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(Kitsap County Superior Court No. 09-2-01023-6)

IN THE COURT OF APPEALS, DIVISION TWO
FOR THE STATE OF WASHINGTON

BAINBRIDGE RATEPAYERS ALLIANCE,

Appellant,

vs.

CITY OF BAINBRIDGE ISLAND,

Respondent.

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case concerns the validity of ordinances adopted by the City of Bainbridge Island (City) purporting to authorize the issuance of bonds to finance improvements to the City's sanitary sewer system, particularly an upgrade to the Winslow Wastewater Treatment Plant (WWTP). The Ordinances are challenged by the Bainbridge Ratepayers Alliance (Ratepayers or Alliance), a non-profit organization incorporated under the laws of the State of Washington. *See Clerk's Papers (CP) at 4.* Ratepayers' members include Bainbridge Island citizens who pay utility charges imposed by the City and who are concerned about the City's utility rates, taxes, and municipal finances. *Id.*

Ratepayers Alliance filed suit seeking a declaratory judgment that the resolution purporting to authorize the proposed bond issue is invalid and issuance of the bonds should be enjoined on multiple grounds. The City counterclaimed seeking a declaratory judgment that the proposed bond issue is valid. CP at 20.

The City moved for summary judgment on the Ratepayers Alliance's claim that the proposed bond issue is invalid, and thus should be enjoined. CP at 40. The City argued the proposed bond issue satisfies Washington's test for bond validity and the City does not have to follow its own ordinance requiring it to establish a Utility Advisory Committee

and to consult with that committee regarding the planning and financing of utility capital facilities, such as the City's wastewater treatment plant. CP at 40. The Superior Court granted the City's motion. CP at 387.

The problems with the Court's decision are several. First, the decision ignores Ratepayers' evidence that the bonds exceed the amount the City itself has declared necessary to complete the proposed sewer system improvements. While state law authorizes the City to issue bonds to finance sewer system improvements, it also requires that monies received for the sale of bonds be used for no purpose other than that for which they were issued. Here, the City has estimated that the sewer system improvements will cost \$4.5 million to complete, yet it wishes to sell bonds up to \$6 million to fund the improvements.

Second, the excess monies issue aside, the City's proposed method of paying off the bonds is illegal. The City proposes to use *water* and *stormwater* rate charges to pay for improvements to the City's *sewer* system, even though many of the water and stormwater ratepayers are not connected to or customers of the sewer system. A long line of Washington Supreme Court cases is clear that such unrelated charges constitute taxes which may not be imposed without express statutory or constitutional authority, authority that is absent here.

Third, the City's assertions that it does not have to follow local ordinances requiring it to consult with a City Utility Advisory Committee regarding water system upgrades are not supported by state law. City law mandates that the City receive recommendations from a Utility Advisory Committee relative to the planning for, financing, operation and maintenance of water and sanitary sewer utility capital facilities. Accordingly, the Court should reverse the trial court's decision to grant summary judgment on these claims.

ASSIGNMENTS OF ERROR AND ISSUES RELATING TO ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The Trial Court Erred in Granting the City's Motion for Partial Summary Judgment.

Issues:

1. Are the Ordinances purporting to authorize the issuance of bonds for a sewer system upgrade invalid because the Ordinances authorize the pledging of revenues from water and storm water utility customers who have no connection to the sewer system?
2. Is the City free to bond for more than the cost of the project and, if not, is there disputed evidence as to the cost of the project?
3. Can the City use bonds to pay for expenses on the project which were incurred before the bonds were authorized?
4. Does the City of Bainbridge Island's Code requirement for recommendations of the Utility Advisory Committee render invalid the ordinances proposing to authorize bonds in the absence of a recommendation of the committee?

Assignment of Error No. 2: The Trial Court Erred in Denying the Alliance’s Motion for Reconsideration.

Issues:

1. Is reconsideration appropriate when the moving party offers new evidence in support of its motion for summary judgment in its reply brief?
2. Is reconsideration appropriate when the evidence and argument by the moving party in its reply raise a new issue not fully addressed in the summary judgment briefing?

Assignment of Error No. 3: The Trial Court Erred in Entering Judgment in Favor of the City.

STATEMENT OF THE CASE

A. The City’s Sanitary Sewer Utility and the Proposed Improvements to the Winslow Wastewater Treatment Plant.

The City operates a wastewater treatment plant in Winslow as part of its sanitary sewer utility. The sewer utility is described by the City as part of a unified City utility system, which also includes water and stormwater management services. *See* City’s Mot. for Summ. J. (CP at 44) (citing City Ords. 89-50, § 2 and 80-14, §2); Bainbridge Island Mun. Code (BIMC) 3.44.010, appended hereto as Appendix (App.) A. However, BIMC 3.44.010 mandates that each of these services “be accounted for as though those utilities were separate funds.” App. A. Similarly, RCW 43.09.210 requires that “[s]eparate accounts shall be kept for each department, public improvement, undertaking, institution, and public service industry under the jurisdiction of every taxing body,” and

that “[a]ll service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same.”

The City’s sewer service is available only to a small portion of the island, centered on the historic town of Winslow. *See* CP at 131. Other parts of the island are served by other sewer districts or private septic systems. *See* CP at 145. By contrast, the City’s water service is available to a relatively larger portion of the island, including areas not serviced by the sewer system. *See* CP at 159. Moreover, the entire island is subject to and potentially must pay for the City’s stormwater system. BIMC 13.24.010-.020, -.060 (establishing stormwater utility covering entirety of City and imposing fees) (App. B).

As part of its 2009 Capital Facilities Plan, the City proposed various improvements to the Winslow Wastewater Treatment Plant. At a meeting of the City’s finance committee, the City’s finance director, Elray Konkel, estimated these improvements will cost \$4.5 million to complete. *See* CP at 122, 124, 127.

B. The City enacts Ordinance 2009-02 to finance part of the improvements to the Winslow Wastewater Treatment Plant.

In order to finance these improvements, the City enacted Ordinance No. 2009-02, which authorized the issuance of up to \$7.13 million in “limited tax general obligation bonds.” City Ord. No. 2009-02, §§ 1(1), 3(a) (CP at 279, *et seq*). In order to repay these bonds, the ordinance provides as follows:

For as long as any of the Project Bonds^[1] are outstanding, **the City further pledges to establish, maintain and collect rates and charges for water, sewer and drainage services** that will be adequate to produce Waterworks Utility Revenue^[2] fully sufficient to provide, in the following order:

¹ Many terms throughout Ordinance 2009-02 are defined in the ordinance. Several of these definitions are set forth in this and the following footnotes. “**Project Bonds**” is defined as “any series of Bonds issued pursuant to this ordinance and a Bond Sales Resolution to carry out the Project and to pay the costs associated with the issuance of the Project Bonds.” City Ord. No. 2009-02, § 2 (CP at 282).

The “**Project**,” in turn, is defined as “the carrying out of certain additions and alterations to, and betterments and extensions of, the Waterworks Utility, consisting of upgrades to the City’s wastewater treatment plant and related improvements, all as more specifically described in Exhibit C.” *Id.*

Exhibit C, in turn, states that “[t]he Winslow Wastewater Treatment Plant consists of upgrades, additions, betterments and extensions necessary to meet Washington State Department of Ecology permit effluent limits, reliability and redundancy requirements, as well as addressing noise and odor problems, all as more specifically described in the 2009 Capital Facilities Plan Update, adopted on December 18, 2009, [sic] which is incorporated by reference herein.” CP at 297.

² “**Waterworks Utility Revenue**” is defined, in part, as “the gross revenue of the Waterworks Utility, including: all of the earnings and revenues received by the City from the maintenance and operation of the Waterworks Utility; all earnings from the investment of money in any debt service fund for any outstanding Revenue Obligations; and all connection and capital improvement charges collected for the purpose of defraying the costs of capital facilities of the Waterworks Utility.” Various items are specifically excluded from Waterworks Utility Revenue, including “City taxes collected by or through the Waterworks Utility.” City Ord. No. 2009-02, § 2 (CP at 284).

“**Waterworks Utility**,” in turn, is defined as “the water, sewer, and SSWM systems of

- (a) for the Maintenance and Operation Expense of the Waterworks Utility;
- (b) for the punctual payment of the principal of and interest on all outstanding Revenue Obligations,^[3] if any, for which payment has not otherwise been provided and all amounts that the City is obligated to set aside into a debt service fund and any reserve fund securing such Revenue Obligations, and all other payment obligations related thereto;
- (c) for the punctual payment of the principal of and interest on all outstanding Subordinate Obligations,^[4] **including the Project Bonds**, and for all amounts that the City is obligated to set aside in the Debt Service Fund^[5] for such Project Bonds;

...

the City operated as a unified waterworks utility pursuant to Ordinance Nos. 80-14 and 89-50 of the City and chapter 3.44 of the Bainbridge Island Municipal Code, and all additions thereto and betterments and extensions thereof at any time made.” *Id.*

³ **“Revenue Obligations”** is defined as “any borrowing, whether issued previously or in the future, that has a lien that is prior and superior to any other lien on the Net Revenues (and ULID Assessments, if any) of the City’s Waterworks Utility, including any obligations later issued on a parity with the then-outstanding Revenue Obligations.” CP at 283.

“Net Revenue,” in turn, is defined as “the Waterworks Utility Revenue less Maintenance and Operation Expense.” CP at 282.

⁴ **“Subordinate Obligations”** is defined as “any borrowing, whether issued previously or in the future, that is payable from and has a lien on the Net Revenue (and ULID Assessments, if any) that is subordinate to the lien with respect to the City’s Revenue Obligations, but superior to any Public Works Trust Fund Loans, and any obligations later issued on a parity with the then-outstanding Subordinate Obligations. Upon issuance of the Project Bonds, the outstanding Subordinate Obligations will include the then-outstanding Subordinate Obligations set forth in Exhibit A, the Project Bonds, and any future Subordinate Obligations.” CP at 283.

⁵ **“Debt Service Fund”** is defined as “the special fund created by this ordinance for the payment of the principal and interest on any series of Bonds, as described in the relevant Bond Sale Resolution.” CP at 281.

Consistent with BIMC § 3.44.010, the City intends to repay the Project Bonds authorized by this ordinance from revenues of the sewer system and, in the event that revenues from the water or SSWM systems are required to be used for repayment of the Project Bonds, the City intends to treat such use as an interfund loan that shall be repaid to the water of SSWM system (as applicable) by the sewer system.

CP at 288, § 11 (line breaks and emphasis added). To the extent that these monies are insufficient to pay off the bonds, the City also pledged to levy property taxes sufficient to pay off the bonds. CP at 287, § 10. All taxes collected for and utility charges allocated to the payment of the bonds are to be deposited in a Debt Service Fund created for the purpose of paying off the bonds. CP at 290, § 17.

C. City Ordinance No. 2009-07 amends and supplements Ordinance No. 2009-02, but does not materially alter it.

After City Ordinance No. 2009-02 was proposed, the Ratepayers Alliance sent a letter to the City expressing doubts regarding the legality of the proposed bond issue. *See* CP at 161. In response to the Alliance's letter, the City enacted Ordinance No. 2009-07, which amended and supplemented Ordinance No. 2009-02 in certain respects. First, it reduced the authorized amount of the bonds from \$7.13 million to \$6 million, struck the reference to "limited tax general obligation bonds," and substituted the term "bonds." CP at 301-03 (City Ord. No. 2009-07, §§ 1(1), 4(a), 4(b)). Second, the ordinance provides that

[O]ne or more series of Bonds issued for the purpose of providing funds for the Project or to refund bonds previously issued for utility purposes, may be issued as Revenue Obligations secured by a pledge of either (as approved by the City Council in a Bond Sale Resolution) **Net Revenues of the Waterworks Utility**, or Sewer System Revenues, on a basis as set forth in Section 11 of Ordinance No. 2009-02, as amended by Section 3(d) [sic] of Ordinance No. 2009-07.

CP at 303 (City Ord. 2009-07, § 4(b) (actually referring to section 4(d))) (emphasis added).⁶ Critically, “Net Revenues of the Waterworks Utility” consists of the charges paid by water and stormwater ratepayers in addition to sewer ratepayers. *See supra* n. 2.

Section 4(d), however, does not amend the portion of Ordinance 2009-02 that authorizes the use of water and stormwater rates to pay off the bonds issued to finance the wastewater treatment plant project, *see* CP at 304 (City Ord. No. 2009-07, § 4(d) (amending other portions of City Ord. No. 2009-02, § 11)).

⁶ Section 4(d) of Ordinance 2009-07, in turn, defines “**Sewer System Revenues**” as “Waterworks Utility Revenue allocable solely to the Sewer System and remaining after payment of the Maintenance and Operation Expense allocable to the Sewer System within the Waterworks Utility.” City Ord. 2009-07, § 3(d) (CP at 304).

Similarly, “**Sewer System Obligations**” is defined as “Revenue Obligations payable solely from and secured by a pledge of Sewer System Revenue. 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.” *Id.*

D. City Enacts Resolution No. 2009-08, Authorizing a Bond Anticipation Note.

Simultaneous with the enactment of City Ordinance No. 2009-07, the City also enacted City Resolution No. 2009-08 which authorized the sale of a “short-term bond anticipation note” to provide interim financing for the project until long-term bond financing could be arranged. *See* CP 279 (Res. No. 2009-08, § 1(b) & (c)).

In contrast to the bonds authorized as discussed above, the bond anticipation note resolution appropriately provided for repayment of the note from revenues of the sewer utility and not the waterworks utility. CP 272 (Section 5) (“This pledge shall constitute a lien and charge upon such **Sewer System Revenues.**”) (emphasis added).

E. Procedural History.

Ratepayers filed suit the day that the City enacted City Ordinance No. 2009-07, alleging that the Ordinance authorizing the proposed bonds were invalid on several grounds. *See* CP at 3. Ratepayers sought a declaratory judgment holding the bonds invalid, and an injunction enjoining issuance of the bonds. *See* CP at 36-37.

The City counterclaimed, seeking a declaratory judgment that the bonds and the bond anticipation note are valid. *See* CP at 20. Thereafter, the City filed a motion for summary judgment regarding the validity of the

proposed bond and sought to sever and dismiss all other claims. CP at 40, 169.

In its reply in support of its motion for summary judgment and at oral argument, the City argued that only sewer revenues were pledged to repay the bonds. However, to make this argument, the City focused on Resolution No. 2009-08 (CP at 279) which relates to the resolution authorizing a bond anticipation note and not the ordinance which authorizes the bonds themselves. Although City's argument diverted attention from the bond ordinance toward the bond anticipation note, there is no dispute that the bond ordinance in its original and amended form, pledged revenues from the entire "waterworks utility"—which includes water and storm water utility revenues—to repay the bonds. CP at 288 (Section 11) and CP at 284 (defining "water works utility").

Nevertheless, the trial court granted both the motion for partial summary judgment and the motion to sever. CP at 387, 390. In response to the Declaration of Mark Dombroski submitted by the City **after** the Ratepayer Alliance's opposition was due, the Ratepayers Alliance filed a motion for reconsideration, CP at 517, which was also denied. CP at 522. This appeal followed. CP at 528.

After the Alliance filed its Notice of Appeal, the City sought a separate entry of judgment. Ratepayers filed a separate notice of appeal of

that judgment in the event the earlier notice of appeal did not encompass a later issued judgment. This brief is filed in both appeals.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE CITY

A. Summary Judgment it Reviewed *De Novo*.

A trial court's summary judgment order is reviewed *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663 (1998). A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990).

Summary judgment is authorized only when the moving party can demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803 (2001); CR 56(c). *See also Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 319 (2005) (moving party bears burden on summary judgment). The Court must view all facts in the light most favorable to the non-moving party and draw all reasonable

inferences in its favor. *Id.* Where the material facts are particularly within the knowledge of the moving party, summary judgment is generally inappropriate. *See Riley v. Andres*, 107 Wn. App. 391, 395 (2001). Likewise, even where the facts are undisputed, summary judgment is inappropriate if reasonable minds could draw different conclusions from those facts. *Security State Bank v. Burk*, 100 Wn. App. 94, 102 (2000).

Where the validity of a proposed bond issue is in dispute, the burden of proving the validity of the bonds rests upon the party seeking to establish validity – here, the City. *See King County v. Taxpayers of King County*, 133 Wn.2d 584, 595 (1997); *see also* CP at 20 (Def’s Answer to Pl’s Compl. & Countercl.) (praying for “a declaratory judgment that the bonds and bond anticipation note authorized by City Ordinance No. 2009-02, City Ordinance No. 2009-07, and City Resolution No. 2009-08 are legally valid”).

B. Determination of the Validity of an Ordinance Purporting to Authorize the Issuance of Bonds is not a Narrowly Circumscribed Inquiry; Rather, Any Subject That Pertains to the Validity of the Bonds is Properly Analyzed Under The Supreme Court’s Three-Part Test.

As noted by the City in the trial court: Under state law, there is a three-part test to determine the validity of a municipality’s bond issue. CP at 48. First, “is there legislative or constitutional authority delegated to the municipality to issue the bonds for the particular purpose?” *King County*,

133 Wn.2d at 594-95 (quoting E. McQuillin, 15 MUNICIPAL CORPORATIONS § 43.04, at 575 (3rd ed.1995)). Second, “was the statute authorizing the bond issue constitutionally enacted?” *Id.* Third, “is the purpose for which the bonds are issued, a public and corporate purpose, as distinguished from a private purpose?” *Id.* The City argued to the trial court that RCW 35.67 and RCW 35.92 authorize the issuance of bonds to finance sewer projects, CP at 50-55, that these statutes are constitutional, *id.* at 49, and that sewer systems are a public purpose, *id.* at 48-49.

The problem with this argument it completely fails to address the point of the Ratepayers’ claims. The issue here isn’t whether the City, in theory, may issue bonds to finance the proposed sewer upgrades; of course it can. Instead, the issues are (1) whether the City may pledge *water* and *stormwater* charges to pay off bonds issued to finance improvements to the City’s *sewer* system, (2) whether the bonds exceed the amount allowed by law in light of what the City has estimated is needed to complete the sewer upgrades, (3) and whether the City must consult with and receive recommendations from a City Utility Advisory Committee before issuing the bonds. All of these issues, as well as any others that pertain to the validity of the bonds, are properly analyzed under the three-part test recited above. *King County*, 133 Wn.2d at 595 (addressing multiple subjects related to the validity of the bonds at issue, including “the validity

of taxes to pay” the bonds). And, as is explained more fully in the following sections, an analysis of these questions compels the conclusion that the proposed bond issue is invalid and must be enjoined.

C. The City Cannot Use Water and Stormwater Charges to Pay Off Bonds Issued to Finance Sanitary Sewer Improvements.

Underlying Ratepayers’ challenge to the ordinance authorizing the issuance of bonds is their challenge to what the ordinance pledges for the repayment of the bonds, namely the pledge of water rates and storm water rates. The law is well established that the validity of a proposed bond depends on the validity of the sources which are pledged to repay them. *See State ex rel. Dunbar v. Board of Trustees*, 148 Wash. 126 (1928) (bonds cannot issue for construction of dormitory when rental revenue from existing buildings is also pledged for bond repayment). Here, because the City pledges water and storm water revenues to repay bonds for the sewer utility—an illegal funding mechanism as described below—the bonds cannot issue.

City Ordinances Nos. 2009-02 and 2009-07 authorize the City “to establish, maintain and collect rates and charges for water, sewer and drainage services . . . fully sufficient” to pay off the bonds issued to finance the sanitary sewer improvements. CP at 288, 304 (City Ord. No. 2009-02, § 11, City Ord. No. 2009-07, § 4(d)). However, as described

above, many water and stormwater ratepayers are not customers of or connected to the City's sanitary sewer system. A long line of Washington Supreme Court cases (discussed further below) makes clear that using water and stormwater charges to pay for unrelated sanitary sewer improvements constitutes the imposition of a tax that may only be imposed pursuant to express statutory or constitutional authority. *See Lane v. City of Seattle*, 164 Wn.2d 875 (2008); *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359 (2004); *Okeson v. City of Seattle*, 150 Wn.2d 540 (2003); *Samis Land Co.*, 143 Wn.2d 798; *Covell v. City of Seattle*, 127 Wn.2d 874 (1995). Because such authority is absent here, the City's attempt to use water and stormwater charges to pay for the sanitary sewer improvements constitutes the imposition of an illegal tax.

1. Using water and stormwater charges to pay for sanitary sewer improvements constitutes the imposition of an illegal tax.

As a general matter, a monetary charge imposed by the government may be classified either as a tax or a regulatory fee. Taxes are subject to an array of restrictions that do not apply to fees. For example, a local government lacks the power to impose a tax unless it is granted express statutory or constitutional authority to do so. *Arborwood Idaho*, 151 Wn.2d at 366; *Okeson*, 150 Wn.2d at 551, 558; *Covell*, 127 Wn.2d at 879; Wash. Const., art. VII, § 5 ("No tax shall be levied except in

pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.”).⁷ If there is any doubt regarding a grant of taxing authority to a local government, it must be denied. *Arborwood Idaho*, 151 Wn.2d at 374; *Okeson*, 150 Wn.2d at 558. On the other hand, “[l]ocal governments have authority under their general article XI, section 11 police power” to impose regulatory fees akin to charges for services rendered. *Samis Land Co.*, 143 Wn.2d at 804. Importantly, the police power does not include the power to tax. *Arborwood Idaho*, 151 Wn.2d at 366; *Samis Land Co.*, 143 Wn.2d at 804 n.8.

Because fees are not considered taxes, “correctly classifying a charge as either a tax or a fee is critical,” lest the government attempt to “circumvent constitutional constraints” applicable to taxes “by levying charges that, while officially labeled ‘regulatory fees,’ in fact possess all the basic attributes of a tax.” *Okeson*, 150 Wn.2d at 552 (quoting *Samis Land Co.*, 143 Wn.2d at 805). In light of this possibility, “the characterization of charges by the governmental entity imposing them is not dispositive.” *Covell*, 127 Wn.2d at 886. Instead, beginning with *Covell*, the Washington Supreme Court has developed a three-factor test to

⁷ Other restrictions include the uniformity requirement, *see* Wash. Const., art. VII, § 1, and the one-percent maximum, *see* Wash. Const., art. VII, § 2.

distinguish taxes from regulatory fees:

First, one must consider whether the primary purpose of the legislation in question is to “regulate” the fee payers or to collect revenue to finance broad-based public improvements that cost money.

Second, one must determine whether or not the money collected from the fees is segregated and allocated exclusively to regulating the entity or activity being assessed.

Third, one must ascertain whether a direct relationship exists between the rate charged and either a service received by the fee payers or a burden to which they contribute.

Samis Land Co., 143 Wn.2d at 806 (line breaks added, internal quotations omitted). The factors need not be unanimous to conclude that a charge is a tax or a fee. *See Arborwood Idaho*, 151 Wn.2d at 371-73 (holding ambulance charge to be a tax, even though only two of three factors indicated charge was a tax). Applying these factors here, it is plain that the use of water and stormwater charges to pay for sanitary sewer improvements constitutes the imposition of a tax. Therefore, such charges cannot be pledged to support these bonds as the City ordinances at issue purport to do.

a. Primary purpose factor.

The first factor one must consider in differentiating a tax from a fee is “whether the primary purpose of the legislation in question is to

‘regulate’ the fee payers or to collect revenue to finance broad-based public improvements that cost money.” *Samis Land Co.*, 143 Wn.2d at 806. If the primary purpose of the legislation is to raise revenue to be used for the desired public improvement, the charge imposed is a tax. *Arborwood Idaho*, 151 Wn.2d at 359. If, on the other hand, “the primary purpose is to regulate the fee payers – by providing them with a targeted service or alleviating a burden to which they contribute – that would suggest that the charge is an incidental tool of regulation.” *Id.*

Here, the primary purpose of the water and stormwater charges (or, more precisely, the marginal portions of the charges directed to paying off the bonds) is to raise revenue to be used for a public improvement – the sanitary sewer system upgrades – rather than to regulate water usage or stormwater impacts. The *Okeson* and *Samis Land Co.* cases are instructive. In *Okeson*, Seattle increased the rates on its electric ratepayers to pay for the electricity used by the City’s streetlights. 150 Wn.2d at 543-44. The court held that the primary purpose of the rate increase was to raise revenue rather than to regulate, inasmuch as there was no relationship between a ratepayer’s electricity consumption and the amount of energy used by the streetlights. *Id.* at 552-53. Likewise, in *Samis Land Co.*, the City of Soap Lake imposed a “standby charge” on lots that abutted, but were unconnected to, the city’s water and sewer lines. 143

Wn.2d at 801-02. The court held that the primary purpose of these charges was to raise revenue rather than to regulate because the “thrust” of the authorizing ordinances was on revenue collection, rather than on regulating water or sewer usage. *Id.* at 807-08.⁸

As in *Okeson*, the marginal increase in water and stormwater rates here is unrelated to the regulation of water usage or stormwater impacts; rather, the marginal increase is devoted to paying for sanitary sewer upgrades not necessarily related to water usage or stormwater impacts. Moreover, as in *Samis Land Co.*, the thrust of the authorizing ordinances here is on revenue collection rather than regulating water usage or stormwater impacts – the ordinances do nothing more than authorize the bonds, describe the bonds, and set forth how they are to be repaid. *See* City Ord. No. 2009-02 (CP at 279); City Ord. No. 2009-07 (CP at 301). Accordingly, this factor supports the conclusion that the marginal increase in rates would be a tax.

b. Allocation factor.

The next factor one must consider in differentiating a tax from a

⁸ *See also Lane*, 164 Wn.2d at 880, 883 (primary purpose of fire hydrant charge on water ratepayers was to raise revenue, given that charge did not regulate water or hydrant usage); *Arborwood Idaho*, 151 Wn.2d 362-63, 371 (primary purpose of city-wide ambulance service charge was to raise revenue because charge did not regulate the use of the service); *Covell*, 127 Wn.2d at 881 (primary purpose of street utility charge imposed on each housing unit was to raise revenue because authorizing ordinances made no attempt to regulate residential housing or street usage).

fee is whether the money collected from the charge “is segregated and allocated exclusively to regulating the entity or activity being assessed.” *Samis Land Co.*, 143 Wn.2d at 806. If the charge is to qualify as a fee, it is “essential that the money collected be segregated and allocated *only* to *the* authorized regulatory purpose.” *Id.* at 809-10 (internal quotes omitted, emphasis in original).

Although depositing funds into a special account established for the stated purpose indicates it is a fee, it is important that it serves a regulatory purpose. All funds could be deposited into special accounts, and that would not necessarily turn taxes into fees. If the costs imposed do not regulate the activity, then the increased rates would, by definition, not be allocated for an authorized “regulatory” purpose. They would simply be a clever device by which taxes are disguised as fees by virtue of the account in which they are deposited.

Okeson, 150 Wn.2d at 553; *see also Samis Land Co.*, 143 Wn.2d at 810 (this factor “requires that regulatory fees be used to regulate the entity or activity *being assessed*.” (internal quotes omitted, emphasis in original)).

Here, while the water and stormwater charges are to be deposited into a special Debt Service Fund, *see* CP at 290 (City Ord. No. 2009-02, § 17) and CP at 306 (City Ord. No. 2009-07, § 4(e)), this account has no relationship to the regulation of water usage or stormwater impacts. Rather, the account exists solely to pay for the unrelated upgrades to the sanitary sewer system – a system to which many water and stormwater

ratepayers aren't connected. As the quotation above indicates, the mere existence of this fund is insufficient to turn the charges into a fee. Indeed, in *Samis Land Co.*, the city placed the challenged "standby charge" into a "Water Capital Improvement Fund" which was "allocated to maintaining and improving the city-wide utility system." 143 Wn.2d at 810. The court nonetheless held that the charge was a tax because it did not regulate the activities of the group paying it – persons unconnected to the utility system. *Id.* at 809-11.⁹ Accordingly, this factor supports the conclusion that the marginal increase in water and stormwater rates is a tax and cannot be pledged to repay bonds for a sewer upgrade.

c. Direct relationship factor.

Finally, to differentiate a tax from a fee one must ascertain whether a "direct relationship" exists between the charge and either a service received by the fee payers or a burden to which they contribute. *Samis Land Co.*, 143 Wn.2d at 806. "If no such relationship exists, then the charge is probably a tax in fee's clothing." *Id.* at 811.

Here, as one might surmise from the above, there is no relationship between the marginal increase in water and stormwater charges, which are

⁹ See also *Lane*, 164 Wn.2d at 883 (hydrant charge on water ratepayers a tax, even though charges placed in a hydrant fund, because fund did not regulate water or hydrant usage); *Arborwood Idaho*, 151 Wn.2d at 372-73 (ambulance charge a tax even though used exclusively for ambulance service); *Okeson*, 150 Wn.2d at 553 (streetlight charge a tax even though used for street lighting and streetlight improvements); *Covell*, 127 Wn.2d

directed to paying off the bonds, and the services received by the water and stormwater ratepayers. Those services are paid for by the portion of the water and stormwater charges *not* directed towards paying off the sanitary sewer bonds. Moreover, many water and stormwater ratepayers aren't connected to the sanitary sewer system in the first place, and thus – as in *Samis Land Co.* – “by definition have no relationship” to the City’s sewer service. 143 Wn.2d at 813.¹⁰ Accordingly, this factor, as with the first two, supports the conclusion that the marginal increase in water and stormwater rates is a tax.

2. The City lacks authority to impose a tax on water and stormwater service to pay for sanitary sewer improvements.

As noted above, a local government lacks the power to impose a tax unless it is granted express statutory or constitutional authority to do so. *Arborwood Idaho*, 151 Wn.2d at 366; *Okeson*, 150 Wn.2d at 551, 558; *Covell*, 127 Wn.2d at 879. No such authority exists here for the imposition of a tax on water or stormwater customers of the City.

at 888-89 (street utility charge a tax even though placed in transportation fund).

¹⁰ See also *Lane*, 164 Wn.2d at 883 (no direct relationship where hydrant charge unrelated to ratepayers’ use of hydrants); *Arborwood Idaho*, 151 Wn.2d at 373 (no direct relationship where ambulance fee unrelated to residents’ use of ambulance service); *Okeson*, 150 Wn.2d at 554 (no direct relationship where increase in electric rates unrelated to individual use of streetlights).

Indeed, at the trial court, the City made no argument that it is exercising an expressly granted *taxing* power. Rather, the City cited RCW 35.67 and RCW 35.92 as the authority for issuing the proposed bonds. *See* CP at 49. Neither of these statutes authorizes imposing a tax on **water** and **stormwater** services to pay off bonds issued to finance sanitary **sewer** improvements, however. RCW 35.67 simply contemplates that legitimate, validly-imposed service fees and otherwise authorized taxes may be used to pay off bonds issued to finance sewer system improvements, *see* RCW 35.67.110, and RCW 35.92 only authorizes the use of property taxes to pay off such bonds, *see* RCW 35.92.080.

Neither of these statutes is sufficient to authorize the imposition of a tax on water users under the state constitution and *Okeson*. The state constitution mandates that “[n]o tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” Wash. Const., art. VII, § 5. If there is any doubt regarding a grant of taxing authority to a local government, it must be denied. *Arborwood Idaho*, 151 Wn.2d at 374; *Okeson*, 150 Wn.2d at 558. In *Okeson*, the legislature amended the relevant statutes (after the suit had been filed) to allow cities to incorporate the cost of streetlights in the general rate structure of their electric utilities. 150 Wn.2d at 557 (citing LAWS of 2002, ch. 102, amending RCW

35.92.050). The court rejected the purported legislative fix, holding that “the increased rate that City Light ratepayers pay for streetlight maintenance still constitutes an unlawful tax.” *Id.* This was because regardless of what the increased rate was called, it was still a tax under the *Covell* test set forth above; and, as here, nothing in the amended statute expressly authorized the imposition of a tax on ratepayers to pay for the desired improvement. *Id.* at 558.

Moreover, even if the City did have statutory authority to impose a tax on water and stormwater services, it has not validly enacted such a tax here. In *Okeson*, the Court held that the City ordinance which enacted the streetlight charge did not lawfully impose a tax simply because it failed to explicitly state that it was imposing a tax or state the object to which the tax was being applied. 150 Wn.2d at 556. Similarly, in *Lane*, because the City did not declare the hydrant charge to be a tax or state the object of the tax until 2005, the imposition of the charge prior to that time was unlawful. 164 Wn.2d at 884. Here, the bond ordinances do not state that they are imposing a tax on water or stormwater service, nor do they state the object of the tax; accordingly, water and stormwater charges pledged to pay off the bonds purportedly authorized by Ordinance Nos. 2009-02 and 2009-07 would be unlawful.

D. The Bonds Unlawfully Exceed the Amount Needed to Complete the Sewer Upgrades.

The Alliance relies on City estimates that the sanitary sewer improvements will cost \$4.5 million to complete. However, the challenged ordinances pledge revenues to support the issuance of \$6 million in bonds to pay for the improvements. *See* CP at 121-27. This disparity is an independent basis for finding the ordinances invalid.

1. The City Cannot Issue Bonds Which Exceed the Estimated Cost of the Project.

The state constitution mandates that “[n]o tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” Wash. Const., art. VII, § 5. Here, the bond ordinances authorize the City both to impose a property tax sufficient to pay off the bonds, and to collect water, stormwater and sewer charges sufficient to pay off the bonds. The problems with the water and stormwater charges were addressed above. However, the excess bond authorization renders the property taxes and sewer charges unlawful as well. This is because the “object” of these charges is the sanitary sewer system upgrades. But given that these upgrades will only cost \$4.5 million to complete and the City wishes to issue \$6 million in bonds (CP at 301, 302, 303), any monies collected beyond that amount cannot be “applied” to the upgrades and thus violate

article VII, section 5.

This \$1.5 million excess conflicts with the ordinance itself. The Ordinance describes the purpose of the of the bond authorization as being limited to “carrying out the Project”, refunding previous bonds and paying the costs of the bond issuance. CP at 279. Similarly, RCW 35.67.065 and 35.67.110 authorize bonds to be issued to pay for “all or part” of the construction of a sewer utility. The statutes do not authorize bonds that exceed that amount. According to the City, on March 11, 2009, that amount was \$7,130,000. CP at 279. One month later, that amount became \$6 million. CP at 301. Ratepayers contend that the Project amount is even less, and there is clearly disputed evidence as to whether the proposed bonds exceed the cost of completing the WWTP upgrade. *See infra* at 28-29. However, the Ordinance and statutes limit bonding to the project costs and the Ordinance authorizes bonds in excess of that amount.

To the extent the bonds are excessive, they violate RCW 35A.34.220 as well. RCW 35A.34.220 provides in pertinent part, “Moneys received from the sale of bonds or warrants shall be used for no other purpose than that for which they were issued...” The bonds here, of course, are supposed to finance sanitary sewer system upgrades. But given that these upgrades will only cost \$4.5 million to complete, any

monies received beyond that amount cannot be “used” for the upgrades and, under RCW 35A.34.220, cannot be used for any other purpose either.

2. There is Conflicting Evidence as to whether the Proposed Bond Exceeds the Authorized Costs.

With the City’s motion for partial summary judgment, the only evidence it provided was a document it styled as “7/17 Documents Declaration.”¹¹ CP at 64. This declaration did not contain evidence of the remaining cost of completing the WWTP upgrade. However, it did make clear that the bond authorization ordinance authorizes the issuance of bonds up to \$6 million. CP at 95.

In response, Ratepayers submitted evidence that the cost of completion of the WWTP upgrade was only \$4.5 million. CP at 121-27. The City is proposing to issue bonds for an extra \$1.5 million and potentially hold water and stormwater users responsible, not only for the actual cost of the sewer upgrade, but also for whatever this extra \$1.5 million is used for.

In reply, the City filed the Declaration of Mark Dombroski (CP at 183), to which a chart is attached describing “Sources and Uses of Funds (as of 8/21/2009).” CP at 262. Mr. Dombroski’s declaration says nothing about any of the numbers on the chart, where they came from, or what

¹¹ The “7/17” apparently refers to the filing date.

they represent other than the terse statement “[t]he City’s estimated sources and uses of funds for the WWTP upgrades as of August 21, 2009, are set forth in the spreadsheet attached hereto as Exhibit A.” Without some supporting testimony, this chart cannot be considered to be conclusive on the amount needed to complete the WWTP project and bonding costs, the “objects” to which the bonds are supposedly limited.

Even if one were to grant the City inferences in its favor (which it is not entitled to as the party moving for summary judgment),¹² one might infer that the cost of the project, including a \$500,000 amount for contingencies and including the bonding costs, totals \$3,994,817. CP at 262. Also included in the Project is the cost of repaying earlier loans, which appear to be the total of \$180,900 and \$178,225, or \$359,125. CP at 262. Hence, the total cost of the Project is \$4,353,942 based on one plausible reading of Mr. Dombroski’s chart.

3. Bonds Cannot be Used to Repay Loans from the Water Fund and Sewer Operating Funds.

The only way one can get anywhere close to the \$6 million is by repaying loans from the water utility of \$1 million and money from sewer operations of \$1,364,309. In fact, the City argued at hearing that the bonds could be used to repay pre-existing loans. Report of Proceedings

¹² *Atherton Condo. Apartment-Owners*, 115 Wn.2d at 516.

(RP) at 5-6, BIMC 3.44.010 (App. A) mandates that each of the utility services “be accounted for as though those utilities were separate funds.” Similarly, RCW 43.09.210 requires that “[s]eparate accounts shall be kept for each department, public improvement, undertaking, institution, and public service industry under the jurisdiction of every taxing body,” and that “[a]ll service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same.”

There are several problems with the City’s argument that it can authorize bonds to repay loans from the water utility fund and the sewer operating funds. First, the repayment of loans for the WWTP upgrade through bonds which are paid by charges to the water and stormwater utility customers does not alter the fact these charges are an unlawful, unauthorized tax.

Second, the fact that the City’s water and sewer funds may eventually need to be repaid in no way guarantees that the ratepayers who were forced to pay increased rates (*i.e.*, the unauthorized tax) will be repaid. Third, nothing in the bond ordinances mandates that the City repay the loans; rather the ordinances merely provide that the City

“intends” to treat water and stormwater monies as an interfund loan. CP at 78 (City Ord. No. 2009-02, § 11). Fourth, even if the bond ordinances did mandate that the City repay the loans, one could not be certain whether the City would honor such mandatory language. Indeed, in this very case the City has argued that it is not bound by mandatory language in its own code. *See* CP at 55-58 (arguing that the City is not bound by the mandatory language of BIMC 2.33.040, App. C). Thus, the notion that the City “intends” to repay the loan is cold comfort at best.

Fifth, RCW 35A.34.220 prohibits spending money on projects to be funded through bonds until the bonds are authorized. *See supra* at 38-40. The City cannot spend money on this project, borrow money from other funds, and then authorize bonds to repay the loans. Fiscal accountability requires the bonds to be authorized—the means of financing—to be determined before the financial obligation is created.

E. Under Its Own Code, City Was Required to Consult With and Receive Recommendations From A Utility Advisory Committee Before Approving The Bond Issue.

BIMC 2.33.040 requires that a Utility Advisory Committee “**shall** . . . [c]onsult with and make recommendations to the mayor and the city council, [and] give advisory recommendations to the city council relative to the planning for, **financing**, operation and maintenance of water and sanitary sewer utility capital facilities.” BIMC 2.33.040(D) (App. C)

(emphasis added).

Here, the City does not dispute that the mayor and city council did not consult with or receive recommendations from the proposed sanitary sewer system upgrades. Indeed, it is undisputed that the Utility Advisory Committee had not been formed prior to authorization of the bonds. Instead, the City argues that the code does not require it to consult with or get advice from a Utility Advisory Committee prior to proceeding with sanitary sewer capital projects. *See* CP at 55-58.

The City's argument that the code does not require it to consult with a Utility Advisory Committee prior to proceeding with sanitary sewer capital projects is belied by the plain language of the city code itself. BIMC 2.33.010 (App. C) states the mayor "shall" appoint the committee, and BIMC 2.33.040 states that this committee "shall" consult with and give advisory recommendations to the mayor and city council "relative to the planning for, financing, operation and maintenance of water and sanitary sewer utility capital facilities." BIMC 1.04.010(U), in turn, provides that the terms "'Must' and 'shall' are each mandatory." App. D. A city "is bound by the explicit provisions of its own rules." *City of Tacoma v. General Metals of Tacoma, Inc.*, 84 Wn.2d 560, 564 (1974). The City's failure to take the steps mandated by BIMC 2.33 renders its subsequent actions with regard to the sanitary sewer upgrades void.

Ratepayers argued that the Utility Advisory Committee was akin to a Planning Commission recommendation on a rezone. RP 20-21. The existence of the recommendation is mandatory, even though the governing body may reject the recommendation. RCW 58.17.100; *Chrobuck v. Snohomish County*, 78 Wn.2d 858 (1971). A similar requirement exists here in regard to the Utility Advisory Committee. While its recommendations are not binding, the City's own process requires a recommendation as part of the open public process related to the financing of utility projects. The City cannot hide behind its power to ignore a Utility Advisory Committee's recommendation to short cut the process in an effort to restrict full and open public debate on the issues.

The *Okeson* case demonstrates the need for and value of such an advisory committee. There, the Seattle Rate Advisory Committee recognized the flaw in Seattle's plan to charge City Light customers for the City's streetlights, and notified the mayor, the city council and the state auditor regarding the problem. 150 Wn.2d at 544-45. Had Seattle heeded this advice, it could have avoided a long, expensive lawsuit. Moreover, such committees can help to ensure that municipalities pay "due regard" to the existing debt and operations and maintenance costs of their utilities, as is required by law. *See* RCW 35.67.130; RCW 35.92.100(1).

Nevertheless, the Utility Advisory Committee is a requirement of the City's own code. There is no justification for noncompliance.

F. An Injunction is Appropriate Here.

An injunction is appropriate where (1) the plaintiff has a clear equitable or legal right at stake, (2) the plaintiff has a well-grounded fear of immediate invasion of that right, and (3) the acts complained of are either resulting in or will result in actual and substantial injury to plaintiff. CP at 60 (citing *Federal Way Family Phys. v. Tacoma Stand*, 106 Wn.2d 261, 265 (1986)).

The Ratepayers Alliance's complaint meets this standard. The City's ratepayers, including the Alliance's members, have a clear right not to be subjected to unlawful, unauthorized taxes; the City's bond ordinances presently threaten to impose such a tax; and this tax will unlawfully extract money from the City's ratepayers. Moreover, such harm may be irreparable if the bond issue is allowed to proceed, inasmuch as innocent bond holders or utility ratepayers with no connection to the sewer utility may be left holding the bag.

II

THE COURT SHOULD HAVE GRANTED THE RATEPAYERS ALLIANCE'S MOTION FOR RECONSIDERATION

Pursuant to LR 59(b), Plaintiff filed a timely motion for

reconsideration of the Court's Order Granting City of Bainbridge Island's Motion for Severance of Plaintiff's Bond Validity Claim. CP at 517. This motion focused on the factual and legal implications of the Declaration of Mark Dombroski in Support of Defendant's Reply Brief in Support of Its Motion for Summary Judgment on the Validity of the City's Proposed Bond Issue (CP at 183). The standard of review for reconsideration is abuse of discretion, *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 412 (2009).

Ratepayers moved for reconsideration for three reasons. First, the City filed the Declaration of Mark Dombroski (CP at 183) in its reply brief, raising new evidence to support its motion. Second, because that declaration is not clear as to the cost of completing the project and one view of the declaration creates a conflict with other evidence, summary judgment should be denied or discovery allowed to flesh out the significance of Exhibit A to the Dombroski Declaration. CP at 187. Third, the Dombroski Declaration and the City's reply contained a new argument that was not raised in the City's moving papers, namely that contained evidence that the proposed \$6 million bond would be used to repay funds borrowed from other funds, such as the water fund. Not only is this new position not raised in its moving papers, this new position violates RCW 35A.34.220.

In response, the trial court denied reconsideration by first simply asserting that the Dombroski Declaration was “rebuttal” to the declaration of Sally Adams in regard to the cost of completion of the WWTP upgrade project. CP 526. Second, the court held that the request for discovery was too late. CP 526. Third, and finally, the Court held that third ground for reconsideration was a new legal argument (presumably by Ratepayers) and was based on evidence that was in existence in June before the hearing on summary judgment. CP 526. Each of these bases for denying reconsideration are erroneous.

First, as addressed at the hearing by counsel for the Plaintiff (RP at 24-25), Plaintiff objects to the submission of evidence by the moving party in a final reply brief, where there is no opportunity for the Plaintiff to challenge assertions of fact in such a declaration. Civil Rule 56 contemplates that the moving party will include its evidence with its original motion and limit rebuttal evidence to rebutting evidence offered by the nonmoving party. *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168-69 (1991). The Dombroski Declaration included more information that could be construed to rebut the Plaintiffs’ Declaration and should not have considered for anything other than that purpose.

Division I of the Court of Appeals in *White* indicated essentially in *dicta* that evidence could be submitted to rebut the nonmoving party’s

evidence. *Id.* Here, the trial court ruled that the Dombroski Declaration was rebuttal evidence to Ratepayers' evidence, namely the Declaration of Sally Adams. CP at 526 (referring to CP at 121). The problem with this *dicta* from *White* is that it can be misconstrued as it was in this case in the context of summary judgment motions.

Evidence offered with a reply might be used to show that there remains no triable issue of fact. However, if the reply evidence simply contradicts the evidence offered by the nonmoving party, such should demonstrate that summary judgment is inappropriate. Conflicting evidence in the *sine qua non* of triable issues of fact. The nonmoving party, here, the Ratepayers Alliance, is entitled to have all inferences from the evidenced viewed in its favor. *Atherton Condo. Apartment-Owners*, 115 Wn.2d at 516. If the City's evidence in reply is offered to contradict the Ratepayers' evidence, the very existence of rebuttal evidence makes clear that there are facts in dispute and summary judgment is inappropriate.

Second, because the Court considered the Dombroski Declaration, the Court should reconsider to allow Plaintiff to conduct discovery to ascertain the truth of the statements made in his declaration and Exhibit A attached thereto (CP at 187). CR 56(f) contemplates the grant of a continuance to enable the nonmoving party to conduct discovery regarding the evidence offered in support of partial summary judgment. Here, there

has been no discovery and discovery is necessary to test the accuracy of the statements made in Exhibit A to the Dombroski Declaration. *See CP* at 393-94. In the absence of discovery, there is simply no way for Ratepayers to know the costs of the WWTP project have been, when costs were incurred and when money was loaned out of the Sewer Fund. *Id.* A continuance should have been granted.

In regard to timeliness, there is no rule that when moving party submits new evidence in reply after the nonmoving parties briefs are due, that reconsideration cannot be sought to request discovery under CR 56(f). To create such a rule would be patently unfair, which allows litigants to blindside their opponents and prevent full disclosure of the factual issues by clever manipulation of the briefing rules.

Third, the Court refused reconsideration because of a new legal issues is raised, but ignored that it was the Dombroski Declaration that raised a legal issue that was not addressed by the City in its moving papers. The Dombroski Declaration highlights an additional legal basis for the Court to deny the City's Summary Judgment Motion. It indicates that the cost to complete the WWTP" upgrade as of August 21, 2009, might be \$3,994,817. (This is contrary to the Declaration of Sally Adams, CP at 121). Although inferences from the evidence are to be taken in the nonmoving party's favor, the Dombroski Declaration could be read to

state that proceeds from the proposed \$6,000,000 bond will be used to (1) fund these completion costs, and (2) prepay \$2,364,309 in previously incurred expenditures that were originally paid from funds in the Water Fund and Sewer Operations Fund. The problem under this scenario is that RCW 35A.34.220 provides that bonds cannot be issued to cover expenditures made prior to the time the bonds were duly authorized.

Moneys 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.** ... Where a budget contains an expenditure program to be financed from a bond issue to be authorized thereafter, no such expenditure shall be made or incurred until after the bonds have been duly authorized

RCW 35A.34.220 (emphasis added). Since this issue was not fully spelled out in the City's moving papers, it was not addressed in detail in Plaintiff's Opposition.¹³ However, it is unfair to characterize it completely as new issue being raised by Ratepayers.

The bonds at issue were purportedly authorized by the City Council in Resolution No. 2009-07 on April 22, 2009. CP at 301. In its motion for summary judgment, the City did not point to evidence to suggest that there was no factual dispute as to whether the City expended

¹³ This provision is referenced in Plaintiff's First Amended Complaint, Fifth Cause of Action (CP at 34, 37) and in the Plaintiff's Opposition to the Summary Judgment Motion, CP at 560-61.

money to be reimbursed by bonds before the bonds were authorized.

Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915 (1988) (“If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion.”).

To the extent expenditures were made prior to April 22, 2009, and are to be refunded by these bonds, the City’s actions conflict with RCW 35A.34.220. A continuance should have been allowed for limited discovery to determine the amount of expenditures made prior to the April 22, 2009, Resolution.

A concern that the proposed bond would be used to pay for WWTP upgrade expenditures incurred prior to April 22, 2009 is not without support. The City’s 2008 Annual Financial Report to the Washington State Auditor dated June 5, 2009 states in Note 6 that as of December 31, 2008 the WWTP project had \$5,531,000 in outstanding construction and design contracts.¹⁴ *See* CP at 431. In other words, the City had signed contracts for the project creating construction obligations before all the related funding had been duly authorized by the City Council.

In short, the Court abused its discretion in denying reconsideration where it was filed primarily to address evidence and issues raised by the City with its reply memorandum after the Ratepayers' opportunity for briefing was closed.

CONCLUSION

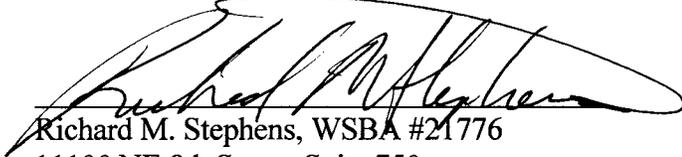
The heart of this case is not about the wisdom of the WWTP upgrades, but rather whether this sewer project can be financed by water and stormwater utility ratepayers. The trial court erroneously allowed the City to promise future bond holders that it will make sure the charges it imposes on water customers would be sufficient to pay for improvements to the sewer project.

The Court should reverse and order the entry of judgment in the Ratepayers' favor. Alternatively, the Court should reverse for further proceedings on whether the amount of the bonds is excessive.

RESPECTFULLY submitted this 9th day of December, 2009.

GROEN STEPHENS & KLINGE LLP

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¹⁴ All numbers are expressed in thousands of dollars. CP at 406.

DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On December 9, 2009, a true copy of Appellant's Opening Brief was placed in envelopes, which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United State Postal Service in Bellevue, Washington addressed to:

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STATE OF WASHINGTON
BY *Ka*
DEPUTY

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of December, 2009 at Bellevue, Washington.



Linda Hall

APPENDIX A

3.38.050 Advisory board.

The Bainbridge Island health, housing and human services council will provide an advisory board to the Bainbridge Island housing trust fund. (Ord. 99-45 § 1, 1999)

3.38.060 Reporting.

A separate written annual report on the status of activities, programs, and projects funded through the use of the city of Bainbridge Island housing trust fund shall be prepared. (Ord. 99-45 § 1, 1999)

**Chapter 3.40
UNEMPLOYMENT COMPENSATION RESERVE FUND**

(Repealed by Ord. 2002-43)

**Chapter 3.44
UTILITIES AND ENTERPRISE FUNDS**

Sections:

3.44.010 Waterworks utility.

3.44.020 Building and development services.

3.44.010 Waterworks utility.

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. (Ord. 2002-43 § 2, 2002: Ord. 74-02, 1974)

3.44.020 Building and development services.

The city shall maintain a separate enterprise fund entitled its "building and development services fund." The building and development services fund shall contain at least the following separate subfunds: land use actions, building permits, and developer improvements. (Ord. 2002-43 § 2, 2002: Ord. 74-02, 1974)

**Chapter 3.45
UTILITIES CAPITAL IMPROVEMENT FUND**

Sections:

3.45.010 Established

3.45.020 Transfer of funds.

3.45.010 Established.

There shall be established a utilities capital improvement fund to better identify and to provide segregated accounting and control for expenditure of moneys identified for the purpose of making capital improvements connected with the city's utilities, and as contained in either the city's capital improvements plan or its successor, the capital facilities element of the city's comprehensive plan now under development. (Ord. 92-46 § 1, 1992)

3.45.020 Transfer of funds.

All uses of funds now accounted for in the city's utilities fund which have been or are intended to be used for utility-related capital improvements shall be

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13.20.050 Adoption of state regulations.

Rules and regulations of the state Board of Health regarding public water supplies, entitled "Cross-Connection Control Regulations in Washington State," WAC 248-54-250 through 248-54-500, and the American Water Works Association, Pacific Northwest Section's third edition of "Accepted Procedure and Practice in Cross-Connection Manual" as they presently exist, and as they may from time to time be amended in the future, are adopted by this reference as if set forth in full. (Ord. 85-21 § 1, 1985)

13.20.060 Abatement of unlawful cross-connections and installation of backflow prevention devices— Procedures.

Cross-connections declared in this chapter to be unlawful, whether presently existing or hereinafter installed, and/or services requiring backflow prevention devices and/or unlawful use or operation of a private water supply system served by the city public water supply are public nuisances, and, in addition to any other provisions of this code or the ordinances of the city of Bainbridge Island on abatement of public nuisances, shall be subject to abatement in accordance with the following procedure:

A. In the event that the city engineer or his designee determines that a nuisance as herein provided does exist, written notice shall be sent to the person in whose name the water service is established under the records of the city of Bainbridge Island, or alternatively, a copy of such written notice shall be posted on the premises served.

B. The notice shall provide that the nuisance described herein shall be corrected within 30 days of the date the notice is mailed or posted on the premises.

C. In the event the nuisance is not abated within the prescribed time, water service to the premises shall be discontinued.

D. In the event that the nuisance, in the opinion of the city engineer, or his designated representative, presents an immediate danger of contamination to the public water supply, service from the city water supply system to the premises may be terminated without prior notice; provided, however, notice will be posted on the premises in the manner heretofore provided at the time the service is terminated. (Ord. 85-21 § 1, 1985)

13.20.070 Penalties.

In addition to the remedies set forth herein, any person found guilty of violating any of the provisions of this chapter shall be subject to the penalties as set forth in BIMC 1.24.010. (Ord. 85-21 § 1, 1985)

Chapter 13.24 STORM AND SURFACE WATERS

Sections:**13.24.010 Utility established.****13.24.015 Jurisdiction.****13.24.020 Plan adopted.****13.24.030 Transfer of property.****13.24.040 Cost.****13.24.050 Definitions.****13.24.060 Fee imposed.****13.24.065 Automatic annual fee adjustment.**

13.24.070 Single-family and duplex residential fees.**13.24.081 Condominium unit fees.****13.24.080 Commercial/multiple fees.****13.24.082 Impervious surface area rate reductions.****13.24.084 On-site mitigation rate reduction.****13.24.085 Rate for disconnection of property with disconnected roof drains.****13.24.086 Application for rate reductions – Appeal.****13.24.089 Streets and roads charge.****13.24.090 State highway charge.****13.24.100 Billing and payment.****13.24.110 Remedies – Termination of water service.****13.24.120 Lien for service – Interest.****13.24.130 Inspections – Right of entry – Emergency.****13.24.200 Repealed.****13.24.010 Utility established.**

There is created and established a storm and surface water utility. The utility shall be administered under direction of the mayor or designee. (Ord. 86-27 § 1, 1986)

13.24.015 Jurisdiction.

The city shall have jurisdiction over all storm and surface water facilities within the city. No modifications or additions shall be made to the city's storm and surface water facilities without the prior approval of the city. (Ord. 91-49 § 1, 1991)

13.24.020 Plan adopted.

The system or plan of the storm and surface water utility shall be (1) as set forth on Figures 1 and 6 of the Plan prepared by Gardner Engineers, Inc., and Warren Consultants, Inc., dated July 22, 1985 and adopted by the city council on August 15, 1985, which figures and plan are incorporated by this reference as if set forth in full, and (2) for all land within the city's boundaries which is not covered by Figures 1 and 6, all natural and man-made drainage conveyance systems from the point of the first contact of rainfall with the land to Puget Sound. (Ord. 91-49 § 2, 1991; Ord. 86-27 § 1, 1986)

13.24.030 Transfer of property.

All properties, property rights and interests of every kind or nature owned or held by the city, however acquired, insofar as they relate to or concern storm or surface water sewage are transferred to the storm and surface water utility, including by way of examples and not limitation, all properties, rights and interests acquired by adverse possession or by prescription in and to the drainage and storage of storm or surface waters over and under lands, watercourses, streams, ponds and sloughs to the full extent of inundation caused by the largest storm or flood condition. (Ord. 86-17 § 1, 1986)

13.24.040 Cost.

Since the city now owns all the facilities, rights and interests set forth in BIMC 13.24.020 and 13.24.030, there is no estimated cost. (Ord. 86-27 § 1, 1986)

13.24.050 Definitions.

The following definitions shall apply to this chapter:

A. "Commercial/multiple property" means and includes all property zoned or used for multifamily, commercial or retail uses.

B. "Impervious area" means any part of any parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes areas which have been cleared, graded, paved or compacted. Excluded, however, are all lawns, agricultural areas, and landscaped area. (Ord. 86-28 § 1, 1986)

13.24.060 Fee imposed.

The owners of all real property in the city which contributes drainage water to and/or which benefits from the city's storm water utility shall pay a monthly fee as set forth in this chapter. (Ord. 86-28 § 2, 1986)

13.24.065 Automatic annual fee adjustment.

The fees described in BIMC 13.24.070, as now existing and as subsequently amended, shall be adjusted on an annual basis beginning January 1st of each year, unless the city council determines by December 31st of any year that the adjustment shall not occur for the next year. The adjustment shall be equal to the annual rate of increase in the Seattle Area Consumer Price Index (CPI-U) for the most recent period available prior to January 1st. (Ord. 2000-48 § 1, 2000; Ord. 99-50 § 1, 1999)

13.24.070 Single-family and duplex residential fees.

The monthly service fee for each single-family and duplex residential dwelling from January 1, 2008, through December 31, 2008, shall be \$12.47; provided, that the ratio of impervious to pervious surface of the lot shall not exceed 50 percent. If the ratio of impervious to pervious surfaces exceeds 50 percent, the rate established in BIMC 13.24.080 shall apply. (Ord. 2007-39 § 1, 2007; Ord. 2006-26 § 1, 2006; Ord. 2005-34 § 1, 2005; Ord. 2003-50 § 1, 2003; Ord. 2000-48 § 2, 2000; Ord. 99-50 § 2, 1999; Ord. 86-28 § 3, 1986)

13.24.080 Commercial/multiple fees.

The monthly fee for all commercial/multiple property shall be calculated according to the following formula:

$$(\text{Impervious area} \div 3,000 \text{ sq. ft.}) \times \text{single-family and duplex rate} = \text{rate.}$$

(Ord. 86-28 § 4, 1986)

13.24.081 Condominium unit fees.

The monthly service fee for each condominium unit shall be the rate charged for single-family dwellings under BIMC 13.24.070. (Ord. 2004-01 § 1, 2004; Ord. 2003-50 § 2, 2003)

13.24.082 Impervious surface area rate reductions.

For any property other than a single-family residence or a duplex residential dwelling:

A. The storm and surface water service monthly fee charged for the property for impervious areas consisting of gravel shall be 80 percent of the rate for impervious areas set forth in BIMC 13.24.080;

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one member shall be appointed for a three-year term. The terms for all subsequent annually appointed members shall be three years.

C. A member may be re-appointed, and shall hold office until his or her successor has been appointed and has qualified. Members may be removed by the mayor upon consent of the city council. (Ord. 99-70 § 1, 1999; Ord. 99-43 § 2, 1999)

2.32.025 Vacancies– Removal.

In the event of a vacancy, the mayor, subject to confirmation of the city council, shall make an appointment to fill the unexpired portion of the term of the vacated position. (Ord. 99-43 § 2, 1999)

2.32.040 Organization.

The mayor shall appoint annually one member of the committee to serve as chairperson for a one-year term. In making an appointment of the chairperson, the mayor shall take into consideration recommendations made by committee. The committee shall adopt such rules and regulations as are necessary to accomplish the duties prescribed in BMC 2.34.050, and consistent with other provisions of this chapter. These rules and regulations shall be placed on file with the city clerk. Necessary supplies and support staff shall be provided by the city consistent with available resources. (Ord. 99-43 § 2, 1999)

2.32.050 Powers and duties.

The committee shall act in an advisory capacity to the mayor and city council with respect to park matters. The committee shall forward any recommendations to the planning commission for review and comment prior to reporting to the council; provided, that minor recommendations or those matters outside the purview of the planning commission may be referred directly to the city council. In its advisory capacity, the committee shall:

A. Consult with and make recommendations to the mayor and city council regarding the development and amendment from time to time of the comprehensive park plan of the city;

B. Consult with and make recommendations to the mayor and city council regarding the use, management, supervision and control of the bandstand in the Waterfront Park;

C. Consult with and make recommendations to the mayor and city council regarding the acquisition, development, use, management supervision, maintenance and control of parks;

D. Consult with and make recommendations to the mayor and city council matters as are prescribed by the mayor and city council;

E. Keep the mayor and city council regularly informed of activities of the committee, which shall include but not be limited to the distribution of agendas at least one week in advance of all meetings and the distribution of minutes within two weeks following all meetings. (Ord. 99-43 § 2, 1999)

Chapter 2.33 UTILITY ADVISORY COMMITTEE

Sections:

2.33.010 Created – Membership, appointment, compensation and term.

2.33.025 Vacancies – Removal.

2.33.030 Organization.

2.33.040 Powers and duties.**2.33.060 Meetings, officers, records and quorum.****2.33.070 Expenditures and staff assistance.****2.33.010 Created– Membership, appointment, compensation and term.**

A. There is created a utility advisory committee for the city, hereinafter referred to as the committee. The committee shall consist of seven voting members who shall be appointed by the mayor and confirmed by vote of the city council. The members shall not be officers or employees of the city and shall be residents of the city. Additionally, a member of the city council shall serve as an ex officio, nonvoting member of the committee.

B. The members of the committee shall serve without compensation and shall initially be appointed for staggered terms as follows: two of the original members shall be appointed and confirmed for one-year terms, two of the original committee members shall be appointed and confirmed for two-year terms, and three members shall be appointed for three-year terms. The terms for all subsequent annually appointed members shall be three years.

C. A member may be re-appointed, and shall hold office until his or her successor has been appointed and has qualified. Members may be removed by the mayor upon consent of the city council. (Ord. 99-11 § 1, 1999)

2.33.025 Vacancies– Removal.

In the event of a vacancy, the mayor, subject to confirmation of the city council, shall make an appointment to fill the unexpired portion of the term of the vacated position. Unexcused absence by any committee member from three consecutive meetings shall constitute grounds for removal, and six absences by any committee member, excused or unexcused, occurring within a 12-month period shall likewise be grounds for removal. (Ord. 99-11 § 1, 1999)

2.33.030 Organization.

The mayor shall appoint annually one member of the committee to serve as chairperson for a one-year term. In making an appointment of the chairperson, the mayor shall take into consideration recommendations made by committee. The committee shall adopt such rules and regulations as are necessary to accomplish the duties prescribed in BIMC 2.33.040, and consistent with other provisions of this chapter. These rules and regulations shall be placed on file with the city clerk. (Ord. 99-11 § 1, 1999)

2.33.040 Powers and duties.

The committee shall act in an advisory capacity to the mayor and city council with respect to issues relevant to the operation and management policies of the city's water, sanitary sewer, and other utilities. The committee shall not supplant administrative advice on policy issues to the city council but shall be in addition to staff advice. The committee shall not interfere with the administrative staff functions involving day to day operation of the city utilities. In its advisory capacity, the committee shall:

A. Consult with and make recommendations to the mayor and city council regarding such utility-related matters as the city deems appropriate;

B. Give advisory recommendations to the mayor and city council on matters relating to the city's water and sanitary sewer utility policy, and operation;

C. Consult with and make recommendations to the mayor and city council regarding utility rates, rate structures and other charges made to water and sanitary sewer utility customers;

D. Consult with and make recommendations to the mayor and the city council, give advisory recommendations to the city council relative to the planning for, financing, operation and maintenance of water and sanitary sewer utility capital facilities;

E. Keep the mayor and city council regularly informed of activities of the committee, which shall include but not be limited to the distribution of agendas at least one week in advance of all meetings and the distribution of minutes within two weeks following all meetings. (Ord. 99-11 § 1, 1999)

2.33.060 Meetings, officers, records and quorum.

The committee shall elect its own chairperson and vice chairperson. The committee shall hold regular meetings at least once during each quarter year. Meetings shall be open to the public. The committee shall adopt rules for the transaction of business, and it shall keep a record of its meetings, resolutions, transactions, findings and determinations. Four members of the committee shall constitute a quorum for the transaction of business. The committee shall forward a copy of all meeting minutes to the city council for the information of the council. (Ord. 99-11 § 1, 1999)

2.33.070 Expenditures and staff assistance.

A. The expenditures of the committee, exclusive of donations, shall be limited to appropriations made by the city council.

B. The city staff, as assigned by the mayor, shall provide assistance to the committee. Except for purposes of inquiry, the committee and its members shall deal with employees of the city only through the mayor or administrative staff assigned by the mayor for that purpose. (Ord. 99-11 § 1, 1999)

Chapter 2.34 PARKING ADVISORY COMMITTEE

Sections:

2.34.010 Created – Membership, appointment, compensation and term.

2.34.020 Vacancies – Removal.

2.34.040 Organization.

2.34.050 Powers and duties.

2.34.060 Transmittal of minutes to city council.

2.34.010 Created– Membership, appointment, compensation and term.

A. There is created a parking advisory committee for the city, hereinafter referred to as the committee. The committee shall consist of seven voting members who shall be appointed by the mayor and confirmed by vote of the city council. The members of the committee shall not be officers or employees of the city. Additionally, a council member of the city council shall serve as an ex officio, nonvoting member of the committee.

B. The members of the committee shall serve without compensation. Three of the original members shall be appointed and confirmed for one-year terms, two of the original committee members shall be appointed and confirmed for two-year terms, and two of the original committee members shall be appointed for three-year terms. Thereafter, the requisite number of members shall be appointed and

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provided, that the foregoing list shall not be deemed to be exclusive or exhaustive, it being the intent and purpose to exclude from repeal any and all ordinances not of a general nature. (Ord. 2003-24 § 8, 2003: Ord. 84-15 § 2 (part), 1984)

1.01.085 Repeal shall not revive any ordinances.

The repeal of an ordinance shall not repeal the repealing clause in the ordinance or revive any ordinance that was repealed by the repealing clause. (Ord. 2003-24 § 9, 2003)

1.01.090 Severability.

If any term, phrase, sentence, or provision of this code shall, to any extent, be held invalid or unenforceable by a valid order of any court or regulatory agency, the remainder of this code shall be valid and enforceable in all other respects and continue to be effective. In the event of a subsequent change in applicable law so that the provision that had been held invalid or unenforceable is no longer invalid or unenforceable, said provision shall return to full force and effect without further action by the city. If, as determined by the city upon appropriate legal advice, or applicable court decision, any term, phrase, sentence, or provision of this code imposes a requirement that is prohibited by applicable federal or state law, or prohibits an action that must be allowed under applicable federal or state law, then any such term, phrase, sentence, or provision shall be construed to not impose the requirement that is prohibited by valid federal or state laws or not to prohibit the action that must be allowed under valid federal or state law. (Ord. 2003-24 § 10, 2003: Ord. 84-15 § 2, 1984)

Chapter 1.04 GENERAL PROVISIONS

Sections:

1.04.010 Definitions.

1.04.020 Title of office.

1.04.030 Interpretation of language.

1.04.040 Grammatical interpretation.

1.04.050 Acts by agents.

1.04.060 Prohibited acts include causing and permitting.

1.04.070 Computation of time.

1.04.080 Construction.

1.04.090 Repealed.

1.04.010 Definitions.

Whenever used in the ordinances of the city, the following words and phrases shall be construed as defined in this section, unless from the context a different meaning is intended or unless a different meaning is stated in the ordinance using the word or phrase:

A. "Appeal" means a request for review of a city decision in accordance with appeal procedures adopted by the city.

B. "Applicant" means a person or authorized agent who applies to the city for a license, permit or other approval.

C. "Application" means an application for a license, permit or other approval that may be issued or denied by the city.

D. "BIMC" or "code" means the Bainbridge Island Municipal Code.

E. "Building official" means the person appointed to be responsible for supervising the enforcement of all applicable building codes, permit processes and inspections.

F. "City" means the city of Bainbridge Island.

G. "City engineer" means the duly appointed city engineer of the city, his employee or authorized deputy.

H. "Clerk" or "city clerk" means the city clerk or such city employee or agent as the mayor shall designate.

I. "Council" or "city council" means the legislative body for the city of Bainbridge Island.

J. "County" means Kitsap County.

K. "Day" means a calendar day.

L. "Director" means the director of a city department.

M. "Ecology" or "DOE" means Washington State Department of Ecology ("Ecology" is preferred).

N. "Fire marshal" means a designated agent of the city who has the authority to implement and enforce the provisions of the adopted fire code and related chapters of the code.

O. "Health district" means the Kitsap County health district.

P. "Health officer" means the Kitsap County director of the Kitsap County health district, or his authorized agent.

Q. "Hearing examiner" means an individual who has been appointed to conduct public hearings in quasi-judicial matters pursuant to Chapter 2.38 BIMC.

R. "Law" means applicable federal law, the Constitution and statutes of the state, the ordinances of the city, and regulations that may be promulgated under all such laws, Constitutions, statutes, and ordinances.

S. "May" is permissive.

T. "Month" means a calendar month.

U. "Must" and "shall" are each mandatory.

V. "Oath" includes an affirmation or declaration in all cases in which, by law, an affirmation may be substituted for an oath, and in such cases the words "swear" and "sworn" shall be equivalent to the words "affirm" and "affirmed."

W. "Owner" means a person who keeps, has interest in, has control of, custody or possession of a business or real or personal property.

X. "Permit" means the official written approval by the city to do any action regulated by this code.

Y. "Person" means an individual, association, cooperative, club, society, corporation, partnership, limited liability company, firm, organization, trust, estate, receiver, federal, state or local governmental unit however designated, or municipal corporation.

Z. "Planning commission" means the planning commission of the city.

AA. "Preceding" and "following" mean next before and next after, respectively.

BB. "State" means the state of Washington.

CC. "Year" means a calendar year. (Ord. 2003-22 § 1, 2003; Ord. 96-03 § 1, 1996; Ord. 82-05 § 1, 1982)

1.04.020 Title of office.

Use of the title of any officer, employee, department, board or commission means that officer, employee, department, board or commission of the city. (Ord. 82-05 § 2, 1982)