 (1894).

The PFD argued in the trial court that the “special fund” doctrine applied. CP 248, 259-63. The trial Court rejected the PFD’s argument because the City paid the deficiency amounts out of its general fund and had not created a special fund. RP 59-60. The PFD has not raised the special fund argument on appeal. Taxpayer assumes that the PFD will not raise this argument in its reply brief. RAP 10.3.

**2. The 2011 Interlocal Agreement requires the City to make deficiency payments that are immediate and certain and not contingent upon future events.**

The “absolute and unconditional” obligation created by the 2011 Interlocal Agreement requires the City to make deficiency payments that would presently, not contingently, exist. CP 94; CP 675. The 2011 Interlocal Agreement does not create a future contingent obligation that resembles the contingency situations that this Court has previously declared to be outside the purview of the constitutional debt limitations. *Ecology*, 116 Wash.2d at 257, 804 P.2d 1241; *Comfort*, 142 Wash at 255-56, 252 P. 929.

The PFD argues that the financing scheme creates a “contingency” solely because the precise amount of deficiency payments required of the City will remain unknown. *PFD’s Br.* 35-36, 38-39 (Nov. 15, 2011). The City has acknowledged from the beginning that the precise amount the City would be expected to pay over 30 years cannot be determined until those 30 years have expired. CP 751, n. 32. However, the 2011 Interlocal Agreement would require immediate payments and would require the City to make the payments even if the Center ceases to operate, creating the full potential of indebtedness for the entire repayment of the bonds. CP 203.

The PFD has offered no evidence that raises a genuine issue of material fact as to whether the PFD could repay the bonds without requiring the City's financial assistance in amounts that violate the City's debt capacity. The undisputed facts demonstrate that whatever total amount of deficiency payments the City will be obligated to make over the next 30 years, the amount will exceed the City's available constitutional debt capacity of approximately \$23 million. CP 676-77.

Even if the City "possibly or even probably" would not have to make deficiency payments to the PFD, the 2011 Interlocal Agreement still violates the constitutional debt limitation because it exposes the City's general taxation funds to creditors. *State Capitol Commn.*, 74 Wash. at 17, 132 P.861. The "mere guaranty of the principal and interest" by the City, even if ample revenues derived from other sources appear to be available, creates indebtedness for the City that violates Article VIII. *Id.*, 132 P.861; *Martin*, 62 Wash.2d at 654-55, 384 P.2d 833.

The Court applied the contingency doctrine in *Comfort* when taxpayers challenged the constitutionality of the city's ordinance to create a guarantee fund under the Guarantee Act of 1917. 142 Wash. 249, 252 P. 929. The taxpayers argued that the constitutionality did not turn on

contingent liabilities because “it was morally certain that there would be some unpaid bonds that the guarantee fund would have to pay.” *Id.* at 259, 252 P. 929. The Court rejected the “moral certainty” argument and concluded that the city did not have a “ripened” debt because the city’s obligation was contingent on the property holders’ failure to pay their tax. *Id.* at 255-56, 252 P. 929.

Beyond moral certainty, the Center’s operation and sales tax revenues cannot presently cover the interest on the bonds, let alone the principal. CP 674-77. The Center’s total expenses due over the last three years have exceeded the Center’s revenue. CP 675. Unlike the future contingency in *Comfort*, the Center cannot repay its presently due debts. CP 675. Any contingency that existed in this financing scheme has already “ripened.” *Id.* at 255-56, 252 P. 929. The Superior Court correctly concluded that the obligation to make payments under the 2011 Interlocal Agreement would be “immediate.” RP 66, 71.

Furthermore, the City has not created a guarantee fund (like that in *Comfort*) that would limit the City’s general indebtedness “to the extent of such funds.” *Id.* at 257, 252 P. 929. The 2011 Interlocal Agreement also

does not provide for a tax levy to meet the City's obligations like that in *Comfort. Id.*, 252 P. 929.

The structure of the financing scheme created by the 2011 Interlocal Agreement resembles the certain, absolute, and present financing obligations that violated the constitutional debt limitation in *Button* and *Bd. of Supervisors v. Massey*, 210 Va. 253, 169 S.E.2d 556, 561 (Va. 1969). The Virginia Supreme Court determines an obligation's contingency "by the terms of the provision creating the obligation, and not by a label placed upon it." *Button*, 139 S.E.2d at 100. The Virginia Supreme Court concluded that the city's agreement to pay transit service's "operating expense" deficit constituted a fixed, absolute, and present debt within the meaning of constitutional debt limitations because the city's agreement required advance monthly payments that would be refunded only if the transit authority made money. *Massey*, 169 S.E.2d at 561.

Just as in the 2011 Interlocal Agreement, the bonds in *Button* needed the security of pledged money from the city to be issued and marketed. *Button*, 139 S.E.2d Va. at 102. Like the certain, absolute, and present obligation in *Button*, the City would have an immediate and certain

obligation to make deficiency payments, if it agrees to the 2011 Interlocal Agreement. *Id.*

Despite its labeling otherwise, the 2011 Interlocal Agreement does not create a contingency like that recognized by this Court to not create constitutional indebtedness. The 2011 Interlocal Agreement would expose the City's general taxation funds to creditors in amounts that exceed the City's debt capacity, which this Court prohibited in *State Capitol Commission*. The undisputed facts show that the 2011 Interlocal Agreement would require the City absolutely and unconditionally to make immediate payments to the PFD in excess of the City's debt capacity.

**3. The City's "absolute and unconditional" obligation to make deficiency payments is not subject to legislative appropriations.**

The 2011 Interlocal Agreement does not include a non-appropriation clause or an "escape hatch" like that in *Ecology* that saved the financing scheme from being deemed unconstitutional. *Ecology*, 116 Wash.2d at 254, 804 P.2d 1241. The closely divided plurality decision in *Ecology* concluded that the financing scheme did not constitute debt within the meaning of the Constitution because (1) the state did not back the financing bonds with full faith and credit, and (2) the financing

documents included a non-appropriation clause that made future payments subject to legislative appropriations. *Id.* at 254, 804 P.2d 1241. The concurring Justices concluded that the state did not “bind” itself “to a long-term financial commitment” because of the nonappropriation clause. *Id.* at 261, 804 P.2d 1241 (Guy, Utter & Andersen, JJ., concurring).

Unlike the financing scheme in *Ecology*, the 2011 Interlocal Agreement obligates the City and its future taxpayers to pay the deficiency amounts for 30 years even if the Center is not operating. CP 203-203. A nonappropriation clause or other “escape hatch” does not exist in the 2011 Interlocal Agreement to allow future elected representatives of the City to withhold payment of the deficiency amounts.

The absolute and unconditional obligation in the 2011 Interlocal Agreement constitutes the kind of “subterfuge” on the Constitution’s debt limit provisions warned against in *Ecology*. *Id.* at 261, 803 P.2d 1241 (Guy, Utter & Andersen, JJ, concurring). Washington’s debt limitations were “not intended to be interpreted narrowly, but rather [were] meant to create an “impassable barrier” against the creation of debt beyond that provided for in the constitution.” *Id.* at 267, 804 P.2d 1241 (Dore, Brachtenbach & Durham, JJ., and Callow, J. Pro Tem, dissenting)

(citations omitted). The 2011 Interlocal Agreement creates indebtedness that would subject current and future citizen taxpayers to crippling tax liabilities in excess of established limitations and should not be permitted.

**E. The City lacks the authority to contractually obligate the City's taxpayers to burdensome deficiency payments in excess of constitutional and statutory debt limitations.**

The City has no right or authority to agree to the 2011 Interlocal Agreement because agreeing to make the deficiency payments would violate the City's debt capacities set by Article VIII, § 6 and RCW 39.36.020. If the City did pledge taxpayer funds to the extent required by the 2011 Interlocal Agreement, the City's action would be invalidated by RCW 39.36.040 and the ultra vires doctrine. *WPPSS I*, 99 Wash.2d at 798-99, 666 P.2d 329; *WPPSS II*, 102 Wash.2d at 894, 691 P.2d 524.

RCW 39.36.040 "absolutely" voids all orders, authorizations, allowances, contracts, payments or liabilities to pay made in violation of the statutory debt limitations and provides that such illegal actions "shall never be the foundation of a claim against a taxing district." The Court has seldom interpreted RCW 39.36.040. The provision clearly states on its face that all obligations that violate the debt limitations are "absolutely void." RCW 39.36.040. "A contract or indebtedness in excess of the debt

limit is void and cannot be made good by ratification by the municipality”  
15 McQuillin § 41.42 (*citing Schooley v. City of Chehalis*, 84 Wash. 667,  
674, 147 P. 410 (1915)).

Similarly, the ultra vires doctrine renders void and unenforceable  
the unauthorized contracts of governmental entities. *WPPSS I*, 99 Wash.2d  
at 797, 666 P.2d 329. The ultra vires doctrine serves “to protect the  
citizens and taxpayers . . . from unjust, ill-considered, or extortionate  
contracts, or those showing favoritism.” *Id.*, 666 P.2d 329 (*citing* 10  
McQuillin § 29.02, 200). The rule also protects “those unsuspecting  
individuals whom the entity represents.” *Id.*, 666 P.2d 329 (*citing Noel v.*  
*Cole*, 98 Wash.2d 375, 378, 655 P.2d 245 (1982)).

In *WPPSS I*, the Court invalidated as ultra vires approximately \$7.2  
billion for principal and interest on bonds issued for nuclear power plants.  
*WPPSS I*, 99 Wash.2d at 776, 779, 798, 666 P.2d 329. The Court  
concluded that the “elaborate financing arrangement” entered by the  
government entities failed to protect unsuspecting individuals and  
exceeded the entities’ statutory authority. *Id.* at 798, 666 P.2d 329.

The 2006 Interlocal Agreement requires the City to pledge its “full  
faith and credit” to repayment of bonds issued by the PFD for construction

and operation of the Center. CP 167-68. The 2011 Interlocal Agreement abandons the “full faith and credit” language, but inserts language that creates an “absolute and unconditional” obligation that the City make the deficiency payments. CP 203. The City’s available non-voted debt capacity equals approximately \$23 million. CP 677. The potential liability under the 2011 Interlocal Agreement equals about \$85 million, far in excess of the City’s available debt capacity. CP 677.

The nation’s economic crisis, the state’s bond rating, and the existence of other cities that have financed infrastructure with similarly invalid financing schemes cannot change the conclusion that the PFD has proposed a financing scheme that violates Article VIII, § 6 and RCW 39.36.020.

**F. The Superior Court did not abuse its discretion regarding the admissibility of evidence.**

The Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 668-69, 230 P.3d 583 (2010) (citations omitted). A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.*, 230 P.3d 583.

All relevant evidence is admissible unless otherwise limited. *Id.* at

669, 230 P.3d 583 (citing ER 402). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.*, 230 P.3d 583 (citing ER 401).

**1. The PFD failed to preserve for appeal its argument regarding admissibility of the McDaniel Declaration.**

The Court will generally not review an error raised for the first time on appeal. RAP 2.5(a); *State v. Becker*, 132 Wash.2d 54, 75-76, 935 P.2d 1321 (1997). The rule promotes the efficient use of judicial resources by requiring litigants to raise issues in the trial court. *State v. Scott*, 110 Wash.2d 682, 757 P.2d 492 (1988); *In re Audett*, 158 Wash.2d 712, 725, 147 P.3d 982 (2006).

The PFD represents that it raised the inadmissibility of Exhibit 1 to McDaniel’s Declaration when it stated in footnote 5 that “serious questions” existed regarding the properness of considering the document. *PFD’s Br.* 46 (Nov. 15, 2011), *citing* CP 530, n. 5. Footnote 5 did not raise an evidentiary objection, however, and does not preserve the objection for appeal. The footnote states only that a “serious question”

exists regarding whether the document would be “proper for consideration under Civil Rule 56(e).” CP 530.

The PFD failed altogether to raise arguments regarding authenticity and relevance in the Superior Court. The PFD did not raise a hearsay argument so much as it raised a CR 56(e) argument. The PFD could have filed a motion to strike. The PFD could have raised the issue in its reply brief. The PFD could have alerted the Superior Court and the parties to its objection during oral argument.

The PFD did not preserve its arguments relating to the McDaniel Declaration and should not be allowed to raise the issues for the first time on appeal. RAP 2.5(a). Alternatively, the Superior Court did not abuse its discretion in admitting the evidence because the McDaniel Declaration stated only what were “the most recent calculations of the City’s debt capacity” report and did not attest to the validity of the figures. CP 676.

**2. The Superior Court did not abuse its discretion when it denied the PFD’s motion to strike the Smith Declaration.**

The PFD moved to strike the Smith Declaration during oral argument. RP 28. The City responded that the public records exception

permitted the declaration. RP 51. The Superior Court denied the PFD's motion. RP 51.

The PFD now argues on appeal that "[t]hat was error." *PFD's Br.* 47 (Nov. 15, 2011). The PFD cites to three evidence rules, but does not explain how the Superior Court violated the evidence rules or what remedy would be appropriate. This Court should not develop the PFD's argument for it. RAP 10.3(6). Alternatively, the Superior Court did not abuse its discretion when it admitted the relevant Smith Declaration that attested that an attached series of emails represented true and accurate copies of his communications with the attorney general. CP 846.

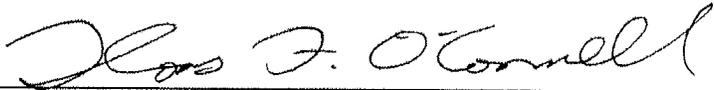
## V. CONCLUSION

The proposed 2011 Interlocal Agreement would create certain and immediate indebtedness in violation of the clear and plain language of Article VIII, § 6 and RCW 39.36. The proposed 2011 Interlocal Agreement would require the City to make deficiency payments out of its general taxation funds and it would absolutely and unconditionally bind current and future generations of City taxpayers. The City has no right or authority to enter the 2011 Interlocal Agreement. If entered into by the City, the 2011 Interlocal Agreement would be invalidated by RCW

39.36.040 and the ultra vires doctrine. The intent and policy of the debt limitation provisions in Article VIII support the Superior Court's conclusion that the 2011 Interlocal Agreement would create illegal City indebtedness. The Superior Court's judgment should be affirmed.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December, 2001.

DAVIS, ARNEIL LAW FIRM, LLP  
Attorneys for Respondent Taxpayer Representative

By:   
Thomas F. O'Connell, WSBA No. 16539

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Attached for filing in the above referenced matter, please find the Respondent Taxpayer Representative's Brief, as well as a certificate of service of that document on all parties.

Please don't hesitate to contact me if you have any problems downloading the attached.

Thank you!

Thomas F. O'Connell  
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