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SUPREME COURT OF THE STATE OF WASHINGTON

CEDAR RIVER WATER AND SEWER DISTRICT *and*
SOOS CREEK WATER AND SEWER DISTRICT,

Appellants/Cross-Respondents,

v.

KING COUNTY,

Respondent/Cross-Appellant, and

SNOHOMISH COUNTY, *et al.,*

Respondents.

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

King County begins its brief by stating, “as the Districts *concede* and the trial court correctly held, sewage treatment is a proprietary function, not governmental,”¹ implying that the districts made that “concession” only reluctantly and that it was harmful to the districts’ claims. The districts did not “concede” that King County operates its Wastewater Treatment Division (WTD) as a proprietary utility; they affirmatively *alleged* it in their complaint and shouted it from the rooftops at every opportunity.² The proprietary nature of WTD is at the heart of the districts’ claims that the sewage utility’s restricted fund, euphemistically called the Water Quality Fund (“WQF”), has been used for unlawful, unauthorized and general governmental or other non-sewage purposes.³

II. KING COUNTY SHOULD HAVE HAD THE BURDEN OF PROVING WHETHER IT USED THE SEWAGE UTILITY FUND PROPERLY.

King County misstates the districts’ argument concerning the burden of proof. The districts do not contend that the county should have

¹ King County Brief (“KC Br.”) at 1 (underlining in original, italics added).

² In contrast, in their answers to the complaint both counties initially *denied* that WTD is a proprietary utility. *See* Complaint, ¶ 2 (CP 3); Answer of KC, ¶ 2 (CP 52); Answer of Snohomish County (“SnoCo”), ¶ 2 (CP 32).

³ The districts have asserted claims for two kinds of monetary relief. One is for King County to reimburse WTD for improper use of proprietary sewage funds (“level one” relief). The second kind is for WTD, in turn, to reimburse the individual local sewer utilities for sewage disposal overcharges due to the improper use of sewage funds (“level two” relief). This appeal involves only the level one claims. *See* Judgment, ¶ 14 (CP 18705) (reserving level two claims for determination following this appeal).

had the burden of proof because it “had information about alleged misuse of the WQF within its ‘peculiar or exclusive possession.’”⁴ Rather, the districts contend that the county should have had the burden of proof because (i) it has sole possession and control of the WQF and has “peculiar and exclusive” knowledge of how it used that fund and why, and (ii) the WQF is a restricted fund and the county has a fiduciary or quasi-fiduciary duty to use it exclusively for authorized sewage purposes.

The county argues that it cannot be deemed to have “peculiar and exclusive” knowledge of how the WQF was used, since the districts had the benefit of discovery in this litigation.⁵ The fact that pretrial discovery is available in litigation does not detract from the “long recognized principle” that the burden of proof should be on the party having easier access to relevant information.⁶ That principle is, after all, the very reason why fiduciaries have the burden of proving whether they properly spent the money entrusted to them: they are the ones who know how and why they spent the funds in question. The same is true of the county here. All of the evidence about how the county spent the money in its restricted sewage utility fund, and why it spent the money that way, came from the county’s own documents and from present and former county employees.

⁴ KC Br. at 9.

⁵ KC Br. at 9-10.

⁶ None of the cases or treatises explaining that “long recognized principle” (*see* districts’ opening brief (“Dists. Br.”) at 37-38) assumed an absence of pretrial discovery.

The county points out that there is no language in RCW 35.58.200 imposing a fiduciary duty on the county to use the WQF only for sewage purposes.⁷ But the districts do not rely on RCW 35.58.200 for that proposition. They rely on the County Charter,⁸ the County Code,⁹ the sewage disposal contracts, and well established principles of municipal utility law for that requirement. Because of that requirement, the county cannot use the money in the Water Quality Fund any way it wishes, *i.e.*, it cannot treat the WQF as its own absolute property.¹⁰

The cases cited by the county are not to the contrary. In *Thompson v. Atlantic Richfield Co.*, 673 F. Supp. 1026 (W.D. Wash. 1987), the court pointed out that the advertising funds in question were not required to be kept in a segregated account. *Id.* at 1028. Here, the funds in question are required to be kept in a separate account, the WQF, to be used exclusively for sewage purposes.¹¹

⁷ KC Br. at 11.

⁸ King County Charter § 230.10.10, quoted at Dists. Br. at 8-9

⁹ King County Code 28.86.160.C.1.FP-10, quoted at Dists. Br. at 9.

¹⁰ Washington is not alone in recognizing fiduciary-like obligations for the use of public funds. In addition to the authorities cited in Dists Br. at 36-37, *see, e.g., O'Fallon Dev. Co., Inc. v. City of O'Fallon*, 356 N.E.2d 1293, 1298 (Ill. 1976) (“A municipal corporation holds its property in trust for the public....”); *Holmes v. Beckwith*, 11 Conn. Supp. 215 at 3 (1942) (“Funds held by a municipality, whether raised by taxation or otherwise, are in the nature of trust funds and the officials holding or dispersing them act as trustees for the benefit of its inhabitants”); *Weik v. City of Wausau*, 128 N.W. 429, 430 (Wisc. 1910) (“this court has held that a fund raised by a city for a special purpose ‘is a trust fund, and equity will in a proper case interfere to prevent its diversion’” [internal citation omitted]).

¹¹ The court in *Thompson* also pointed out that the franchisees’ purpose in alleging trust status was to influence how ARCO spent the advertising funds, but since the franchise

The county's reliance on *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) ("*Mitchell I*"), is misplaced. The follow-up decision three years later in *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*"), recently cited with approval by this Court in *State v. Jim*, 173 Wn.2d 672, ¶29, 273 P.3d 434 (2012), is more pertinent. In *Mitchell II* the Court held that a trust or fiduciary relationship can exist (and did exist in that case) "even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." 463 U.S. at 225.

Similarly, the court in *Branson Sch. Dist. v. Romer*, 161 F.3d 619, 634 (10th Cir. 1998), cited by the county, held that the Colorado Enabling Act imposed trust duties on the State of Colorado because of explicit restrictions on how school lands could be used, although the words "trust" or "trustee" were not used. And in *Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003), although the Court held that the director of the state retirement system did not have a fiduciary obligation to collect pension fund contributions at the higher rates urged by the plaintiffs, it reaffirmed that those responsible for investing public pension funds that have already been collected do have fiduciary

agreement explicitly denied the franchisees any power to influence ARCO's advertising strategies there was no reason to imply a trust relationship. *Id.* at 1028.

obligations as to those funds. 148 Wn.2d at 621-22, citing *State ex rel. State Emps. Ret. Bd. v. Yelle*, 31 Wn.2d 87, 110-13, 201 P.2d 172 (1948), and *Naccarato v. Sullivan*, 46 Wn.2d 67, 76, 278 P.2d 641 (1955).¹²

Here, as in the pension fund investment cases, the funds in question were already collected and deposited into, and then were wrongfully expended from, a restricted fund that was supposed to be used exclusively for the benefit of the sewage utility. The county should have had the burden of proving whether it used those funds for an authorized purpose. The trial court erred by placing that burden on the districts.

III. THE “COMMUNITY MITIGATION” PAYMENTS TO SNOHOMISH COUNTY WERE UNLAWFUL AND AN IMPROPER USE OF SEWAGE FUNDS.

A. LUPA Does Not Bar the Districts’ Claim.

The Settlement Agreement and Development Agreement between King County and Snohomish County are two separate agreements, and neither one (either individually or “in conjunction with” the other) is a land use decision subject to LUPA’s 21-day appeal period. The counties deliberately drafted and approved two separate contracts which are not

¹² The Court also based its decision in *Charles* on earlier decisions holding that the state retirement statute did not constitute a written contract between public employees and the state (*Noah v. State*, 112 Wn.2d 841, 774 P.2d 516 (1989)) and that employees had no claim to the retirement fund until they completed their employment and qualified for a pension (*City of Marysville v. State*, 101 Wn.2d 50, 56, 676 P.2d 989 (1984)). Here, the local utilities have written contracts with the county, and they have a present interest in protecting the WQF.

“expressly-interdependent.”¹³ Having made that choice, the counties cannot seriously argue that what they really intended was one agreement.¹⁴

Although the Settlement Agreement is conditioned upon execution of the Development Agreement, the reverse is not true. The Development Agreement stands on its own; although its proposed form was included as an exhibit to the Settlement Agreement, it was not conditioned upon the Settlement Agreement in any way. The Development Agreement and any permits subsequently issued for Brightwater continue in effect regardless of any future invalidation of the “community mitigation” payments pursuant to the Settlement Agreement.¹⁵ Since the counties expressly contemplated the possibility and specified the consequences of that eventuality, invalidation of the payments could not be “prejudicial.”¹⁶

Even if the two agreements had been contemporaneously executed

¹³ KC Br. at 15.

¹⁴ It was reasonable for the counties to adopt separate agreements, since the purpose of each was different. *Compare* Settlement Agreement four-part purpose (CP 2366 (§4)) to single purpose of the Development Agreement (CP 2374). In semantic sleight of hand, Snohomish County asserts that there is a *two-part* “unified purpose” to “the Agreement.” Snohomish County brief (“SnoCo Br.”) at 20.

¹⁵ Settlement Agreement, § 6.5 (CP 2369). The Settlement Agreement spells out the consequences of a subsequent successful challenge to the “community mitigation” payments: any unexpended funds will be returned, and the parties will enter discussions regarding crediting King County for expended funds. *Id.* On October 15, 2008 King County asserted a crossclaim against Snohomish County, putting Snohomish County on notice that any subsequent expenditures using the mitigation money was inappropriate and in contravention of the Settlement Agreement. CP 68. As of the end of 2008, Snohomish County had spent only \$10,407,648 of the \$67.05 million in cash received from King County. CP 2120-21; CP 2623-26.

¹⁶ SnoCo Br. at 28.

(which they were not)¹⁷ and even if appeal of the Development Agreement were governed by LUPA, none of the cases cited by Snohomish County¹⁸ stand for the proposition that a statute of limitations applicable to a challenge of one document (Document A) is imported to bar a challenge to a second document (Document B) by virtue of Document A's being incorporated by reference, or made an exhibit to, Document B.¹⁹

The counties clearly contemplated that a challenge could be brought regarding the "community mitigation" payments after permits were issued and the payments were made.²⁰ Since the permits were not issued and the payments were not made until long after the Settlement Agreement was signed,²¹ and since the districts were not "aggrieved" until the payments were made out of the WQF, the districts would not have had standing to sue within 21 days of Settlement Agreement execution. The contract provision contemplating a possibly successful challenge to those payments would make no sense if a challenge had to be brought within 21

¹⁷ The Development Agreement became effective "upon execution by King County and adoption of an ordinance by Snohomish County approving it as required by Ch. 36.70B RCW." CP 2374. That date was December 15, 2005, almost two months after Snohomish County formally approved the Settlement Agreement. *See* SnoCo Br. at 12.

¹⁸ SnoCo Br. at 19, n.75.

¹⁹ *See* 11 Richard A. Lord, *Williston on Contracts*, § 30:26 at 247 (4th ed. 1999) ("It is important to note that even though several instruments relating to the same subject and executed at the same time should be construed together in order to ascertain the intention of the parties, it does not necessarily follow that those instruments constitute one contract or that one contract was accordingly merged in or unified with another so that every provision in one becomes a part of every other").

²⁰ CP 2369 (§ 6.5).

²¹ *See* Dists. Br. at 14, n.37. The districts filed this lawsuit well within the applicable six-year or three-year statutes of limitations of RCW 4.16.040(1) or 4.16.080(3).

days after the Agreement was signed.

Nor is there merit to the counties' argument that the Settlement Agreement was a "development agreement" under RCW ch. 36.70B.²² The Settlement Agreement does not "relate to" any specific project permit application within the meaning of that statute. The Settlement Agreement contemplated that permit applications would be made after the Agreement was signed.²³ Although *James v. Kitsap Cnty.*, 154 Wn.2d 574, 590, 115 P.3d 286 (2005), held that impact fees imposed as a condition of "the issuance of permits are inextricable from land use decisions" (emphasis added) and are subject to LUPA, the "community mitigation" payments at issue here were not impact fees imposed as a condition of permit issuance; no permit was issued upon execution of either Agreement.²⁴

Snohomish County quotes the trial court's ruling that the "Settlement Agreement ... read in conjunction with the ... Development

²² If a development agreement entered into pursuant to RCW ch. 36.70B "relates to a project permit application, [LUPA] shall apply to the appeal of the decision on the development agreement." RCW 36.70B.200, emphasis added.

²³ Furthermore, although the Development Agreement was recorded with the Auditor as required by RCW 36.70B.190, the Settlement Agreement was not. Even if the Development Agreement were deemed a "development agreement" within the meaning of RCW ch. 36.70B, the districts did not challenge or seek review of any aspect of the Development Agreement, or of any permit issued.

²⁴ The plaintiffs in *James* never argued the LUPA exception for monetary damages, and thus the majority did not address that issue. 154 Wn.2d at 586-87. Snohomish County also cites (at 27 n.100) *Brotherton v. Jefferson Cnty.*, 160 Wn. App. 699, 249 P.3d 666 (2011), which, unsurprisingly, held that a complaint filed three months after a final land use decision denying a waiver of sewer regulations was time-barred under LUPA.

Agreement ... constitutes at least in part a 'land use decision' ..."²⁵ The trial court did not specify which "part" of the Settlement Agreement or Development Agreement supposedly constituted a land use decision, but presumably only that "part" of the agreements would be subject to LUPA. A claim for monetary relief which also includes a challenge to a land use decision is exempt from the "procedures and standards, including deadlines" of LUPA. RCW 36.70C.030(1)(c). Even if the entire Development Agreement constituted a land use decision, that would not bar the districts' challenge to the payments made separately under the Settlement Agreement, because the monetary relief requested by the districts falls squarely within this LUPA exception.²⁶

B. The Districts Did Not Have Standing to Sue under LUPA but Do Have Standing to Seek Recovery of the "Community Mitigation" Payments under the Settlement Agreement.

The counties do not respond to the argument that the districts would not have had standing to appeal under LUPA and therefore could not be subject to LUPA's 21-day appeal period. Instead, they contend that the districts do not have standing to sue at all, arguing that (i) the community mitigation payments were consideration for settlement of litigation between the counties, (ii) the districts are not parties to that agreement, and (iii) the districts are outside the zone of interest of

²⁵ SnoCo Br. at 26-27, emphasis added.

²⁶ Neither county addresses the districts' argument regarding this LUPA exemption.

RCW 82.02.020.²⁷ Those arguments are flawed, and were not the basis for the trial court's ruling.

In *Warburton v. Tacoma Sch. Dist. No. 10*, 55 Wn.2d 746, 752, 350 P.2d 161 (1960), this Court laid out the test as to whether a municipal corporation may legitimately compromise a claim. A pre-condition (even before reaching the three-part test) is that there must be an absence of "fraud or manifest abuse of discretion." *Id.* Snohomish County's demand for, and King County's payment of, \$70 million for so-called "community mitigation" was nothing more than a bribe and was in violation of RCW 82.02.020. It does not meet the pre-condition described in *Warburton*.

The legality of the Settlement Agreement depends on whether what it provides for is legal. The counties cannot short-circuit that inquiry by including a promise to make an illegal payment as part of a settlement. If payment of a bribe is necessary to proceed with a project, it may be a project cost, but it is not a legitimate cost. When a county performs an illegal act, that act is arbitrary and capricious. The \$70 million payment at issue here was not made to compromise a legitimate claim or to mitigate legally cognizable environmental impacts of Brightwater, but to buy off political opposition from Snohomish County. That was outside of the

²⁷ SnoCo Br. at 36-44. *See also* SnoCo's argument made in trial court. CP 127 ("The Settlement Agreement was negotiated and executed in compromise and settlement of litigation rather than pursuant to the authority of either RCW 82.02.020 or RCW 43.21C.060"). King County joined in Snohomish County's argument. CP 435.

counties' authority, was bad public policy, and was a violation of RCW 82.02.020 and SEPA.

The districts do not dispute that they are neither parties to the Settlement Agreement nor third-party beneficiaries of that Agreement. They are not seeking to enforce that Agreement and are not seeking any benefits under it. On the contrary, the districts are seeking to recover payments illegally made by King County *in compliance* with that Agreement. The districts' claim is that the "community mitigation" payments were illegal and were made in violation of their rights under the sewage disposal contracts, the King County Charter and Code, and other applicable statutes and legal principles.

The districts have standing to challenge illegal and improper expenditures from the restricted Water Quality Fund, and they seek monetary relief requiring that the Fund be reimbursed for those improper expenditures. The districts meet all of the standing requirements under the Uniform Declaratory Judgment Act ("UDJA").²⁸ The districts' standing to challenge King County's payments to Snohomish County is analogous to

²⁸ RCW ch. 7.24; *see also City of Spokane v. Cnty. of Spokane*, 158 Wn.2d 661, 678 n.7, 146 P.3d 893 (2006). The districts have an actual, present and existing dispute as to King County's use of the WQF to pay cash to Snohomish County for projects having no legally cognizable nexus to Brightwater impacts. The districts have a direct and substantial interest in whether King County's payments were lawful, because the county used money from a restricted fund to which they contributed and that is supposed to be dedicated to providing wastewater services to them. Finally, a judicial determination will be binding on the parties to this action.

that of utility ratepayers who have undisputed standing to challenge the wrongful diversion of utility funds. Just as the utility ratepayer in *Jones v. City of Centralia*, 157 Wash. 194, 203-204, 289 P. 3 (1930), had standing to sue for return of money paid by the city to contractors under an illegal contract, the districts are “certainly interested”²⁹ in the Water Quality Fund, and they have standing to bring this action to prevent unlawful diversion of money from that fund.³⁰

C. The “Community Mitigation” Payments Do Not Comply with RCW 82.02.020, Applicable Case Law or the King County Charter and Code, and Were Not Required under the GMA.

The counties admit that the Settlement Agreement was not made under the auspices of RCW 82.02.020, but argue that it nevertheless complied with that statute.³¹ Not only does the Agreement violate certain procedural requirements of the statute,³² but the counties cannot show (as

²⁹ *Jones*, 157 Wash. at 204.

³⁰ Snohomish County’s reliance on *Org. to Preserve Agricultural Lands v. Adams Cnty.*, 128 Wn.2d 869, 913 P.2d 793 (1996), is misplaced. One of the arguments made by the plaintiff community organization in that case was that a landfill permit was conditioned on the developer’s making “voluntary” payments to the county which did not meet the requirements of either RCW 82.02.020 or SEPA. *Id.* at 894. OPAL defended its standing based on limitations as to how the mitigation money could be spent. The Court held that OPAL was not within the zone-of-interest of RCW 82.02.020 because that statute is intended to protect developers from unreasonable fees or taxes (128 Wn.2d at 895) and OPAL was not seeking the return of money paid by the developer. Unlike OPAL, the districts here *are* seeking return of money to the developer (WTD) for reimbursement of a fund (the WQF) in which they have an interest. The districts are squarely within the zone-of-interest of RCW 82.02.020.

³¹ SnoCo Br. at 32-36 & King County joinder (KC Br. at 16, n.38). *See also* n.27, *supra*.

³² *E.g.*, RCW 82.02.020 requires that the developer be refunded all unexpended money (with interest) within five years of payment. In contrast, the Settlement Agreement does not require return of any unexpended money until December 31, 2015 (CP 2367,

they must under the statute) that the “community mitigation” payments address identified project impacts or are “reasonably necessary as a direct result of the proposed development.” RCW 82.02.020.

The only “individualized, fact-specific analysis”³³ done to determine “specific impacts” of Brightwater was King County’s FEIS and Snohomish County’s thorough review of that FEIS. Both counties acknowledged in the Development Agreement that the FEIS and Supplemental EIS (SEIS) identified all significant adverse environmental impacts associated with Brightwater and were adequate for purposes of making any permitting decisions.³⁴ Neither county has identified any

§ 6.2(a)), which is between seven and nine years after the payments made by King County. *See* Dists. Br. at 14, n.37. It has already been more than five years after the first payment, and Snohomish County is still holding on to the bulk of that money, pending the outcome of this appeal. *See* n.15, *supra*. The statute also prohibits payments to be used for “local off-site transportation improvements.” King County paid Snohomish County \$28.85 million for such projects. *See* Appendix A to Dists. Br. 33 SnoCo Br. at 35. The counties could not have performed the individual project analyses for the “community mitigation” projects as they claim in their briefs, because it is not clear even today how a significant amount of the money will be spent; the Settlement Agreement does not identify specific projects in many cases, and it allows money to be spent on other, not-yet-identified projects. *See* Settlement Agreement, § 6.1 (CP 2367). Furthermore, the assertion that the counties rejected projects when the nexus was too remote (SnoCo Br. at 9-10) is easily shown to be untrue. The document cited as support for that assertion (CP 3131, ¶ 32) says that road capacity projects were deemed unrelated and were immediately removed from the project list. However, in the Settlement Agreement King County agreed to pay \$1.63 million to Snohomish County for the Sno-Wood Road widening (*i.e.*, road capacity) project. *See* Dists. Br. at A-1. 34 CP 2375 (§1.3(a)(i)) and CP 2383 (§4.1(c)). SnoCo blurs the procedural history regarding its appeals of the EIS. It initially appealed the FEIS in December 2003, but it withdrew that appeal one month later after concluding that it could not prevail in an argument that King County’s environmental review process was flawed regarding the siting of the plant or the listing of appropriate mitigation for environmental impacts. CP 2043-45. King County issued a Supplemental EIS in July 2005, addressing only seismic issues. SnoCo appealed that document, and that was the only SEPA appeal

section of the FEIS or SEIS identifying any of the “community mitigation” projects or calling on King County to pay for them as mitigation measures.³⁵ Moreover, in approving the Development Agreement the Snohomish County Council expressly confirmed that “the proposed agreement provides for adequate mitigation of significant adverse environmental impacts.”³⁶ The Development Agreement makes no mention of the “community mitigation” projects or payments.

The counties argue that subjecting the Settlement Agreement to scrutiny under the *Nollan/Dolan* line of cases and Washington case law directly on-point would somehow amount to “import[ing] an additional ‘nexus’ requirement” into the sewage disposal contracts.³⁷ That argument is just plain wrong. The issue here is about the validity of the Settlement Agreement, not the validity of the sewage disposal contracts. In effect, the districts are merely seeking to require King County to comply with *its own*

pending at the time of the counties’ Settlement Agreement. Seismic mitigation was addressed in the Development Agreement, not the Settlement Agreement.

³⁵ The implementing rules of SEPA define “elements of the environment” to include two broad categories: the “natural environment” and the “built environment.” WAC 197-11-444. The Settlement Agreement provides that the projects funded with the \$70 million of “community mitigation” fall into the following general categories: Recreation, Community Resource Center, Public Safety and Habitat Mitigation. CP 2367 (§ 6.1). Recreation, transportation and public facilities are contained within the SEPA definition of “built environment.” WAC 197-11-444(2). “Habitat” is contained within the SEPA definition of “natural environment.” WAC 197-11-444(1)(d)(i). When the Snohomish County Council found that the Development Agreement addressed all significant environmental impacts, it effectively conceded that there were no other impacts that needed mitigating within these categories.

³⁶ CP 189 (§3(e)).

³⁷ KC Br. at 20.

law. The county's environmental mitigation policies³⁸ were adopted as part of the Regional Wastewater Services Plan (RWSP) and thus, according to the county,³⁹ are incorporated by reference into the sewage disposal contracts. EMP-1 directs King County to "develop mitigation measures for environmental impacts created by the construction, operation, maintenance, expansion or replacement of regional wastewater facilities." The mitigation measures must (1) address the adverse environmental impacts caused by the project, (2) address the adverse environmental impacts identified in the county's environmental documents (*i.e.*, the EIS), and (3) be reasonable in terms of costs and magnitude as measured against severity and duration of impact. *Id.* These three conditions essentially reiterate the nexus and rough proportionality requirements of *Nollan/Dolan*, RCW 82.02.020 and the Washington cases cited in the districts' brief at 46-47.⁴⁰

The "community mitigation" payments made by King County to Snohomish County under the Settlement Agreement were payments of cash by the developer (King County) to the permitting agency (Snohomish

³⁸ The EMPs are codified in the King County Code at KCC 28.86.140; *see* CP 1897.

³⁹ KC Br. at 29-30.

⁴⁰ In addition, EMP-5 requires that any "mitigation funded through wastewater revenues [be] consistent with chapter 35.58 RCW; Section 230.10.10 of the King County Charter; agreements for sewage disposal entered into between King County and component agencies; and other applicable county ordinance and state law restrictions." Those requirements are among the very provisions that the districts contend were violated by the payments in question.

County). That cash was not for the developer to spend on measures to mitigate the impacts of its project, but for the permitting agency to spend as it chose to meet its own previously unfunded infrastructure needs. The EMPs do not provide for King County to make cash payments *to* affected communities for mitigation; they merely say that the county will mitigate environmental impacts, consistent with applicable laws. Even prior to the Settlement Agreement, King County had already committed to spending over \$100 million on measures to mitigate Brightwater impacts.

Regulations promulgated under the Growth Management Act (GMA) contain procedural criteria for the siting process for EPFs. Both counties argue that one of those regulations required King County to pay Snohomish County \$70 million for “community mitigation.”⁴¹ That argument fails because (1) any conditions imposed “must be necessary to mitigate an identified impact” of the facility, and no such impacts have been identified, (2) these *procedural* regulations are not binding,⁴² and (3) this section of the regulations relates to *siting* of EPFs, not permitting of

⁴¹ KC Br. at 18 and SnoCo Br. at 3, citing WAC 365-196-550(6)(e) (previously WAC 365-195-340): “Counties and cities should consider the extent to which design conditions can be used to make a facility compatible with its surroundings. Counties and cities may also consider provisions for amenities or incentives for neighborhoods in which facilities are sited. Any conditions imposed must be necessary to mitigate an identified impact of the essential public facility.” (Emphasis added).

⁴² *King Cnty. v. Snohomish Cnty.*, Order on Reconsideration and Clarification, CPSGMHB Case No. 03-3-0011 (Dec. 15, 2003) at 3 (*see* CP 6844-48), citing *Children's v. City of Bellevue*, CPSGMHB Case No. 9503-0011 (May 17, 1995) and *Masters Builders Ass'n v. Snohomish Cnty.*, CPSGMHB Case No. 01-3-0016, FDO (Dec. 13, 2001).

EPFs. The *siting* decision for Brightwater had already been made before the Settlement Agreement was negotiated, and in making that decision King County had already taken this provision into account.⁴³

The counties argued that paying \$70 million to Snohomish County was justified as a way to address the alleged “stigma” of a wastewater treatment plant. The trial court apparently agreed. Painting with a broad brush, the trial court concluded that since the Settlement Agreement related to Brightwater, and since Brightwater was a wastewater project, all payments made pursuant to the Settlement Agreement were authorized wastewater expenditures.⁴⁴ In doing so, the trial court ignored King County’s own EMPs, the mandate of RCW 82.02.020, and well-established case law, which require identification of direct project impacts and do not recognize “stigma” as a valid impact.⁴⁵

Furthermore, despite the counties’ claim that there is a “stigma” associated with proximity to a sewage treatment plant, neither county performed any analysis to demonstrate or quantify adverse effects on

⁴³ See CP 6841 (2003 letter from Ron Sims extolling the Route 9 site as allowing more opportunities for on-site improvements to the existing degraded property).

⁴⁴ RP 4:60-61 (“But, it looks to me, in looking at each of these projects, that they are all, in some way mitigating against the negative impacts of siting a sewage treatment or having a sewage treatment plant in your neighborhood. ... It needs to be mitigation of the siting and development, the creation of this capital improvement, and all of these things do go to assisting in creating this capital improvement, which is I believe the necessary nexus, which is why I’m prepared to grant summary judgment for the defendants”).

⁴⁵ See Dists. Br. at 49.

property values in the vicinity of Brightwater.⁴⁶ In fact, property appraisal reports for various parcels being considered for purchase using the Settlement Agreement funds either make no mention of Brightwater in the discussion of the neighborhood surrounding the subject parcel, or, after mentioning Brightwater, go on to say that the parcel will not be negatively impacted by the plant.⁴⁷ There is no support in the record for the statement that Brightwater was a “loss” for Snohomish County.⁴⁸

It is true that Brightwater was a complex and controversial project, which is all the more reason why the decision whether and how to move forward with it should have been based on the thorough and open SEPA analysis as opposed to a back-room deal between county officials to buy off political opposition. The payments in question were not made by King County for wastewater treatment or for mitigation of identifiable adverse environmental impacts of Brightwater, but rather as a payoff to Snohomish County to end its political opposition to the Brightwater

⁴⁶ Snohomish County did not do any survey of area residents concerning their attitudes about the Brightwater project. CP 2130; CP 2080-81 (“not aware of a way that you can calculate a dollar value of the sort of impacts on community we’re talking about”); CP 2047 (no studies showing house values decreased due to Brightwater); CP 2251-52 (same); CP 2144 (same). But a public opinion survey done for King County in 2001 showed that 54 percent of the persons polled were in favor of building Brightwater in their community, while only 29 percent opposed it. CP 2636.

⁴⁷ *See, e.g.*, CP 3155 at ¶ 114; CP 6863 (“no adverse influence on the subject property”); CP 6865; *see also* CP 6867-79 & 6881-904; CP 6906-21; CP 6923-48 (CP 6932: “No adverse environmental influences are noted for the immediate vicinity”); CP 6950-78 (*see* CP 6959, same); CP 6980-98; CP 7000-24. *See* CP 6856 for a map of all of these properties in relation to Brightwater.

⁴⁸ SnoCo Br. at 8. To the contrary, Snohomish County would have suffered a “loss” if development had to be curtailed due to lack of sufficient sewage treatment capacity.

project. That is not a proper way for important public decisions to be made. It is the function of the Court to step in when elected officials violate the law – not to turn a blind-eye under the guise of “deference” as the counties request this Court to do.

IV. KING COUNTY LACKS AUTHORITY TO OPERATE A WATER UTILITY, AND ITS USE OF SEWAGE FUNDS TO BUILD INFRASTRUCTURE FOR THE DISTRIBUTION AND SALE OF RECLAIMED WATER WAS IMPROPER.

Because of the well-established principle that “if there is any doubt as to whether the power is granted, it must be denied,” *Pac. First Fed. Savings & Loan Ass’n v. Pierce Cnty.*, 27 Wn.2d 347, 353, 178 P.2d 351 (1947), and because King County cannot point to any express legislative authority for it to enter into a reclaimed water utility business, this Court should reverse the trial court and hold that King County is not authorized to build or operate a reclaimed water distribution utility.

A. Permits Issued by State Agencies Do Not Require King County to Distribute and Sell Reclaimed Water.

King County plays fast-and-loose with the facts regarding Department of Ecology’s and Department of Natural Resources’ (“WDNR”) permits for wastewater facilities. While both agencies would undoubtedly like to reduce pollutants in the environment, neither agency requires King County to enter into an unauthorized water utility business.

In its easement for the new outfall for Brightwater, WDNR

requires the county to submit a report documenting progress towards implementation of “reasonably practical disposal alternatives that abate the effect of the discharge” to receiving waters of the state.⁴⁹ King County is already going a long way towards complying with the WDNR requirement by using advanced membrane bio-reactor technology at the Brightwater plant. This more expensive treatment method results in a higher quality effluent because it removes more pollutants than a conventional secondary treatment process does.⁵⁰ In addition, reclaimed water is produced, which can be (i) used for on-site operations (in lieu of potable water), (ii) provided to an authorized water utility for off-site distribution or (iii) discharged along with the other treatment effluent. The issue here is who, if anyone, should pay for building the infrastructure for off-site distribution of reclaimed water, where the county itself has not been authorized to engage in the water distribution business.

Although Ecology approved the RWSP and Facilities Plan⁵¹ for Brightwater, neither of those documents requires King County to enter into an unauthorized water utility business. RCW 90.48.112 requires a

⁴⁹ CP 7152.

⁵⁰ The technology used at Brightwater produces effluent “substantially cleaner than typical secondarily-treated wastewater, removing seven to ten times more suspended solids and biological oxygen demand.” CP 8155 (§9). The districts do not contest the additional expense to WTD of treating the sewage to this higher standard.

⁵¹ There is absolutely no evidence that Ecology would have disapproved either plan if the county had not planned to construct the reclaimed water distribution infrastructure.

facilities plan to “include consideration of opportunities for the use of reclaimed water,” which is similar to WDNR’s mandate to “investigate reasonably practical alternatives” to discharge. King County can comply with Ecology’s “requirement” simply by ensuring that authorized water utilities are aware of the availability of reclaimed water at Brightwater.

B. Disposal of Treated Effluent Is a Wastewater Function, but Distribution and Sale of Reclaimed Water Is Not.

The county would have this Court believe it had no choice but to construct the reclaimed water “Backbone” as part of the Brightwater project. That is patently false. The county invested millions of dollars in a new 13-mile long effluent pipeline and mile-long state-of-the-art marine outfall in order to properly dispose of the highly-treated effluent to Puget Sound. That is the only disposal infrastructure required for the project, and it is indisputably sufficient to handle all of the effluent from the plant, including reclaimed water.⁵² While distribution of reclaimed water may be an *additional* way to dispose of some of the effluent, the infrastructure required to distribute reclaimed water is an expense that should be borne not by the sewage utility, but by a water utility, consistent with a regional water supply plan, which has never been prepared.⁵³

⁵² The distribution and sale of reclaimed water will neither eliminate nor reduce the county’s need for that infrastructure.

⁵³ On the same page of its brief (29), King County quotes from one of its Treatment Plant Policies (TPP-7) which requires any distribution of reclaimed water to go through a

C. There Is No Evidence that the Reclaimed Water “Backbone” Will Reduce Operating Costs of the Sewage Utility.

The districts do not disagree that the county’s on-site use of reclaimed water at the treatment plant in lieu of purchasing potable water has the potential to reduce WTD’s operating costs.⁵⁴ However, there is absolutely no evidence that the amount of money the county can recover through the off-site distribution and sale of reclaimed water to third-parties will ever be sufficient to cover the cost of building the off-site distribution Backbone, an entirely redundant system that is not needed for the purpose of utilizing the reclaimed water at the treatment plant. WTD and the local sewer utilities will realize no net benefit from the off-site distribution and sale of reclaimed water, because there is no realistic prospect of recovering the costs of building the distribution Backbone.⁵⁵

municipal or regional water supply agency “consistent with a regional water supply plan,” and then admits that such a plan has never been completed. To get around this conundrum, the county argues that *it* is not required to prepare such a plan (KC Br. at 28), but the county does not identify *any* regional water supply plan, prepared by *any* agency, which would allow the county to comply with TPP-7.

⁵⁴ These “benefits” are among those listed in King County’s brief at 26.

⁵⁵ The assertion in n.64 of the county’s brief that WTD will recover the cost of the Backbone from reclaimed water revenues in 40 years is founded on unrealistic assumptions, as pointed out in detail in Seattle’s rebuttal to the county’s draft White Paper. CP 8760-63. According to Seattle’s analysis, King County would have to charge 4 to 8 times more than current municipal water rates in order to recover the costs of the Backbone within 40 years. CP 8762. In n.63, King County asserts that it performed the financial feasibility analysis required under WRP-14 in its draft White Paper (March 2006); however, WRP-2 (adopted in Sept. 2006, subsequent to the draft White Paper) required additional feasibility analyses, including a comprehensive financial business plan. Although the county issued a report titled “Reclaimed Water Feasibility Study” in March 2008 (CP 7405-7599), it admits that it did not include the required financial feasibility analysis (CP 7425: “much more work needs to be done to

D. The Districts' Claim Does Not "Hinge" on Application of RCW ch. 36.94.

The districts and the county apparently agree, albeit for different reasons, that RCW ch. 36.94 does not provide the authority for King County to operate a reclaimed water utility. The county concedes that it has not complied with the provisions of that statutory framework, on the theory that that code chapter only applies to operation of a *potable* water utility.⁵⁶ The districts disagree with the county's interpretation of RCW ch. 36.94. That chapter is entitled "Sewerage, Water and Drainage Systems." It deals with many more subjects than potable water. Nothing in RCW 36.94.030, .050, .070, .080, .100, .120, .140 or .170, cited in the districts' brief at 53-54, nn.141 & 142, indicates that those sections apply only to "potable" water systems. The only reference to "potable" in the entire chapter is in RCW 36.94.235,⁵⁷ and the only reference to "drinking water" is in RCW 36.94.480.⁵⁸ Neither of those provisions has the effect of limiting the requirements set forth in RCW 36.94.030-.170 to "potable" water systems. Although the federal Safe Drinking Water Act defines "public water systems" as those providing water for human consumption

achieve this objective"). The county also admitted that under a conventional financial analysis, reclaimed water projects would need additional funding sources in order for the reclaimed water to be affordably priced. CP 7482.

⁵⁶ KC Br. at 28.

⁵⁷ That section imposes "additional notice" requirements when a local improvement district is proposed to "finance sanitary sewers or potable water facilities."

⁵⁸ That section immunizes a county from liability when it takes over a water system that does not meet state or federal drinking water requirements.

(42 U.S.C. § 300(f)(4)(A)), RCW ch. 36.94 is not limited to “public water systems.” The various provisions in that chapter govern “water systems,” and a “system of water” is defined as

- (a) A water distribution system, including dams, reservoirs, aqueducts, plants, pumping stations, transmission and lateral distribution lines and other facilities for distribution of water;
- (b) A combined water and sewerage system;
- (c) Any combination of or any part of any or all of such facilities.

RCW 36.94.010(2). Although RCW ch. 36.94 certainly applies to potable water systems, it is not limited to such systems; it also applies to systems delivering water for irrigation or other uses.

Since the county admits it has not complied with the requirements of RCW 36.94.030-.170 for operation of a water system, and since Metro has never been authorized to operate a water system (*see infra* at 37), the county is not authorized to operate a water system, including one for distribution and sale of reclaimed water, under either statutory framework.

E. King County Could Offer Reclaimed Water to an Authorized Water Utility Consistent with a Regional Water Supply Plan.

According to the county, RCW 90.46.120(1) would make no sense if it did not have authority to distribute and sell reclaimed water because that statute “requires that revenues from reclaimed water be used to offset the cost of operating the wastewater utility fund.”⁵⁹ In fact, that statute

⁵⁹ KC Br. at 27.

goes on to say “or other applicable source of systemwide funding.” Thus, if King County took the steps necessary to operate a water system, and created and used a dedicated water fund to construct a distribution system for reclaimed water, the revenues from the sale of that water could, under RCW 90.46.120(1), be used to reimburse either that fund, or the wastewater fund (which paid to produce the reclaimed water), or both.⁶⁰

That statute reinforces the need for regional water system planning when reclaimed water is to be used, as the county proposes to use it, to “augment or replace potable water supplies.” RCW 90.46.120(2). The county provided no evidence that its proposed distribution of reclaimed water has been incorporated into any such plan.

F. The Backbone May Be a “Water Pollution Control Facility” under RCW ch. 70.146, but That Only Supports the Districts’ Argument that It Should Be Paid for by the General Fund.

King County argues that, because RCW 90.46.005 provides that reclaimed water facilities are “water pollution control facilities as defined in chapter 70.146 RCW,” it has express statutory authority to distribute and sell reclaimed water under the “water pollution abatement” function of

⁶⁰ After ensuring consistency with regional water supply plans, the county could offer reclaimed water for sale to an authorized water utility at the treatment plant (*i.e.*, without constructing a water distribution system at the sewage utility’s expense). In that case, the county could generate revenues for the sewage utility which, under RCW 90.46.120(1), could be used to defray the cost of the advanced treatment needed to produce the reclaimed water. The county’s argument that “use” of reclaimed water cannot occur without a distribution system built at the sewage utility’s expense (KC Br. at 27) is false, because the reclaimed water can be used on-site at the treatment plant or it can be used by an authorized water utility.

RCW 35.58.200. That argument is flawed. RCW ch. 70.146 simply provides *state* financing for water pollution control facilities, which are deemed to protect the “health, safety, use, enjoyment, and economic benefit of its people.” RCW 70.146.010. Thus, that statute supports the districts’ argument that, because distribution and sale of reclaimed water will provide “health, safety, use, enjoyment, and economic benefit” to the general public, as opposed to the sewage utility in particular, it is improper for the Backbone to be financed solely by the sewage utility.

V. **THE EXTRA \$12 MILLION PAID TO STOCKPOT WAS FOR THE GENERAL GOVERNMENTAL PURPOSE OF JOB PRESERVATION AND WAS AN IMPROPER USE OF SEWAGE FUNDS.**

A. **The Trial Court Erred by Dismissing the Districts’ Claim Concerning the Extra \$10 Million Payment to StockPot for “Relocation Assistance” Under the Local Option.**

King County’s brief fails to mention the July 2004 settlement agreement with StockPot, which preceded the relocation agreement that was signed in early 2005 (the county calls the 2005 relocation agreement the “StockPot Agreement”). The 2004 settlement agreement is important in two ways. First, it provided that the county and StockPot would “exercise their reasonable best efforts to negotiate a mutually agreeable relocation agreement to provide adequate relocation assistance and other support to StockPot to prevent the loss of StockPot Culinary Campus jobs

in the Puget Sound region.”⁶¹ Thus, the parties agreed to negotiate a final relocation package under which StockPot would receive “other support” to prevent job losses, in addition to adequate relocation assistance.

That is exactly what the parties did through the 2005 relocation agreement. The “adequate relocation assistance” was the \$5.5 million amount that the parties agreed was “the cost of actual, reasonable and necessary, moving and related expenses and reestablishment expenses” for a non-local move.⁶² Unless one is prepared to believe that it would cost \$10 million more to move from Woodinville to Everett than to move from Woodinville across the country, there is no reasonable basis to conclude anything other than that the additional \$10 million in supposed “relocation assistance” for a local move (as well as the \$2 million expressly labeled as being for “job retention”) was paid as an incentive to preserve local jobs.⁶³

⁶¹ StockPot/KC Settlement Agreement, § 5 (Tx 74, at 2) (emphasis added).

⁶² Relocation Agreement, §3.1 (Tx 90, at 5).

⁶³ § 3.1 of the relocation agreement says that another component of the amount payable to StockPot under the local option is the value of “Acquired Personal Property,” *i.e.*, personal property left at the old site, to be acquired by the county. The county asserted during the discovery phase in this litigation that the value of that property accounted for most of the \$10 million difference between the local and non-local options. *See* CP 16016. However, the county was forced to abandon that contention when the evidence showed that the value of that property amounted to at most several hundred thousand dollars. *See* Dists. Br. at 20, n. 54. Now King County attributes most of the extra \$10 million under the local option to StockPot’s need to purchase “substitute personal property” in order to resume manufacturing operations within 72 hours after shutting down the old plant. KC Br. at 47, 52. “Substitute personal property” is one component of “moving expenses,” along with the many other kinds of potential moving expenses listed in WAC 468-100-301. But there is no logical reason to believe that more “substitute personal property” would be needed for a new plant in Everett than for a new plant in New Jersey or anywhere else.

The county says that the districts “introduced no evidence at trial in support of their allegation that . . . the difference between the amounts agreed to under the Local and Non-Local options was ‘to preserve jobs.’”⁶⁴ That statement is preposterous. The districts offered into evidence the county’s admissions, in its contemporaneous news releases, that “[o]ur goal was to preserve Stockpot jobs and its \$20 million annual payroll for the local economy,” that the parties “structured the agreement to provide incentives to support StockPot staying in our region rather than moving out of state,”⁶⁵ and that “*King County offers incentives for StockPot to stay local.*”⁶⁶ Those admissions were not “political spin.” They were the plain and obvious truth of what happened.

The second reason the 2004 settlement agreement is important for purposes of this appeal is that it, not the later relocation agreement, was the agreement that resolved the dispute between the county and StockPot over the adequacy of the county’s FEIS for Brightwater.⁶⁷ Hence, the county’s reliance on *Warburton*⁶⁸ is misplaced. The dispute with StockPot over the adequacy of the county’s FEIS had already been resolved by the

⁶⁴ KC Br. at 52, emphasis in original.

⁶⁵ Tx 93, at 1.

⁶⁶ Tx 97, at 2-3, boldface emphasis in original, quoted in Dists. Br. at 21.

⁶⁷ See Settlement Agreement, Tx 74, recital H at 1, and ¶ 4 at 2 (StockPot agrees to withdraw its appeal of the FEIS, with prejudice).

⁶⁸ See KC Br. at 52.

2004 settlement agreement, many months before the 2005 relocation agreement was negotiated. Even more fundamentally, the districts are not challenging the legality of the county's agreeing to pay a \$12 million incentive to StockPot in order to preserve jobs in the region; rather, the districts are challenging the legality of using *sewage utility* funds for that general governmental purpose.

B. The Trial Court Correctly Held that the \$2 Million Payment for Job Retention Was for a General Governmental Purpose and Was an Improper Use of Sewage Funds.

The county cross-appeals from the trial court's conclusion that the \$2 million "job retention" payment to StockPot was for a general governmental purpose. The county's principal argument is that Snohomish County had adopted an ordinance⁶⁹ that supposedly required King County to adopt mitigation measures "that provide substantial assistance to displaced or impacted businesses in relocating within the county."⁷⁰ That argument fails for several reasons. First, that ordinance had been declared invalid by the Growth Management Hearings Board in May 2004, well before King County and StockPot entered into the July 2004 settlement agreement, and long before the county and StockPot entered into the

⁶⁹ King County is referring to Snohomish County Emergency Ordinance No. 04-019. Snohomish County calls it "EPF Ordinance II" (SnoCo. Br. at 5).

⁷⁰ KC Br. at 54.

relocation agreement in 2005.⁷¹ Second, the provision of the ordinance cited by King County addresses the decision criteria to be used by a hearing examiner in considering a conditional use permit (“CUP”) for a land use proposal; those criteria did not impose any relocation reimbursement obligations on a party in King County’s position, since King County never applied for a CUP for Brightwater (and in fact vehemently opposed the CUP process). Third, nothing in the language of that invalidated ordinance required or authorized the county to offer StockPot a \$12 million incentive to stay in the area. The language merely states that the project sponsor (King County) is to propose mitigation measures that provide “substantial assistance” to displaced businesses. The ordinance does not describe what kind, or how much, “substantial assistance” must be proposed, so King County has no basis for its contention that the ordinance somehow compelled it to offer StockPot

⁷¹ FFCL ¶87 (CP 18679). King County strains to argue that certain “mitigation criteria” embraced in the invalid ordinance could have been imposed, but the fact remains that the GMHB formally ruled that the entire ordinance was invalid: “Snohomish County’s adoption of Ordinance No. 04-019 does not comply with the requirements of RCW 36.70A.200 and was not guided by RCW 36.70A.020(7) and (12); the County’s action was clearly erroneous. Furthermore, because the continued validity of Ordinance No. 04-019 would substantially interfere with the fulfillment of RCW 36.70A.020(7) and (12), the Board enters a determination of invalidity for Ordinance No. 04-019.” Tx 73, ¶ IX(1) at 22-23 (emphasis added). That GMHB order was in effect in the fall of 2004 when the relocation agreement was being negotiated, and in early 2005 when the relocation agreement was signed. In May 2005 the Thurston County Superior Court remanded the question of whether a CUP process could comply with the GMA; however, the court affirmed the invalidity of EPF Ordinance II on the basis that the definition of “regional authority” was unduly restrictive. CP 5673-74 (¶5). Accordingly, at no time while the relocation agreement was being negotiated was King County required to do anything by Ord. 04-019.

over \$12 million from the wastewater fund as an inducement to stay in the area. King County already was proposing to provide “substantial assistance” to StockPot by agreeing to pay \$5.5 million for relocation assistance.⁷² Nothing in the ordinance required the county to offer an additional \$2 million for “job retention” (or an extra \$10 million in supposed relocation assistance) if StockPot chose the local option. Just as the county explained in its news releases in early 2005, the reason for offering an additional \$12 million was to preserve local jobs by providing an incentive to StockPot to relocate locally. That may be a laudable general governmental purpose, but it is not a sewage utility purpose.

The county also argues that the districts suffered “no damages” because Brightwater capital costs are financed by bonds that will be paid in future years “almost entirely through ‘capacity charges’” and because any sewage charges imposed on the districts are passed along to their ratepayers.⁷³ The county’s assertion that Brightwater capital costs are not borne by the districts (and the other local sewer utilities) is contradicted by the evidence. Even if bonds are used to finance capital expenses, the debt service on those bonds is being paid for primarily by sewage disposal charges imposed on the local sewer utilities rather than through capacity

⁷² This is in addition to paying StockPot \$7.28 million (under either the local or non-local option) for its real property improvements. Tx 90 at ¶2.1.

⁷³ KC Br. at 58-59.

charges billed directly to end users.⁷⁴ Nor is there any merit to the county's argument that the districts suffered "no damages" because they passed along any StockPot-related costs to their ratepayers.⁷⁵ Moreover, the judgment below is limited to issues regarding "level one" relief. *See* n.3, *supra*. The issues on this appeal relate to whether the WQF is entitled to reimbursement from the county's general fund; it is immaterial whether the districts are entitled to any reimbursement from the WQF.

There is no merit to the county's argument that the trial court erred by awarding prejudgment interest.⁷⁶ The payments to StockPot for job preservation were made by WTD, the county's proprietary sewage utility. The trial court correctly held that WTD lacked authority to spend proprietary utility money for the non-utility purpose of preserving jobs for the local economy.⁷⁷ Because the county operates WTD as a proprietary

⁷⁴ *See* testimony of KC financial services administrator Tom Lienesch, RP 28:2454 (agreeing that for years in question, "by far, the lions share" of debt service on bonds issued for Brightwater has been paid out of sewer rate revenues rather than capacity charges), & RP 28:2459 (debt service on bonds whose proceeds were used to make the payments to StockPot "has been paid and is being paid primarily out of sewer rates"). Capital expenditures and bond requirements are included in the "total monetary requirements" on which sewage disposal rates are based. Tx 9 at 4 (¶3(a)).

⁷⁵ The U.S. Supreme Court and Washington courts have rejected similar arguments. *See, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) (rejecting "pass-through" defense in antitrust context); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (a direct purchaser [analogous to districts], not an indirect purchaser [analogous to ratepayers], is the injured party as a result of a manufacturer's [analogous to King County] illegal overcharges); *Blewett v. Abbott Labs.*, 86 Wn. App. 782, 785-86, 938 P.2d 842 (1997) (rejecting pass-through defense).

⁷⁶ KC Br. at 59-60.

⁷⁷ RP 34:43-44.

utility, and because the refund obligation is based in part on the sewage disposal contracts (pursuant to which sewage revenues are to be used only for sewage utility purposes), the doctrine of sovereign immunity does not protect the county from liability for prejudgment or postjudgment interest. *See Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 615-16, 94 P.3d 961 (2004) (municipal corporation has same sovereign immunity from liability for interest as state does for governmental functions, but it does not have sovereign immunity for proprietary acts);⁷⁸ *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 529-30, 598 P.2d 1372 (1979) (state impliedly consents to be held liable for interest by entering into a contract); *see also Lane v. City of Seattle*, 164 Wn.2d 875, ¶¶ 29-35, 194 P.3d 977 (2008) (city must pay 12% interest on refunds for proprietary water utility's costs of providing fire hydrant service, a general governmental function).

The county's reliance on *Our Lady of Lourdes Hosp. v. Franklin Cnty.*, 120 Wn.2d 439, 842 P.2d 956 (1993), *Teevin v. Wyatt*, 75 Wn. App. 110, 876 P.2d 944 (1994), and *Union Elevator & Warehouse Co. v. Dep't of Transp.*, 171 Wn.2d 54, 248 P.3d 83 (2011), is misplaced because none

⁷⁸ The rule that sovereign immunity applies only to governmental acts, not proprietary acts, has been recognized in Washington for nearly as long as the doctrine of sovereign immunity itself. *See, e.g., Russell v. City of Tacoma*, 8 Wash. 156, 158-160, 35 P. 605 (1894); *Sutton v. City of Snohomish*, 11 Wash. 24, 27-28, 39 P. 273 (1895); *Cunningham v. City of Seattle*, 42 Wash. 134, 137, 84 P. 641 (1906); *Riddoch v. State*, 68 Wash. 329, 334, 123 P. 450 (1912) (municipal corporations acting in proprietary capacity "are neither sovereign nor immune"); *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) (city liable for negligent operation of municipal water system, because sovereign immunity is not applicable to proprietary municipal utility).

of those cases involved a proprietary utility.⁷⁹

VI. THE CULVER FUND EXPENDITURES WERE AN IMPROPER USE OF SEWAGE FUNDS.

A. King County Mischaracterizes the Culver Fund Background Facts.

King County begins its description of the Culver Fund “factual background” by stating that the Culver committee “found that these expenditures directly benefited the wastewater system,” citing the Culver committee’s written report.⁸⁰ That report said nothing of the kind. It set forth the committee’s “finding” that certain kinds of limited, temporary expenditures for water pollution abatement activities other than sewage treatment and disposal were “valuable, beneficial in the public interest and appropriate for Metro to undertake,”⁸¹ and recommended certain guidelines for continuing such limited expenditures until 1995.⁸²

Next, the county misrepresents what occurred at the “Robinswood”

⁷⁹ Furthermore, in this case any sovereign immunity has been explicitly waived by statute. “A metropolitan municipal corporation may sue and be sued in its corporate capacity in all courts and in all proceedings.” RCW 35.58.180. When the county assumed all of Metro’s rights and obligations in 1994, it also assumed the statutory waiver of any sovereign immunity related to Metro functions. *See* RCW 36.56.070 (“No transfer of any function made pursuant to this chapter shall be construed to impair or alter any existing rights acquired under the provisions of chapter 35.58 RCW or any other provision of law relating to metropolitan municipal corporations”).

⁸⁰ KC Br. at 31, n.84.

⁸¹ Tx 262 at 2, first bullet point.

⁸² *Id.* at 4, 7. The report also found that Metro had historically expended one to two percent of current customer rates (to be decreased in future years) “in areas which arguably are not absolutely required in order to achieve a regulatory requirement and/or fulfill component agency agreements” (*id.* at 2, fourth bullet point), and Metro “has avoided expenditures for the continuous operation of programs which were not directly related to the sanitary sewage function” but “has, at times, allocated specific, limited funds for demonstration or startup activities” (*id.* at 3, first bullet point).

meeting in 1998. The county implies that the Culver Fund program was discussed at that meeting and that an agreement was reached to continue the program.⁸³ As the county well knows, the Culver Fund program was not discussed at all at Robinswood. The agreement reached at that meeting related to different subjects altogether.⁸⁴

In quoting Financial Policy 8 (originally numbered as FP-5) adopted by the county as part of the RWSP, the county omits the last sentence, which makes it clear that the policy was intended to be only temporary, until other funding sources were found.⁸⁵ The county also says the districts “took no action” for nine years after the RWSP was adopted,⁸⁶ but actually the districts and MWPAAC repeatedly objected to the Culver Fund program and requested that it be eliminated.⁸⁷

The county also says it only “occasionally” refers to Culver Fund

⁸³ KC Br. at 32-33.

⁸⁴ See Tx 26 (agenda for Robinswood meeting), Tx 314 (meeting minutes), and Tx 27 (“Robinswood agreement”); RP 13:145-146 (Testimony of KC Councilmember Larry Phillips, who chaired the Robinswood meeting) (“Q. Was the Culver Fund in particular discussed at that meeting? A. Not that I recall”).

⁸⁵ KC Br. at 33-34; see Dists. Br. at 23, n.65.

⁸⁶ KC Br. 34.

⁸⁷ See, e.g., FFCL ¶26 (CP 18664-65); Tx 133, “Alternatives to Culver Funding” attachment at 1-3, 10; Tx 106 at 2; Tx 123 at 2; Tx 128 at 3. The trial court’s rejection of the county’s defenses of “acquiescence, estoppel, statute of limitations and laches” (see KC Br. at 34, n.95) was not erroneous. The applicable six-year statute of limitations began running anew each year when the county council formally appropriated 1.5% of sewer revenues to be transferred to WLRD for the Culver program and those costs were wrongfully included in computing sewage disposal charges. See, e.g., *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945); *Schumacher v. Schumacher*, 26 Wn.2d 23, 25-26, 172 P.2d 841 (1946); *In re Parentage of Fairbanks*, 142 Wn. App. 950, 960, 176 P.3d 611 (2008). Since the complaint was filed in 2008, the claims reach back to 2002.

expenditures as Category III (neither directly nor indirectly related to sewage treatment and disposal) rather than Category I (directly related) or Category II (indirectly related).⁸⁸ But what is important is what those “occasions” are. Among such “occasions” are each year’s formal budget ordinances adopted by the county council, in which the Culver Fund appropriations are always described as Category III expenditures.⁸⁹

In quoting the first “Whereas” clause of the sewage disposal contracts, the county conveniently omits the phrase “development of adequate systems of sewage collection and disposal” after “the residents of Metro require.”⁹⁰ The obvious purpose of the sewage disposal contracts was to reduce water pollution by properly disposing of sewage, not to address all other sources of water pollution.⁹¹

B. King County Misreads RCW 35.58.200.

RCW 35.58.200 does not authorize a metropolitan municipal corporation, or the county as successor to Metro, to spend money on any and all kinds of water pollution abatement. It provides that a metropolitan municipal corporation may spend money only on “authorized” water

⁸⁸ KC Br. at 37.

⁸⁹ See FFCL ¶ 28 (CP 18665).

⁹⁰ KC Br. at 41; Tx 3 at 1.

⁹¹ Also, in its brief at 41, n.111, the county misleadingly says the contracts “contain provisions relating to storm and groundwaters.” The only contract provision cited allows the county to charge a local sewer utility an additional fee for quantities of storm or groundwater entering the sewer lines. It does not permit the county to charge the local utilities for abatement of water pollution in storm or groundwaters.

pollution abatement activities. RCW 35.58.200(4). The issue here is whether Metro, or the county standing in Metro's shoes as its successor, was ever "authorized" to perform any water pollution abatement function other than sewage treatment and disposal.

Metro was formed in 1958 solely to perform the function of "metropolitan sewage disposal."⁹² Once formed, a metropolitan municipal corporation may engage in additional functions only if approved by the voters. RCW 35.58.100. The only additional function the voters ever approved for Metro was transportation (in 1972).⁹³ The issue to be addressed here is whether Culver Fund expenditures are or are not for the purpose of "metropolitan sewage disposal," as approved by the voters in 1958. RCW 35.58.200 does not shed any light on that issue.⁹⁴

⁹² Tx 2, FFCL ¶13 (CP 18662).

⁹³ See FFCL ¶13 (CP 18662). Accordingly, the only functions Metro (and King County as its successor) has ever been authorized to perform are (i) metropolitan sewage disposal and (ii) transportation. The county's suggestion that by approving the county's takeover of Metro in 1992 the voters approved additional non-sewage functions under RCW 35.58.100 (see KC Br. at 40-41) is unpersuasive. The ballot measure approved by the voters was set forth in the ballot title, which merely asked whether the county "shall ... assume the rights, powers, functions and obligations of" Metro. Tx 277. The "explanatory statement" set forth in the voters' pamphlet is not part of the ballot measure and cannot be considered part of the enabling legislation, and a court will not undertake an inquiry into the voters' understanding of what they thought they were approving. *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 71, 85 P.3d 346 (2004). Moreover, the cited language in the "explanatory statement" merely acknowledges the unremarkable proposition that sewage disposal is a form of water pollution abatement. It does not tell the reader that Metro will perform additional functions.

⁹⁴ If that statute were construed as allowing sewage funds to be spent on non-sewage activities, it would have the same constitutional defect as the statute at issue in the *Okeson* streetlight case. See *Okeson v. City of Seattle*, 150 Wn.2d 540, 557-58, 78 P.3d 1279 (2003); Dists. Br. at 65-66.

C. There Is No Evidence that Culver Fund Expenditures Reduce Sewage Disposal Costs.

There is no evidence that Culver Fund expenditures have reduced sewage disposal costs. The county's statements in its brief about Culver expenditures having delayed or eliminated the need for WTD to invest hundreds of millions of dollars in new treatment systems to meet additional Ecology requirements⁹⁵ are pure fiction. It may very well be true that Ecology is considering additional treatment requirements that will be very expensive, but there was no evidence at all that Culver expenditures have delayed or eliminated any such requirements. WTD director Pam Elardo testified that all costs of complying with disposal permits and other Ecology requirements are already covered by WTD itself, outside of the Culver Fund program.⁹⁶

D. The Structure of the Culver Fund Program Shows that It Is Not Intended for the Particular Benefit of the Sewage Utility.

The county has already told us – outside of this litigation – whether Culver Fund expenditures benefit the sewage utility. In its annual budget ordinances the county has consistently described all Culver Fund expenditures as “Category III” expenditures, defined as meaning they are neither directly nor indirectly related to sewage treatment or disposal.⁹⁷

⁹⁵ KC Br. at 35.

⁹⁶ See RP 28:2507-15.

⁹⁷ FFCL ¶¶ 27, 28 (CP 18665).

That is why those funds are transferred from the sewage utility, WTD, to a sister division, WLRD, which then spends the money on Culver Fund projects chosen either by the politicians on the county council or by WLRD, not by the sewage treatment professionals in WTD.⁹⁸ The criteria used by WLRD in selecting projects to receive Culver money do not include any consideration of benefit to the sewage utility.⁹⁹

It is only for purposes of this litigation that the county now argues that Culver expenditures have a sewage disposal purpose. As should be apparent from simple perusal of the list of Culver Fund projects set forth in Appendix B to the districts' brief, any "nexus" between Culver expenditures and sewage disposal is too tenuous to justify imposing those costs on the local sewer utilities or their ratepayers. If those expenditures benefit surface water, stormwater or groundwater systems, or the general public, they should be paid out of WLRD or other funds dedicated to those purposes or by the general fund, not by WTD's sewage utility fund.¹⁰⁰

⁹⁸ See Dists. Br. at 25-26.

⁹⁹ *Id.* at 26, n.74 (RP 15:515-24).

¹⁰⁰ Even if there is some incidental benefit to WTD from the Culver Fund expenditures, what counts is whether the expenditures were primarily for a sewage utility purpose or for some general governmental or other purpose. In *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008), the Court noted that there were incidental benefits to the water utility and its customers from providing fire hydrants, but that was not determinative. *Id.*, ¶¶ 14-15. Incidental benefit to a utility does not convert an otherwise general governmental purpose into a utility purpose. Fire hydrants provide a good example of this principle. See, e.g., 18A Eugene McQuillin, *Municipal Corporations* § 53.106 at 197 (3d ed., rev. vol. 2002) ("as the principal purpose of a hydrant is for fire protection, an occasional use for other purposes, such as flushing or

The county misapplies the test for implied powers of a proprietary utility.¹⁰¹ Culver Fund expenditures fail the third prong of the test, because the expenditures are contrary to the express limitations in the King County Charter and King County Code requiring that wastewater funds be used exclusively for wastewater purposes.¹⁰²

Finally, in trying to justify the Culver Fund expenditures as “regulatory fees” under its *Covell* analysis,¹⁰³ the county equates those expenditures to the sewage disposal fees. The districts do not dispute that

testing the entire water system, does not change the primary character of such installations from governmental to proprietary”); *Stiefel v. City of Kent*, 132 Wn. App. 523, ¶ 16, 132 P.3d 1111 (2006) (“fact that the same water supply line serves both fire hydrants and the domestic water system does not convert a fundamentally governmental function into a proprietary one”). Similarly, even if Culver Fund expenditures provided some incidental, unquantifiable benefits to WTD, that would not mean there was a genuine sewage utility purpose and would not justify using the WQF for those expenditures.

¹⁰¹ See KC Br. at 39.

¹⁰² See Dists. Br. at 8-9. Nor is there any merit to the county’s argument that the contractual provision about rules and regulations for delivery of sewage allows the county to spend sewage funds for non-sewage purposes and to include those costs in the sewage disposal charges to the local utilities (see KC Br. at 41-42). That provision in the contract is simply about adopting rules and regulations for how the sewage is to be delivered from the local utilities to the county’s system (e.g., how and where the local “retail” sewer lines are to be connected to the county’s “wholesale” sewer lines). See KCC 28.84.050 (Tx 532). Similarly, the county’s “course of dealing” argument (KC Br. at 42) is based on a false premise. As noted *supra* at 35, n.87, from the time the county took over Metro the districts and other local utilities have repeatedly objected to the Culver fund program and have asked that it be eliminated. The only “course of dealing” on this subject has been the local utilities’ repeated objections to the Culver program and the county’s repeated disregard of its assurances that the Culver program was only temporary, until other funding sources were found.

¹⁰³ KC Br. at 44-45. *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995) provides the following test to distinguish taxes from regulatory fees: (1) whether the primary purpose of the charge is to raise revenue for general governmental purposes, or whether the primary purpose is to regulate; (2) whether the money collected must be allocated only to the authorized regulatory purpose; and (3) whether there is a direct relationship between the fee charged and the service received by those who pay the fee, or between the fee charged and the burden produced by the fee payer.

properly calculated sewage disposal charges are fees; it is the *improper* charges *included* in those fees that the districts argue are the hidden tax.

VII. THE COUNTY IMPROPERLY ALLOCATED OVERHEAD EXPENSES TO WTD AND SHOULD REIMBURSE WTD FOR THE OVERCHARGES.

Despite being warned multiple times by the State Auditor that the only legitimate way the county can charge its proprietary sewage utility for general government overhead is to document that its allocation of overhead is equivalent to the value of services provided, the county has never implemented the “time charges”¹⁰⁴ method of documentation – the method its own consultant identified as the best allocation method.¹⁰⁵ Instead, the county uses a “surrogate measure” that allocates a pro rata share of the general government overhead to receiving agencies (including WTD) based on those agencies’ relative budgets. The county’s own code puts the onus on the county¹⁰⁶ to prove that its methodology results in an overhead allocation which “best matches the estimated cost of services,”¹⁰⁷ but the county has not complied with that requirement.

On the issue of whether the general fund should reimburse WTD

¹⁰⁴ “The time charges method compares the number hours [sic] spent on activities directly related to the unit to the total number of hours spent for the county as a whole.” CP 14377 (Tx 15 at 7).

¹⁰⁵ CP 14377 (“we believe the most equitable allocation methodology should be utilized. We believe the time charges method is the most equitable”).

¹⁰⁶ “The current expense fund may allocate costs to other county funds if it can be demonstrated that other county funds benefit from services provided by current expense funded agencies.” KCC 4.04.045.A (emphasis added).

¹⁰⁷ KCC 4.04.045.D. *See* Dists. Br. at 27 & 68.

for any past overallocations based on a “true-ing up” of actual expenditures to budgeted expenditures, the trial court incorrectly held that there is no requirement in law for the county to perform such a retroactive “true-up” and that in any event such a true-up would be “immaterial.”¹⁰⁸ On the first point, the law prohibits spending sewage funds for non-sewage purposes. In any year in which a trueing-up shows that WTD was overcharged for overhead, that means that WTD was charged for non-sewer related services, which is a direct violation of King County Charter § 230.10.10, Financial Policy 10, and the sewage disposal contracts (and, of course, the Accountancy Act). On the second point, this is not a fraud or misrepresentation case where “materiality” of a misrepresentation may be a valid concern. There is no legal basis for disregarding hundreds of thousands of dollars of admitted overcharges.¹⁰⁹

The county’s position, as well as the trial court’s, regarding the 1% provision in the sewage disposal contracts, is that under that provision the sewer rates charged to local utilities are to be calculated by determining 100% of all WTD costs, including any DNRP and general government overhead attributable to the sewage system, and then adding another 1% of

¹⁰⁸ CP 18688, FFCL ¶132.

¹⁰⁹ The same applies to the \$200,000 overcharge resulting from the admitted arithmetic error. Again, the county’s only rationale for not reimbursing that money is that it is “immaterial.” KC Br. at 64, n.179. The districts do not dispute that this error is relatively small. By the same token, the remedy for this relatively small error is similarly small. This Court should direct the county to provide that remedy.

that total to cover even more “general administrative overhead.” That interpretation is unreasonable, because it would mean that WTD could charge its customers approximately \$2 million per year¹¹⁰ for extra, non-sewage related overhead, in direct contravention of King County Charter § 230.10.10, Financial Policy 10 and the Accountancy Act.¹¹¹

A contract provision should not be interpreted in a way that produces an unreasonable result. The only rational interpretation of the 1% provision in the sewage disposal contract is the one put forward by the districts, namely, that the parties intended that the “total monetary requirements” of the sewage utility would include the costs of administering and operating the utility itself (*e.g.*, the WTD Director and everyone under her) and that all other “general administrative overhead” (*i.e.*, above WTD in the county’s table of organization) would be limited to one percent of the actual operating and capital costs of the utility. The county argues that including the DNRP and general government cost pool overhead expenses within the meaning of “administration” and “operation” of the utility is reasonable because WTD would have to pay for those expenses if it were a stand-alone utility. That is simply wrong.

¹¹⁰ See Appendix C of Dists. Br. calculating 1% of Wastewater “Monetary Requirements.”

¹¹¹ Because of the illogic of that interpretation, the county says that in calculating sewer rates it has never included the additional 1% that is supposedly allowable under that provision. KC Br. at 68.

The general government cost pool has included costs for such things as the county law library, King County Civic Television, and the periodically-constituted Charter Review Commission.¹¹² The DNRP administration includes such expenses as those for implementing the County Executive's Climate Change Initiative (under which DNRP "developed a comprehensive climate change adaptation guidebook for local government") and the Rural Initiative (which supports rural areas "through strategic investments, partnerships and reforms").¹¹³ There is no support in the record for the proposition that a private sewage utility would have to incur such expenses.

This Court should reverse the trial court and require the county to reimburse WTD for all overhead allocations which the county has not documented as representing the value of actual services to the utility. The Court should also require the county to reimburse WTD for (i) all DNRP and general government overhead expenses allocated to WTD in excess of 1% of the utility's other monetary requirements, (ii) all overhead overallocations resulting from failure to true-up, and (iii) the overhead overallocation resulting from the admitted \$200,000 arithmetic error.

¹¹² CP 13423, ¶ 9; FFCL ¶ 110 (CP 18683).

¹¹³ Tx 151 at 4.

VIII. KING COUNTY SHOULD REIMBURSE WTD FOR THE “CREDIT ENHANCEMENT FEES.”¹¹⁴

A. King County Cannot Properly Impose a Charge on WTD without Incurring and Quantifying an Actual Cost to the County.

Despite King County’s assertions, which the trial court apparently accepted, that the county incurs a greater cost when issuing LTGO bonds rather than traditional revenue bonds, King County has never quantified any greater cost which it has been forced to pay as a result of issuing LTGO bonds for WTD.¹¹⁵ As a result, the “credit enhancement fee” charged by the county bears no relationship to any such cost. If at any time in the future the county’s general fund were called upon to cover a WTD bond, the county could legitimately seek reimbursement for that actual cost. Until such time, if the county cannot correlate the “credit

¹¹⁴ Some of the county’s representations about the “credit enhancement fee” need clarification. First, “LTGO” stands for “limited tax general obligation,” not “long term general obligation.” See Txs 14, 16, 22, 25, 92, 155, 178, and 193. King County’s sewer revenue bonds and LTGO bonds are both *long-term* obligations. Second, LTGO bonds, as with sewer revenue bonds, are first and foremost covered by a lien on sewer revenues. Only in the unlikely event that those revenues were insufficient to cover the debt would King County’s general fund be called upon to back-up those obligations. Third, the county did not impose this “fee” only on new bonds. Instead, in 2003 it began imposing this *annual* charge on the entire outstanding principal balance of LTGO bonds that were issued as far back as 1994.

¹¹⁵ WTD already pays all out-of-pocket costs incurred in issuing either type of bond. The issue here is whether there are any greater costs for LTGO bonds than for traditional revenue bonds. As the following colloquy with the trial court shows, the “credit enhancement fee” is not based on any such greater costs incurred for LTGO bonds. See RP 22:1575 (The Court: “Let me try the question this way: Is the \$4,627,000 [the amount charged to WTD for the “credit enhancement fee”] comprised of any expense? Is any part of that an expense that the County is out? Not a benefit but an expense?” Answer [Mr. Guy, director of King County Finance and Business Operations Division]: “It’s not an expense that the County would be out”).

enhancement fee” to a quantifiable expense to the county, it cannot legitimately impose that charge on the utility.

King County bases its “credit enhancement fee” on a purported interest rate differential between LTGO and revenue bonds, rather than on any alleged cost to the county incurred as a result of issuing LTGO bonds. The county is taking the Accountancy Act into the realm of absurdity by arguing that the Act requires it to charge WTD for every decision made by the county which could theoretically benefit the utility. The county is simply doing its job by using the most cost-effective means of financing projects. It is not entitled to charge a fee for making that decision.¹¹⁶

B. Under the *Covell* Test, the Credit Enhancement Fee Is a Tax.

The “credit enhancement fee” is not an authorized capital improvement expense; it is a charge imposed on the utility to raise money for the general fund. Under the *Covell* three-part test (*see* n.103, *supra*), it is a hidden unauthorized tax on the utility.

King County witnesses acknowledged that the purpose of the

¹¹⁶ Consider this hypothetical. Suppose King County is faced with hiring a new director for WTD and there are two potential candidates; both will be paid \$100,000, and that cost will be charged to WTD. One candidate possesses qualifications far superior to those of the other. Under King County’s theory, if the county hires the better qualified candidate, then WTD would be obligated under the Accountancy Act to pay additional money to the county’s general fund, because the county has conferred a benefit on the utility despite the fact that hiring the better candidate costs the county nothing more than it costs to hire the less qualified candidate (because WTD will fully cover the director’s salary in either case). There is no real difference between that example and King County’s argument that it is entitled to charge WTD for the choice the county made in issuing lower interest bonds instead of higher interest bonds.

“credit enhancement fee” was not to reimburse the county for any expense but simply to increase revenue for the general fund.¹¹⁷ Similar to the situation in *Okeson I* involving streetlights,¹¹⁸ there is no regulatory purpose involved here, because neither WTD nor the local utilities have any control over whether the county issues an LTGO bond or a traditional revenue bond. In the case of either type of bond, WTD is required to ensure that sewer revenues are established and collected sufficient to cover the bonds, which in turn ensures that there will be no burden on the general fund. The money is collected from WTD and deposited directly into the county’s general fund. There is no segregation of the money or restriction placed on it (for instance, to be used only for any future bond coverage in the unlikely event of WTD default). Finally, although the charge here is based on outstanding LTGO bonds issued for the purpose of constructing sewer capital improvements, there is no direct relationship between the amount of the charge and any burden to which WTD or the local utilities contribute. As in *Okeson I*, without that nexus the charge constitutes a tax rather than a regulatory fee. King County makes the

¹¹⁷ RP 22:1530 (Bob Cowan, former OMB Director, testifying to this charge as a “potential revenue source” for the general fund); RP 20:1254-56 (John Bodoia, CFO for DNRP, testifying that Mr. Cowan proposed the charge because he “needed to meet a revenue target”). When asked whether someone directed him to find additional revenue for the general fund, Mr. Cowan testified that the county’s finance and budget departments are under a “standing order” to do so. RP 22:1538.

¹¹⁸ *Okeson v. City of Seattle*, 150 Wn.2d 540, 553, 78 P.3d 1279 (2003).

decision about which type of bond to issue, and this charge is nothing more than a “revenue-raising ploy for the general budget.”¹¹⁹

King County is not authorized to impose this tax on WTD. The Court should invalidate the charge and require the county’s general fund to reimburse the utility’s Water Quality Fund for those wrongful charges.

IX. THE TRIAL COURT PROPERLY DISMISSED KING COUNTY’S RECOUPMENT/OFFSET DEFENSES.

The county seems to be arguing that it is entitled to offset any recovery awarded to WTD with the value of any unbilled services it provided to the utility, even if those services are entirely unrelated to the claim for which damages are awarded.¹²⁰ For instance, the county appears to be arguing that, if this Court upholds the ruling on the \$2 million job

¹¹⁹ *Okeson I*, 150 Wn.2d at 554. The county also cites to *King Cnty. Fire Prot. Dist. No. 16 v. Housing Auth. of King Cnty.*, 123 Wn.2d 819, 872 P.2d 516 (1994). KC Br. at 72. In that case, this Court noted that: “If charges are primarily intended to raise money, they are taxes. If the charges are primarily tools of regulation, they are not taxes. Where the charge is related to a direct benefit or service, it is generally not considered a tax or assessment.” *Id.* at 833 (emphasis added). The “benefit charges” at issue in *Housing Authority* were authorized by RCW 52.18.010, were only imposed on the housing authority because of its failure to contract with the fire district as required by law, were directly related to fire and emergency services provided by the fire district to the housing authority, and were used by the district in providing those services. Here, the money collected from the “credit enhancement fee” goes into the county’s general fund to be used for anything the county wants, and there is no correlation between services and charges. The county is simply imposing the charge to raise money for the general fund; it is a hidden tax on the utility.

¹²⁰ King County never asserted a counterclaim, crossclaim or affirmative defense seeking such relief. It only asserted that if, in adjudicating the districts’ claims, any of the county’s expenditures were deemed improper, then the districts and other local utilities would be obligated to reimburse the county “an amount equal to the value of all similar or identical payments, in-kind products, property and/or services they have received from King County.” CP 17911, ¶4 (Prayer for Relief on King County’s Counterclaims and Crossclaims, emphasis added).

retention payment to StockPot, the county should be able to offset that reimbursement with the half of the LTGO interest spread which it never charged to WTD. That argument is contrary to the county's own authority: "Recoupment allows a defendant to defend against a claim by asserting, up to the amount of the claim, the defendant's own claim against the plaintiff growing out of the same transaction." 20 Am. Jur. 2d *Counterclaim, Recoupment and Setoff* § 5 (2010), quoted at KC Br. at 74, n.211. The StockPot job retention payment and the issuance of LTGO bonds are completely different transactions.¹²¹

The trial court's ruling on the \$2 million job retention payment to StockPot was based on that being for a general government purpose, not a sewage disposal purpose.¹²² There was no benefit to WTD from the county's using the utility fund to make that payment, so there was no countervailing "benefit" to WTD that could be the basis for an offset against the county's obligation to reimburse WTD. Similarly, if this Court reverses the dismissal of any of the districts' other claims based on a conclusion that the expenditures or charges to the utility were not

¹²¹ The county's argument is analogous to the following hypothetical. Suppose Homeowner hires Plumber at \$50 an hour to install a new bathroom and later hires him to install a water heater. When the water heater leaks, Homeowner sues Plumber for negligent installation of the water heater and is awarded damages. Plumber then seeks to "offset" the water heater damage award by arguing that he could have charged \$100 an hour for the bathroom installation, so he should be able to recoup that difference now by offsetting it against the damages he owes for the water heater failure. That argument is flawed; it is simply not how our legal system works.

¹²² FFCL ¶¶ 103-106 (CP 18682).

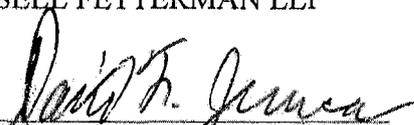
legitimate sewage disposal expenses, it follows that the county would not be entitled to any recoupment or offset for an alleged benefit conferred on the utility as a result of those improper expenditures.¹²³

X. CONCLUSION

The districts respectfully request that the Court (1) reverse the dismissal of the districts' claims and direct entry of judgment in their favor, (2) affirm the judgment in favor of the districts on the \$2 million job retention payment to StockPot, (3) affirm the dismissal of the county's cross-claims and counterclaims, and (4) remand the case for determination of appropriate remedies.

Respectfully submitted this 14th day of May, 2012.

HELSELL FETTERMAN LLP

By 

David F. Jurca, WSBA #2015

Colette M. Kostelec, WSBA #37151

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Cedar River Water and Sewer District and
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¹²³The county may also be arguing that it is entitled to offset the value of unbilled services to individual local utilities against what it owes to WTD, but the county cites no authority and offers no logic for the proposition that it could use a claim against a local utility to reduce its obligation to WTD. Such an argument would also run afoul of the independent duty rule. The local sewer utilities do not owe any duty to the county except to comply with the sewage disposal contracts and pay their sewage disposal bills (note that the converse is not true: the county *does* have an independent duty, under the county charter and code and other applicable law, to spend sewage utility funds only for sewage purposes). The county has not alleged that any of the local utilities have failed in any of their duties under the contracts.

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Subject: Cedar River, et al. v. King County, et al., No. 86293-1; Reply Brief of Appellants/Cross-Respondents Cedar River Water and Sewer District and Soos Creek Water and Sewer District

Dear Clerk of the Court,

Attached please find the Reply Brief of Appellants/Cross-Respondents and Declaration of Service for filing in the following case:

Case: Cedar River, et al. v. King County, et al.

Case No.: 86293-1

Name, Phone Number, Bar Number and email address of Counsel Filing: David F. Jurca, WSBA No. 2015; Colette M. Kostelec, WSBA No. 37151; (206) 292-1144, djurca@helsell.com and ckostelec@helsell.com

Please do not hesitate to contact me should you have any questions or concerns. Thank you!

Katherine M. Stewart

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Legal Secretary to Scott E. Collins, David F. Jurca,
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