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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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

Appellants,

vs.

KING COUNTY, *et al.*,

Respondent/Cross-Appellant.

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**BRIEF OF RESPONDENT AND CROSS-APPELLANT  
KING COUNTY**

---

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## I. INTRODUCTION

Appellants Cedar River Water and Sewer District and Soos Creek Water and Sewer District (“the Districts”) are two of 34 governmental entities with Agreements for Sewage Disposal (“Contracts”) with King County. The Districts challenge County expenditures that they allege were improperly included in sewage disposal rates charged under the Contracts, using as a template the *Okeson*<sup>1</sup> line of utility cases involving implied authority to charge ratepayers for various expenditures that were “governmental” in nature. But King County has express authority for the challenged expenditures, both under statute and the Contracts. Furthermore, as the Districts concede and the trial court correctly held, sewage treatment is a proprietary function, not governmental. And even if the *Okeson* “nexus” standard for implied authority applied, King County provided substantial evidence to satisfy it, as the trial court found.

The trial court decided each issue presented by the Districts on 19 summary judgment motions and after a six-week trial. At trial, the court heard from 23 witnesses and admitted 342 exhibits, totaling over 10,000 pages. The appellate court should affirm the trial court’s thoroughly-considered decisions.

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<sup>1</sup> See, e.g., *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003).

## II. ASSIGNMENTS OF ERROR.

### A. Assignment of Error on StockPot mitigation.

The trial court erred in entering judgment for the Districts on their challenge to King County's payment of \$2 million in mitigation to StockPot Soups, Inc. ("StockPot"), a company displaced by the construction of the Brightwater Wastewater Treatment Plant ("Brightwater"). The payment was to comply with a Snohomish County Essential Public Facilities ("EPF") Ordinance requiring King County to mitigate Brightwater's economic impacts and substantially assist displaced businesses.

#### *Issues Pertaining to StockPot Assignment of Error:*

1. Was King County, acting in its proprietary capacity, authorized to mitigate Brightwater's economic impacts and substantially assist a displaced business by paying StockPot \$2 million?
2. Did King County make the payment to StockPot as part of a good faith settlement to resolve a bona fide dispute, under *Warburton v. Tacoma Sch. Dist. No. 10*, 55 Wn.2d 746, 350 P.2d 161 (1960)?
3. Did the trial court err in holding that King County breached the Contracts by paying \$2 million as mitigation to StockPot, where the Contracts entitle the County to include in sewage rates all costs to "finance the acquisition, construction or use of sewerage facilities," and the

expenditure was reasonably necessary to construct Brightwater?

4. Did the trial court err in requiring King County to reimburse the \$2 million mitigation payment where the Districts suffered no damages because (a) the payment was made with bonds that will be repaid largely with “capacity charges” from future ratepayers, which are not the subject of the Contracts and/or (b) the Districts passed along all costs to ratepayers who are not parties in this lawsuit?

5. Did the trial court err in awarding prejudgment interest on the \$2 million mitigation payment, where the court held that the payment “primarily benefited the general public” and King County did not waive its immunity for acts occurring in its governmental capacity?

**B. Assignment of Error on Dismissal of “Setoff” and “Recoupment” Defenses.**

The trial court erred in dismissing King County’s affirmative defenses that would have entitled the County to offset or recoup against any damages, the “true and full value” of benefits the County provided to the Wastewater Treatment Division (“WTD”).

***Issue Pertaining to the Assignment of Error on Setoff and Recoupment Defenses:***

1. Does the “Local Government Accounting Act,” RCW 43.09.210, which requires a government department to pay the true and full value of services another department provides to it, entitle King

County to reduce or offset against any recovery by the Districts, the value of benefits the County conferred on the WTD and its ratepayers?

2. Did the trial court err in rejecting the County's affirmative defenses of recoupment or offset to prevent the Districts' unjust enrichment?

### III. STATEMENT OF THE CASE

#### A. Procedural Background.

In 1958, regional voters established the Municipality of Metropolitan Seattle ("Metro") under RCW 35.58 to clean up pollution and improve water quality in Lake Washington and the Puget Sound area. In 1992, the County merged with Metro, assuming its rights and obligations under RCW 35.58. WTD was charged with most of Metro's responsibilities for water pollution abatement activities, which included water quality improvement. RCW 35.58.200.

As Metro's successor, King County provides wholesale wastewater treatment services to the Districts and thirty-two other governmental entities.<sup>2</sup> The Contracts with the Districts authorize the County to establish sewer rates that include all costs to build, administer, operate and

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<sup>2</sup> The entities include cities and utility districts, an Indian Tribe, the State of Washington, and a Washington limited liability company (the only non-governmental entity). Together with the Appellants, the entities that have Contracts with the County are collectively referred to as "component agencies."

maintain the wastewater system.<sup>3</sup>

The Districts brought eight claims against King County, alleging that the County improperly included certain expenditures in sewer rates – an amount totaling in excess of \$240 million.<sup>4</sup> The court dismissed four of the claims by summary judgment, including those related to: (1) an agreement to mitigate impacts from the siting and operation of Brightwater (“Snohomish County Mitigation Claim”)<sup>5</sup>; (2) the construction of a pipeline to dispose of reclaimed water produced as a byproduct of wastewater treatment at Brightwater (“Reclaimed Water Claim”)<sup>6</sup>; (3) alleged violations of trust or fiduciary responsibilities (“Fiduciary Claim”)<sup>7</sup>; and (4) alleged violations of the “Local Government Accounting Act,” RCW 43.09.210.<sup>8</sup>

The parties tried the Districts’ remaining four claims to the bench. At trial, the Districts challenged (5) the County’s use of up to 1.5 percent of WTD’s operating budget for water quality improvement activities that

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<sup>3</sup> Tr. Ex. 3.

<sup>4</sup> CP 1-29, 16629-59.

<sup>5</sup> CP 18708-11, 18713-17, 18719-23; RP 1:49-51; 4:59-61.

<sup>6</sup> CP 18728-30; RP 5:48-49.

<sup>7</sup> CP 18725-26; RP 3:39-40.

<sup>8</sup> CP 8420-21; RP 3:40-41. Before trial, the court heard 18 summary judgment motions and cross-motions (a total of 17,000 pages of briefing), 94 declarations submitted with the motions, documentary evidence in 626 exhibits to the declarations, and counsels’

plaintiffs alleged were not directly related to sewage treatment (“Culver Fund Claim”); (6) relocation assistance payments to a company displaced by Brightwater, StockPot Soups (“StockPot Claim”); (7) allocation of the cost of services the County’s centralized departments provide to WTD (“Allocation Claim”); and (8) assessment of a fee for King County’s issuance of Long-Term General Obligation (“LTGO”) bonds on WTD’s behalf (“Credit Enhancement Fee Claim”).<sup>9</sup>

After the Districts rested their case, the trial court dismissed part of the Allocation Claim.<sup>10</sup> After both parties rested, the court ruled in favor of King County on all issues except for the County’s mitigation payment to StockPot.<sup>11</sup> The court entered a 36-page Findings of Fact and Conclusions of Law.<sup>12</sup> The trial court’s rulings rendered the issue of remedies moot except for the County’s mitigation payment to StockPot. Against the County’s objections, the trial court ordered the County’s “General Fund” to reimburse the “Water Quality Fund” (“WQF”) \$2 million, plus nearly a million dollars in prejudgment interest. The Court

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argument in at least 17 hearings. The Districts have not appealed the court’s dismissal of their claims under the Local Government Accounting Act.

<sup>9</sup> Over a six week trial, the trial court heard 20 days of argument and testimony of 23 witnesses, and admitted 342 trial exhibits consisting of over 10,000 pages.

<sup>10</sup> RP 25:1948; Findings of Fact & Conclusions of Law at 3, ¶ 3.

<sup>11</sup> RP 33:3011-32.

<sup>12</sup> Findings of Fact & Conclusions of Law; RP 35:1-58.

entered judgment in favor of the Districts in the amount of \$2,937,644.<sup>13</sup>

The trial court also dismissed, on the Districts' motion for partial summary judgment, the County's affirmative defenses of offset and recoupment that would have allowed the County to offset the value of benefits it provided to WTD against the amount that the court required the County to reimburse to the WQF.<sup>14</sup>

**B. Standards of Review.**

The appellate court reviews summary judgment rulings *de novo*, such as those dismissing the Districts' Snohomish County mitigation, reclaimed water, and fiduciary duty and trust claims, as well as the County's offset and recoupment defenses. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010).

Argumentative assertions without a factual basis, however, cannot create a genuine issue of material fact. *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 536, 871 P.2d 601 (1994) (citation omitted).

The appellate court should apply a deferential standard of review to the trial court's factual findings relating to the Culver Fund, StockPot, Allocation, and the Credit Enhancement Fee claims. The appellate court

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<sup>13</sup> Findings of Fact & Conclusions of Law at 25, ¶ 107. The County satisfied the judgment. See Order Granting Def. Mot. for Order Acknowledging Satisfaction of J. (Sept. 27, 2011) (designated as "SCP").

reviews Findings of Fact under a “substantial evidence” standard.

“Substantial evidence” is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” We will not “disturb findings of fact supported by substantial evidence even if there is conflicting evidence.”

*McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (citations omitted; emphasis added).<sup>15</sup>

The appellate court reviews *de novo* Conclusions of Law, such as interpretation of statutes and constitutional provisions. *McCleary*, 173 Wn.2d at 514. In trying to obtain *de novo* review of Findings of Fact with which they disagree, the Districts argue that a number of the Findings of Fact actually are Conclusions of Law.<sup>16</sup> They are not. For example, Finding of Fact 70, which summarizes the County’s reasons for the relocation assistance it provided to StockPot,<sup>17</sup> is not a Conclusion of

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<sup>14</sup> CP 17879-81; Order Granting in Part & Deny. in Part Plfs.’ Mot. for Partial S.J. RE: Alleged Bond & Ins. Benefits (June 4, 2010) (designated as “SCP”); RP 10:44.

<sup>15</sup> Where a trial involved a large, complex record, and the trial court was required to resolve “conflicting assertions,” the Court has applied a substantial evidence standard in the interest of “conservation of judicial resources.” *Dolan v. King County*, 172 Wn.2d 299, 310-11, 258 P.3d 20 (2011). The same considerations apply here.

<sup>16</sup> Br. of Appellants at 34-35.

<sup>17</sup> The Finding of Fact states:

The County was at first skeptical of StockPot’s claim that it could not be shut down for more than 72 hours. However, the County conceded that StockPot could suffer serious business losses if it were shut down for longer than 72 hours. It also appeared to the County that it would be physically impossible to relocate StockPot’s business in less than 30 to 60 days because of the complexity of its operations. StockPot’s

Law. The same is true of the factual findings about the Districts' lack of injury, and the other Findings that the Districts seek to recharacterize.<sup>18</sup> The Districts did not complain about the characterization of the Findings and Conclusions when they were argued in two hearings, and they have waived any objections.<sup>19</sup>

Finally, this Court should not reverse the normal burdens of proof. In civil cases, plaintiffs bear the presumptive burden of proving each element of their claims by a preponderance of the evidence. *In re Black v. Black*, 153 Wn.2d 152, 180, 102 P.3d 796 (2004). The Districts argue that the trial court should have shifted the traditional burden of proof because King County had information about alleged misuse of the WQF within its "peculiar or exclusive possession."<sup>20</sup> But the Districts do not identify any evidence "peculiarly or exclusively" within King County's possession, and there is none. The Districts conducted exhaustive discovery, taking

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inability to be shut down longer than 72 hours required that StockPot have a new facility ready to open when it closed the doors of its existing plant. This meant the County had to provide certain relocation assistance to accommodate StockPot, including substitute personal property. The County believed that StockPot's inability to be shut down for more than 72 hours made providing substitute personal property to StockPot "reasonable and necessary" under applicable law.

<sup>18</sup> For example, the Districts argue that Finding of Fact 122, regarding the Allocation Claim, should have been a Conclusion of Law, although it recites the Districts' failure to prove an element of a claim, and does not involve undisputed facts since the Districts relied on the State Auditor's reports that were critical of the County.

<sup>19</sup> See, e.g., RP 34:3-12; 35:5-31.

34 depositions, receiving 106,477 pages in response to Public Record Act requests, and obtaining 35,289 pages of discovery as well as 85 pages of interrogatory answers.

The Districts rely on the 1909 shipping case of *Joliffe v. Northern Pac. R.R. Co.*, 52 Wash. 433, 100 P. 977 (1909), involving a limitation-of-liability clause's enforceability. In that case, the Court applied the established principle that a shipper is not required to establish the cause of railroad delays to prove a railway's negligence, where that information was solely in the railway's possession. *Id.* at 436. The other cases cited involve unique statutory language or factual circumstances, and like *Joliffe*, do not bear on this contract dispute.<sup>21</sup>

#### IV. ARGUMENT

##### A. The Trial Court Correctly Dismissed the Districts' Fiduciary Duty and Trust Claims.

As the trial court correctly held, there is no basis for a trust or fiduciary relationship in the statutes, Contracts, or any other authority that

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<sup>20</sup> Br. of Appellants at 52 (citations omitted).

<sup>21</sup> See *Ireland v. Scharpenberg*, 54 Wash. 558, 565-66, 103 P. 801 (1909) (addressing burden of proof on holder in due course where fraud is involved in promissory note's procurement); *National Elec. Contr. Ass'n v. Employment Sec. Dep't*, 109 Wn. App. 213, 226-27, 34 P.3d 860 (2001) (addressing employers' "Interested Party" status in unemployment insurance benefits action, and whether employer overcame presumption of employee's availability for work under "cause for doubting" standard); *City of Seattle v. Parker*, 2 Wn. App. 331, 337, 467 P.2d 858 (1970) (burden on defendant charged with carrying a concealed pistol to show license); *U.S. v. New York, New Haven, & Hartford*

governs King County's water pollution abatement activities.<sup>22</sup> Use of the WQF for particular purposes does not create a fiduciary duty between King County and the Districts, or establish a trust. The Washington Supreme Court has declined to impose trust or fiduciary duties based on the alleged existence of a "special fund, of proprietary nature," where no statutory language "clearly illustrate[s]" legislative intent to impose such duties. *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 622-23, 62 P.3d 470 (2003). There is no such language in RCW 35.58.200. *See also Branson Sch. Dist. v. Romer*, 161 F.3d 619, 633-34 (10<sup>th</sup> Cir. 1998) (statute may create a fiduciary relationship if the legislative body manifests such an intent, for example by providing an "enumeration of duties" demonstrating intent to create a trust relationship); *United States v. Mitchell*, 445 U.S. 535, 542, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (statute requiring government to hold Indian lands "in trust" does not create fiduciary duties to manage land, given evidence of Congressional intent and statutory language as a whole).

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*R.R. Co.*, 355 U.S. 253, 263-64, 78 S. Ct. 212, 2 L. Ed. 2d 247 (1957) (carrier bore burden to disprove overcharges; federal transportation act did not change burden).

<sup>22</sup> RP 3:39-40; *see also* CP 18725-26. The County's summary judgment briefing is found at CP 1526-87, 18861-81. The Districts argue that the County breached a trust or fiduciary duty to use WQF funds properly, and should have borne the burden of proof at trial on each of their claims. But they failed to satisfy the very requirement that they argue warrants shifting the burden – the existence of a "prima facie case against a trustee for misuse of funds held in trust."

A contract does not create a trust simply because the contract limits the use of funds to a particular purpose. In *Thompson v. Atlantic Richfield Co.*, 673 F. Supp. 1026, 1028 (W.D. Wash. 1987), the United States District Court rejected the argument that franchise agreements created an express trust because the agreements required ARCO to apply funds to a specific purpose. The missing “key element” was intent to create a trust relationship rather than a contractual relationship. *Id.* There, as here, no such intent was demonstrated. The Court granted summary judgment for defendant, holding that “the contractual relationship itself is sufficient to assure that the funds are used for the required purposes.” *Id.*

None of the Districts’ “trust” cases supports imposing trust or fiduciary duties on King County. The AIA form contract language in *Westview Inv. Ltd. v. U.S. Bank Nat’l Ass’n*, “evinced an express understanding on the part of the general contractor that it is not to hold the [payments at issue] as its own absolute property.” 133 Wn. App. 835, 847, 138 P.3d 638 (2006) (emphasis added). The District’s old local improvement district (“LID”) cases, including *City of Longview v. Longview Co.*, 21 Wn.2d 248, 254, 160 P.2d 395 (1944), and *Keyes v. City of Tacoma*, 12 Wn.2d 54, 57, 120 P.2d 533 (1941), involved situations

where bonds were sold for particular local improvement projects.<sup>23</sup> The LID did not hold the funds as its own property, but for those who paid for the improvements. Likewise, the cursory statement from McQuillan’s MUNICIPAL CORPORATIONS that “a fund raised by a municipality for a special purpose is a trust fund”<sup>24</sup> is based on old cases involving special assessments for particular improvements, and a local government’s obligations to bond and warrant holders. In contrast, WTD is an operating utility, and holds sewage disposal revenues as its own absolute property.<sup>25</sup>

**B. The Trial Court Correctly Granted Summary Judgment Dismissing the Districts’ Snohomish County Mitigation Claim.**<sup>26</sup>

1. Relevant factual background.

After King County chose the Brightwater site in south Snohomish County, King and Snohomish Counties became embroiled in a highly publicized and contentious legal dispute about locating the wastewater

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<sup>23</sup> See also *Potter v. City of New Whatcom*, 20 Wash. 589, 56 P.3d 394 (1899) (city is a trustee for warrants and is liable when treasurer converted assessments); *Quaker City Nat’l Bank of Philadelphia v. City of Tacoma*, 27 Wash. 259, 67 P. 710 (1902) (misappropriation renders city liable to the holders of warrants drawn on street improvement fund).

<sup>24</sup> Br. of Appellants at 51-52.

<sup>25</sup> A trust also does not exist because King County would have no duty under any circumstances to convey property in the WQF to the Districts or the other component agencies. The King County Code provides that “the system” – not the Districts or their ratepayers – “shall be reimbursed for the value associated with any use or transfer of such assets for other county purposes.” See KCC 28.86.160.C.1.FP-10 (emphasis added).

plant there.<sup>27</sup> Local residents objected to the plant and Snohomish County officials tried to block it. The Counties filed seven lawsuits and administrative actions against each other.<sup>28</sup> The litigation jeopardized King County's ability to timely construct the facility.<sup>29</sup>

King and Snohomish Counties engaged in lengthy and difficult negotiations to resolve their differences and allow Brightwater to move ahead.<sup>30</sup> The Counties finally entered into a comprehensive settlement of the lawsuits and administrative actions, resolving the many contentious issues related to Brightwater's permitting, construction, and operation, including mitigation of impacts in neighborhoods near the plant.<sup>31</sup>

The settlement described the permitting processes Snohomish County would follow;<sup>32</sup> the ordinances that would apply;<sup>33</sup> the public

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<sup>26</sup> The County's summary judgment briefing is found at CP 90-108, 211-441, 587-607, 633-930, 1229-57, 1427-84, 1708-812, 4021-6725.

<sup>27</sup> CP 4092-215, 5416-21.

<sup>28</sup> From 2003 to 2005, King County filed four actions with the Growth Management Hearings Board ("GMHB"), challenging Snohomish County's ordinances related to the siting and permitting of essential public facilities ("EPFs"). King County also sued Snohomish County in Skagit County Superior Court. Snohomish County appealed the GMHB's decisions and challenged separately the Brightwater Final Environmental Impact Statement ("FEIS"). The litigation existed in six different forums. CP 4099-215, 5416-21.

<sup>29</sup> Because of the delays, the Department of Ecology in 2005 threatened to impose a sewer connection moratorium, which could have significantly affected, or even halted, residential and commercial development in King and Snohomish Counties. CP 5407-08, 5442-43.

<sup>30</sup> CP 5421-22.

<sup>31</sup> CP 5421-22, 5734-66.

<sup>32</sup> CP 5735, 5743-55.

processes that King County would use;<sup>34</sup> and the mitigation projects that King County would fund to address Brightwater's impacts.<sup>35</sup> The parties recorded the settlement in 2005 in two expressly-interdependent documents, a Settlement Agreement and a Development Agreement, which the trial court ruled constituted a single, integrated agreement<sup>36</sup> ("Agreement").

Under the Agreement, King County agreed to fund up to \$70 million in mitigation projects to address "impacts to the affected neighborhoods and communities in and around the Brightwater facilities of the sewage treatment plant" as required by the Growth Management Act,<sup>37</sup> WAC 365-195-340(2)(b), and the State Environmental Policy Act ("SEPA"), WAC 197-11-768, both of which are discussed below.

2. Procedural background in the trial court.

The trial court dismissed the Districts' challenge to King County's mitigation payments to Snohomish County under the Agreement. The court first held that the Land Use Petition Act ("LUPA"), RCW 36.70C *et seq.*, barred any "land use"-type claims as untimely, including the Districts' claim that Snohomish County's mitigation requirements violated

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<sup>33</sup> CP 5735, 5746-47.

<sup>34</sup> CP 5735, 5744-45.

<sup>35</sup> CP 5735-37, 5745-47.

<sup>36</sup> RP 1:49 ("The attempt to divorce the settlement agreement from the development agreement is strained and not persuasive to the Court.").

RCW 82.02.020.<sup>38</sup> The court then permitted the Districts to take additional discovery regarding the relationship between Brightwater’s impacts and the mitigation projects. The court noted that the Districts bore the burden to establish that particular mitigation projects in Snohomish County lacked a nexus to Brightwater.<sup>39</sup>

After the Districts completed discovery, the court received additional briefing and heard oral argument again. King County offered two lengthy declarations detailing the relationship between Brightwater and the mitigation projects.<sup>40</sup> The Districts offered nothing in rebuttal. The court held that King County had agreed to the mitigation in order to site Brightwater, a capital improvement. The court concluded that, based on the undisputed facts, a sufficient nexus existed between Brightwater’s impacts and the mitigation projects.<sup>41</sup>

On appeal, the Districts rely on RCW 82.02.020 in arguing that King County may make “voluntary” payments only to mitigate “direct” impacts of Brightwater, and that the mitigation was an “illegal exaction” because the projects supposedly did not address impacts identified in the

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<sup>37</sup> CP 5735-37, 5745-47.

<sup>38</sup> RP 1:49-50; CP 18708-11. King County incorporates by reference Snohomish County’s respondent’s brief addressing LUPA and other issues.

<sup>39</sup> RP 2:40-43.

<sup>40</sup> CP 5403-39, 4962-82.

Environmental Impact Statement (“EIS”). Not only are these claims time-barred, but the undisputed evidence on summary judgment was to the contrary.<sup>42</sup>

3. King County properly charged the Snohomish County mitigation expenses to the Water Quality Fund.

The Contracts entitle the County to base the sewage disposal charge “upon the County’s ‘total monetary requirements for the disposal of sewage,’”<sup>43</sup> and include in the rates “the cost of administration, operation, maintenance, repair and replacement of the Metropolitan Sewage System . . . .”<sup>44</sup> The Contracts define “Metropolitan Sewage System” as “the facilities to be constructed . . . as part of the Comprehensive Plan,” now referred to as the Regional Wastewater Services Plan (“RWSP”).<sup>45</sup> The RWSP directed the County to construct Brightwater and to spend up to ten percent of the budget on mitigation of its impacts. *See* KCC 28.86.140.B.EMP-5 (“[M]itigation . . . shall be at

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<sup>41</sup> RP 4:59-61.

<sup>42</sup> *See, e.g.*, CP 5426-37, 5768-79. Former WTD Director Christie True testified that “there are direct relationships between the mitigation projects required by the Settlement Agreement, and the impacts caused by Brightwater that are identified in the EIS process.” Ms. True described in exhaustive detail the impacts recognized in the EIS, and corresponding mitigation. CP 5426-37. King and Snohomish County also submitted unchallenged testimony of other witnesses explaining the relationships between the mitigation projects and Brightwater’s impacts. *See, e.g.*, CP 2728, 2730-34, 2767-71, 3125-52, 3266-82, 4095-96, 4969-81.

<sup>43</sup> CP 756.

<sup>44</sup> CP 756.

least ten percent of the costs associated with the new facilities.”). The “total monetary requirements for the disposal of sewage” include the capital costs of mitigation necessary to build Brightwater.<sup>46</sup>

The Districts do not challenge their obligation to pay for Brightwater’s siting, construction, and operation, or even other required mitigation.<sup>47</sup> Complying with the Snohomish County mitigation conditions is one of those costs, no different than complying with local building code requirements for the Brightwater buildings. All are costs of “the facilities to be constructed . . . as part of the [RWSP].”<sup>48</sup>

The Growth Management Act required the County, in siting an “essential public facility,” to consider “amenities or incentives for neighborhoods or jurisdictions in which facilities are sited.” WAC 365-195-340(2)(b). The mitigation involved “amenities and incentives” to the area surrounding Brightwater for the impacts of siting, constructing, and operating a wastewater treatment system in the midst of residential neighborhoods.

The RWSP’s mitigation provisions, the King County Code, and the

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<sup>45</sup> CP 751.

<sup>46</sup> The Contracts include costs for future facilities. CP 759.

<sup>47</sup> For instance, the Districts did not challenge construction of a 70-acre buffer area (referred to as the North Mitigation Area) for the Brightwater plant, berms to reduce the plant’s visual impact, and numerous mitigation projects at each tunnel portal site.

King County Charter all authorize funding of the Settlement Agreement's mitigation projects as capital costs of a wastewater treatment plant. KCC 28.86.140; .160.C.1.FP-10; King County Charter § 230.10.10. The Districts bizarrely argue that the mitigation was not required to address Brightwater's impacts, but the only evidence was to the contrary, and both Snohomish and King County officials agreed that it was necessary.

SEPA defines "mitigation" to include "compensating for the impact by replacing, enhancing, or providing substitute resources or environments." WAC 197-11-768. The Districts assert that the EIS documents did not include the Brightwater impacts that Snohomish County sought to mitigate. However, former WTD Director Christie True identified numerous EIS analyses of Brightwater's impacts on community resources, habitat, public safety, and recreation.<sup>49</sup> Other King and Snohomish County witnesses also testified about the relationship between Brightwater's impacts and the mitigation projects.<sup>50</sup> The Districts did not dispute this and presented no evidence in rebuttal.

4. The "nexus" and "rough proportionality" requirements do not apply, but even if they did, King County satisfied them.

The Contracts require the ratepayers to bear Brightwater's costs.

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<sup>48</sup> CP 751.

<sup>49</sup> CP 5423-37, 5768-79.

The Court may not import an additional “nexus” requirement into the Contracts. *See Hearst Communc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 511, 115 P.3d 262 (2005) (court cannot ignore or change agreement’s express terms even when clear public policy concerns are voiced).

The Districts rely on an “essential nexus” and “rough proportionality” test from the Supreme Court cases of *Nollan* and *Dolan*.<sup>51</sup> The issue in those cases – a local government’s authority to impose conditions on property development – was a land-use issue that would have been barred here by the LUPA statute of limitations. If the Districts thought the conditions that Snohomish County was requiring and to which King County ultimately agreed were contrary to *Nollan/Dolan*, the Districts did not timely challenge them. Moreover, *Nollan/Dolan* does not speak to whether, under the Contracts, a sufficient nexus exists between Brightwater and the mitigation costs.<sup>52</sup> *But for* the County’s need to obtain Snohomish County permits, the County would not have agreed to pay for any mitigation.

Even if the Court applies an “essential nexus” and “rough

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<sup>50</sup> See CP 2728, 2730-34, 2767-71, 3125-52, 3266-82, 4095-96, 4969-81.

<sup>51</sup> *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

<sup>52</sup> *Nollan/Dolan* also do not apply when, as here, two entities enter into a good faith settlement of bona fide disputes regarding mitigation required in connection with an essential public facility. *See Warburton*, 55 Wn.2d at 751-52.

proportionality” standard, King County satisfied it. The County provided unchallenged evidence of the relationship between the specific Brightwater impacts and the Snohomish County mitigation, including testimony from former WTD Director Christie True and Mitigation Manager Michael Popiwny.<sup>53</sup> Ms. True testified that the County carefully assessed the relationship between every mitigation project and Brightwater’s impacts:

King County consistently required a nexus between Brightwater impacts and projects to be funded as mitigation in Snohomish County. King County took the position that in order for mitigation to be funded by WTD, mitigation projects had to have a reasonable relationship to the impacts (individual or collective, direct or indirect) of Brightwater. In my view and in the view of all the other members of the King County negotiating team, there was a nexus for each of the mitigation projects on Exhibit B to the Settlement Agreement.<sup>54</sup>

The Districts offered no contrary evidence.

5. The Districts cannot challenge the good faith settlement between the two Counties under *Warburton*.

King County agreed to fund the Snohomish County mitigation projects in a bona fide settlement to resolve numerous disputes, enabling Brightwater to proceed. Under Washington law, the Districts cannot

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<sup>53</sup> CP 5423-37, 4969-81. The declarations also identified references in the EIS documents to the impacts and the required mitigation. *See, e.g.*, CP 5768-79.

<sup>54</sup> CP 5423.

challenge the Settlement Agreement where (1) the claims arose out of a subject matter upon which the County had a general power to contract; (2) there was a bona fide dispute as to the County's responsibilities; and (3) the County exercised good faith in effecting the settlement. *Warburton*, 55 Wn.2d at 751-52.<sup>55</sup>

The Districts did not challenge and offered no evidence to rebut the County's authority to agree to mitigate the impacts of an essential public facility like Brightwater. Entering into a settlement to allow construction to proceed clearly is a "subject matter upon which [King County] has general power to contract." "Bona fide" disputes existed between King and Snohomish Counties, and the Districts offered no evidence that the Counties acted in bad faith in resolving them. Because the County's Agreement with Snohomish County satisfied the *Warburton* requirements as a matter of law and fact, the Court should affirm the judgment below.

**C. The Trial Court Correctly Granted Summary Judgment for King County on the Districts' Reclaimed Water Claim.<sup>56</sup>**

1. Relevant factual background.

Wastewater treatment generates three byproducts: biosolids,

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<sup>55</sup> A municipality's power to compromise claims "does not depend on the possible ultimate decision for or against the validity of the asserted claim." *Abrams v. City of Seattle*, 173 Wash. 495, 502, 23 P.2d 869 (1933).

methane gas, and treated effluent (reclaimed water).<sup>57</sup> When operating at capacity, Brightwater will generate enough treated effluent *every day* to fill 83 NFL football fields to a depth of a foot.<sup>58</sup> WTD must recycle or dispose of this byproduct of wastewater treatment, just as it recycles or disposes of biosolids and methane gas.<sup>59</sup> Because of increasing regulatory requirements to reduce the volume of treated effluent disposed into Puget Sound and the lack of alternative disposal options, the County needed to construct a conveyance system to distribute the reclaimed water that Brightwater generates, to users who can benefit from it.<sup>60</sup>

The trial court correctly ruled that “the process of operating a sewage system . . . includes the distribution of reclaimed water” to dispose of effluent.<sup>61</sup> King County’s two other regional wastewater facilities, at Renton and West Point in Seattle, have operated reclaimed water systems for years.<sup>62</sup>

The Districts do not challenge King County’s production of

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<sup>56</sup> The County’s summary judgment briefing is at CP 7050-8132, 8153-71, 9167-990.

<sup>57</sup> CP 7076.

<sup>58</sup> CP 7079.

<sup>59</sup> CP 7394.

<sup>60</sup> That conveyance system sometimes is referred to as the “backbone.”

<sup>61</sup> RP 5:49.

<sup>62</sup> CP 7076-78.

reclaimed water, but only its distribution and sale.<sup>63</sup> But distribution is the same as disposal of treated effluent – a core WTD task – and selling reclaimed water will benefit ratepayers, since reclaimed water revenues return to the WQF, reducing wastewater disposal rates.<sup>64</sup>

The undisputed evidence was that the County exhaustively analyzed alternatives to distributing reclaimed water, including: discharges into Lake Washington; groundwater injection; and augmenting stream flows in Brightwater’s vicinity.<sup>65</sup> The County discussed the need to use the backbone, in addition to the marine outfall, in the Brightwater Facilities Plan as required by RCW 90.48.110.<sup>66</sup> The alternatives were uneconomical, unfeasible, or unacceptable to regulators.<sup>67</sup>

The Districts assert that “reclaimed water could easily be included” in the Brightwater’s discharges to Puget Sound. All the evidence was to the contrary.<sup>68</sup> WTD already is the largest municipal discharger of treated effluent into Puget Sound. If WTD discharged all of Brightwater’s

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<sup>63</sup> The Districts inaccurately say that the County did not conduct a “financial feasibility assessment” of reclaimed water under KCC 28.86.100.B.WRP-14. King County performed the assessment and included its analysis in a “White Paper.” CP 8616-727.

<sup>64</sup> WTD will recover the backbone costs from reclaimed water revenues in 40 years. CP 8657-60.

<sup>65</sup> CP 7085-87, 9219-22.

<sup>66</sup> CP 8162, 8170-71, 9230, 9300.

<sup>67</sup> CP 7081-87.

<sup>68</sup> *See, e.g.*, CP 7081-85, 8154-57, 9220.

effluent into Puget Sound, it would increase WTD's discharges into Puget Sound by seven to ten percent.<sup>69</sup> Ecology directed the County to pursue reclaimed water options, "particularly in relation to the Brightwater project."<sup>70</sup> Ecology required that the Brightwater Facilities Plan analyze "opportunities for the use of reclaimed water." RCW 90.48.110; .112. Furthermore, the Department of Natural Resources conditioned its grant of an "Aquatic Lands Outfall Easement" for the Brightwater outfall on WTD minimizing discharges into Puget Sound through development of a reclaimed water program, which necessarily must include a distribution system to address the significant volumes produced.<sup>71</sup>

2. The undisputed evidence was that the reclaimed water "backbone" benefits WTD ratepayers.

The reclaimed water backbone allowed for state regulators' approvals of Brightwater. It also reduces WTD's operating costs. WTD itself directly benefits from using reclaimed water rather than purchasing 71 million gallons of potable water per year for Brightwater's treatment-related processes.<sup>72</sup> The backbone also allows for an economical and revenue-producing method to dispose of a wastewater treatment

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<sup>69</sup> CP 7079.

<sup>70</sup> CP 7146; *see also* CP 7082, 7145-50. The Legislature's "high priority" is to reduce wastewater discharges into Puget Sound. RCW 90.46.005 (Notes).

<sup>71</sup> CP 7084, 7188.

byproduct, just like the sale of biosolids and on-site use of methane gas.<sup>73</sup>

The Districts rely on a single reference in a 2009 draft report that lists WTD as beneficiary of two of 44 “benefits” listed. But the same report lists “ratepayers” as “key beneficiaries,” and includes as benefits “savings from using reclaimed water to avoid costs of wastewater treatment and conveyance” (3.D.1); “reclaimed water sales revenues” (3.D.2.); and “energy savings from avoided pumping costs for importing water” (3.D.4).<sup>74</sup>

The Districts ignore other “direct benefits” to the ratepayers, including reduced risk of penalties from exceeding the state’s mandated water-quality goals.<sup>75</sup> Regulatory approvals also directly benefit WTD. The fact that there are incidental benefits to the general public as well as benefits to ratepayers does not change the fact that disposal of treated effluent from Brightwater is a fundamental wastewater function. *See City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 705, 743 P.2d 793 (1987) (conservation program providing incidental benefits to private parties proper where the public received sufficient consideration).

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<sup>72</sup> CP 8162-63.

<sup>73</sup> CP 7087-88, 8162-63, 9222-25, 9229.

<sup>74</sup> CP 9015-16.

<sup>75</sup> CP 9011-14.

3. King County is statutorily authorized to produce, distribute, and sell reclaimed water.

The County is authorized by statute to perform “water pollution abatement” functions, including constructing pipelines and all other necessary “equipment and accessories.” RCW 35.58.200(2). “Reclaimed water facilities are water pollution control facilities as defined in chapter 70.146 RCW. . . .”<sup>76</sup> RCW 90.46.005. Ecology’s permits also authorize the County “to produce and distribute reclaimed water” to identified customers.<sup>77</sup> RCW 90.46.120(1) requires that revenues from reclaimed water be used to offset the cost of operating the wastewater utility fund.

The Water Pollution Control Act, RCW 90.48 *et seq.*, required that Ecology approve the Brightwater Facilities Plan before the County could construct the plant. That Plan had to include the use of reclaimed water. RCW 90.48.112 (“[A]ny plans submitted under RCW 90.48.110 must include consideration of opportunities for the use of reclaimed water . . .”). The Districts argue that the phrase “use of reclaimed water” does not authorize sale or distribution. But “use” cannot occur without a distribution system.

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<sup>76</sup> RCW 70.146.020(8) broadly defines “water pollution control facilities” to include “systems for the . . . recycling of wastewater . . . including all equipment, utilities, structures, real property, and interest in and improvements on real property necessary for or incidental to such purpose.” The backbone is a “structure” or “improvement on real property” necessary to wastewater effluent disposal and/or recycling.

The Districts' claim that WTD lacks authority hinges on the application of RCW 36.94 *et seq.* But RCW 36.94 addresses potable water systems, not reclaimed water, as Ecology previously determined: “[T]his law [referring to RCW 36.94] is specific to potable, drinking water systems, which are separate and distinct from reclaimed water systems.”<sup>78</sup> *See also* Laws of 1990, ch. 133 § 1 (RCW 36.94 “address[es] . . . operating requirements which will be imposed on public water systems under the federal Safe Drinking Water Act.”). Likewise, RCW 36.94.480 refers to “public drinking water systems.” Because RCW 36.94 does not apply, King County does not need a “water general plan” to reclaim water.

The Districts also incorrectly argue that King County must create a “regional water supply plan.” But the provision they rely on requires King County only to consult with regional water suppliers, which it did:

[I]n the interim period prior to the development of a regional water supply plan, King County shall consult and

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<sup>77</sup> CP 7078, 7090.

<sup>78</sup> CP 7140. Appellant Cedar River made the identical argument regarding the alleged applicability of RCW 36.94 when it opposed Ecology's renewal of King County's reclaimed water permit for the Renton wastewater treatment plant in 2009. Cedar River argued that the County was “not authorized to engage in a water supply business”; had not taken the required steps under RCW 36.94 to “construct, operate and maintain a water system”; and that wastewater rates should not include a reclaimed water program. CP 7138-39. Ecology rejected these arguments and expressly authorized the County to sell reclaimed water to, among others, Starfire Sports, City of Tukwila, City of Renton, and the Tukwila and Cascade Land Conservancy. CP 7105, 7140. The Court should give a “heightened degree of deference” to Ecology's determinations within its field of expertise. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 310, 197 P.3d 1153 (2008) (citation omitted).

coordinate with regional water suppliers to ensure that water reuse decisions are consistent with regional water supply plans. To ensure costs and benefits are shared equally throughout the region, all reclaimed water used in the community shall be distributed through a municipal water supply or regional water supply agency consistent with a regional water supply plan.

KCC 28.86.050.B.TPP-7. Similarly, RCW 90.46.120(2) states that a wastewater treatment plant owner should be “included in” regional water planning, and addresses “regional water supply plans or other potable water supply plans prepared by multiple water purveyors” – not by a wastewater treatment facility operator.

It is undisputed that the County sought to “consult and coordinate with regional water suppliers” in the development of a plan. Local water suppliers, such as the Districts, rebuffed the County’s efforts. Former Department of Natural Resources and Parks (“DNRP”) Director Pam Bissonnette explained:

[S]ince reclaimed water could be used in some applications instead of potable water by existing water utility customers, or by potential water utility customers, these [potable] water suppliers viewed the County as a potential competitor. As a result, despite efforts by the County, no regional water supply plan has ever been completed.<sup>79</sup>

4. The Contracts authorize inclusion of the “backbone” expenditures in the sewage disposal charge.

The Contracts authorize King County to include in the sewage

disposal charge “the costs of . . . operation” of the wastewater system, and define the system to include all facilities constructed “as part of the Comprehensive Plan [RWSP].”<sup>80</sup> King County has the sole discretion to determine the wastewater “facilities” that it will construct: “Metro shall in its sole discretion determine the nature, location and time of construction of facilities of the Metropolitan Sewerage System.”<sup>81</sup>

The reclaimed water backbone is a “facility . . . constructed” under the RWSP. The RWSP, in its “Water Reuse Policies,” requires King County to develop “nonpotable projects” that may require “major capital funding,” and retain “the flexibility to produce and distribute reclaimed water at all treatment plants . . . .” KCC 28.86.100.B.WRP-5; WRP-12. The RWSP also authorizes funding of “water reuse projects, in whole or in part, from the wastewater utility rate base,” *i.e.*, rates computed under the Contracts. KCC 28.86.100.B.WRP-13.

The production and distribution of reclaimed water is necessary to operation of the wastewater system. It is a means of disposing of a byproduct of wastewater treatment, required by the State’s permits. Because WTD saves money from the use of reclaimed water in its

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<sup>79</sup> CP 9209.

<sup>80</sup> CP 7374.

<sup>81</sup> CP 7370 (emphasis added).

treatment processes, and raises money from the off-site sale of reclaimed water, it is beneficial to ratepayers. The costs of the backbone fall within the Contracts.

**D. The Trial Court Correctly Entered Judgment Dismissing the Districts' Culver Fund Claims After Trial.**

1. Relevant factual background.

The evidence at trial was that since Metro's inception, the public authorized and expected Metro to address regional water quality issues, not just operate the "pumps and pipes" for wastewater treatment.<sup>82</sup>

In 1988, a Metro committee chaired by the then-mayor of Issaquah, A.J. Culver, described Metro's historic expenditures of up to 3.5 percent of its operating funds in areas not "absolutely required" for wastewater treatment.<sup>83</sup> The committee found that these expenditures directly benefited the wastewater system, and recommended that Metro continue to fund water quality projects under what came to be known as "the Culver Fund."<sup>84</sup> The Metropolitan Water Pollution Abatement Advisory Committee ("MWPAAC"), on which the Districts' representatives served, unanimously endorsed Metro's adoption of the

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<sup>82</sup> Finding of Fact and Conclusions of Law at 6, ¶ 18; RP 26:2058-61.

<sup>83</sup> Finding of Fact & Conclusions of Law at 6, ¶¶ 21-22; Tr. Ex. 262 at 3.

<sup>84</sup> Tr. Ex. 262 at 2-5, 7.

Culver committee's recommendations.<sup>85</sup>

The Districts, at least by 1995, believed that the Contracts might not authorize Culver Fund expenditures, but they compromised that claim during the RWSP's development.<sup>86</sup> The Regional Water Quality Committee ("RWQC"), on which the Appellant Cedar River was a member and represented other sewer districts,<sup>87</sup> asked the County in 1995 to adopt a policy that "would define when it is appropriate to fund special water quality projects."<sup>88</sup> In 1998, the RWQC held a special meeting at the Robinswood Retreat Center in Bellevue, Washington ("Robinswood") to agree on the final RWSP financial policies, including funding for the Culver projects. The Districts' representatives attended this meeting. At that meeting, all stakeholders in the wastewater system, including Appellant Cedar River, agreed on the RWSP financial policies that included the Culver policy and the underlying principle that WTD's mission included water quality improvement.<sup>89</sup>

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<sup>85</sup> Findings of Fact & Conclusions of Law at 7, ¶¶ 23-24.

<sup>86</sup> For instance, a November 2, 1995 MWPAAC memorandum reflects a specific concern that the Contracts might not permit the use of sewer revenues for Culver Fund projects, *i.e.*, the same argument the Districts make in this case. Tr. Ex. 18 at 2-3.

<sup>87</sup> Finding of Fact & Conclusions of Law at 8-9, ¶ 29.

<sup>88</sup> Tr. Ex. 282 at 2.

<sup>89</sup> Tr. Exs. 27, 314. The minutes for the Robinswood meeting state: "Mr. Canter [a long-time Commissioner from Appellant Cedar River] said the sewer districts support the package [and] Mr. [Bill] Tracy said he and Mr. Canter are in agreement. He sees the

Under this “Robinswood Agreement,” the County made concessions in favor of the component agencies, including assuming several multi-million-dollar commitments, in consideration for the Districts’ and other component agencies’ agreement to allow continued funding of Culver projects.<sup>90</sup> The negotiated compromise at Robinswood led to the County’s adoption of the financial policy allowing for the continued funding of water quality improvement activities, still known as the “Culver Fund.”<sup>91</sup>

The Districts, as members of both MWPAAC and the RWQC, approved of the RWSP in 1999, including the Culver Fund financial policy.<sup>92</sup> Based on the Robinswood Agreement, as approved by MWPAAC and the RWQC, the County codified the Culver Fund in the RWSP.<sup>93</sup> Financial Policy 8 provides:

Water quality improvement activities, programs and projects, in addition to those that are functions of sewage treatment, may be eligible for funding assistance from

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package as taking into consideration input that has been gathered. It reflects a compromise and is a workable plan.” CP 314 at 6 (emphasis added).

<sup>90</sup> For instance, the County assumed responsibility for sewer line interceptors. The County also agreed to pay for development of an “I&I” (infiltration and inflow) program and relieve Seattle from a surcharge for stormwater and surface water entering the wastewater system. *See, e.g.*, RP 27:2252-55; Tr. Ex. 27.

<sup>91</sup> Findings of Fact & Conclusions of Law at 9, ¶¶ 31-32; RP 14:249; 25:2001-02; 26:2081-82; 27:2255-56.

<sup>92</sup> Finding of Fact & Conclusions of Law at 10, ¶ 36. Component agencies have received thousands of dollars of Culver Fund expenditures. *See, e.g.*, RP 16:611-27.

<sup>93</sup> Findings of Fact & Conclusions of Law at 9, ¶¶ 31-33.

sewer rate revenues after consideration of criteria and limitations suggested by the metropolitan water pollution abatement advisory committee and, if deemed eligible, shall be limited to one and one half percent of the annual wastewater system operating budget.

KCC 28.86.160.C.1-FP 8 (emphasis added). For the last 12 years, in reliance on that policy and all the parties' mutual concessions, the County has funded Culver Fund projects in an amount up to 1.5 percent of the annual WTD operating budget. The Districts took no action for over nine years while the County, based on the RWSP and RCW 35.58.200(4),<sup>94</sup> funded Culver Fund projects. The Districts ignore all of these facts.<sup>95</sup>

2. Culver projects directly benefit WTD and wastewater treatment.

The trial court found that the County exercised vigilance to ensure that Culver projects related to WTD functions and benefitted the wastewater system.<sup>96</sup> The evidence was that Culver programs benefit the WTD (and its ratepayers) in at least three ways. First, they reduce the quantity and improve the quality of flows into the treatment plants,

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<sup>94</sup> That statute entitles the County to use monies collected from water pollution abatement facilities for water quality improvement activities. *See* RCW 35.58.200(1), (4).

<sup>95</sup> The trial court incorrectly rejected the County's defenses of acquiescence, estoppel, statute of limitations, and laches. Findings of Fact & Conclusions of Law at 12 ¶¶ 43-44; RP 33:3013. If this Court finds that the County lacks authority for Culver expenditures, the Court can nevertheless affirm the judgment based on these defenses. For example, if use of sewage disposal fees for the Culver Fund breached the Contracts, the six-year statute of limitations for a contract claim started running in 1999 (at the latest), when the Culver Fund policy was formally adopted in the RWSP. *See, e.g.*, RP 32:2968-69.

decreasing WTD operating expenses.<sup>97</sup> Second, Culver expenditures reduce non-point source pollution into Puget Sound, delaying or eliminating the need for WTD to invest hundreds of millions of dollars in treatment systems to meet additional Ecology requirements. For example, WTD's use of Culver Funds helps reduce nutrient loading in Puget Sound, delaying an Ecology requirement that WTD adopt expensive tertiary treatment or other processes in its plants.<sup>98</sup> Third, Culver Fund projects educate the public on water-quality impacts of various behaviors, which WTD permits require, and which facilitates effective wastewater treatment.<sup>99</sup> The trial court correctly found after trial:

Activities and projects funded by the Culver Fund are primarily education and water-quality programs, with a number of the activities and projects serving both wastewater treatment and water quality goals. . . .

The County's witnesses at trial established the relationship

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<sup>96</sup> Finding of Fact & Conclusions of Law at 10, ¶ 37; RP 24:1837-38; 27:2315-16.

<sup>97</sup> RP 24:1835-36; 28:2495-500. Examples include "green build" techniques and rain gardens that eliminate surface and stormwater runoff that enters the wastewater system, and education programs about the need to reduce the use of pesticides and fertilizers that enter the wastewater system. *See, e.g.*, RP 16:627-28, 637-38; *see also* RP 27:2312.

<sup>98</sup> RP 24:1842-46; *see also* RP 28:2495, 2506 (meeting new NPDES permit requirements for nutrient loading [*i.e.*, pollution from "non-point" sources] would cost at least \$500 million for the capital investment, plus operational costs of \$10 million per year). The evidence was that to implement tertiary treatment just for the Renton treatment plant, WTD would incur about \$700 million in capital investment costs and double its operating costs. The County's accounting expert estimated that the savings to WTD from delays in adding a tertiary treatment system was about \$21.5 million for a one-year delay, and nearly \$62 million for a three-year delay. RP 30:2837-38.

<sup>99</sup> RP 24:1835-36; 28:2500-04; *see also* RP 26:2077-78 (explaining educational value of "Salmon Homecoming").

between wastewater treatment and water quality improvements. For example, they pointed out that you can't divorce treatment costs from the quality of the water that WTD is discharging into. They showed the effects of nutrients in effluent discharged from the wastewater treatment plants and "combined sewer overflow" ("CSO") facilities. They also identified vector waste, non-point source pollution, stormwater disposal, and increasing demands by federal and state regulators as other examples of water-quality issues related to wastewater treatment.<sup>100</sup>

The trial court also correctly held that the *Okeson* "nexus" requirement does not apply to the Culver claims, but nonetheless was satisfied.<sup>101</sup>

The trial court correctly rejected the Districts' contention (repeated on appeal) that because another County division, the Water and Land Resources Division ("WLRD"), also engages in surface water quality activities, the use of sewage disposal fees for the Culver Fund is improper. WLRD's surface water management fund can be used only in unincorporated King County and for stormwater facilities.<sup>102</sup> See RCW 36.89.080(4). It was not until 2003, years after the Culver Fund's adoption, that state law authorized the use of surface water management fees for "cooperative watershed management" that may include water quality protection and management. RCW 36.89.130. The fact that activities of two County divisions may partially overlap does not bear on

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<sup>100</sup> Finding of Fact & Conclusions of Law at 10-11, ¶¶ 38-39; RP 24:1835-38.

<sup>101</sup> Findings of Fact & Conclusions of Law at 13-14, ¶ 51.

whether WTD is authorized to use a small portion of sewage disposal fees for water quality improvement activities.

Nor is it relevant that the County occasionally refers to Culver Fund expenditures as “Category III” expenditures rather than “Category I” or “II.” King County’s former Director of DNRP, Pam Bissonnette, testified that the County adopted the nomenclature simply to avoid using Mr. Culver’s name.<sup>103</sup> “Category III” merely indicates expenses that do not involve the “pumps and pipes” of wastewater treatment and disposal. The trial court, after hearing days of testimony, correctly ruled that all Culver Fund projects “result in identifiable benefits to water quality and/or sewage treatment and disposal in the region, and are reasonably necessary to the operation of the wastewater treatment system.”<sup>104</sup>

3. The Culver Fund is statutorily authorized.

RCW 35.58.200 expressly authorizes the inclusion of Culver Fund expenses in the total monetary requirements of wastewater treatment. In

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<sup>102</sup> RP 16:649; 20:1239-40.

<sup>103</sup> RP 15:438.

<sup>104</sup> Finding of Fact & Conclusions of Law at 11, ¶ 41. The Districts complain that the trial court changed its summary judgment ruling from a year earlier. But Judge Felnagle explained: “I know that we thought this matter was resolved at summary judgment, but, you know, what this case has demonstrated, among other things, is that there’s just no substitute, often, for a trial on these issues. What I can digest in the course of a few hours studying for a summary judgment argument doesn’t compare with what you get when you spend weeks on a case and have a trial.” RP 33:3012.

1974, in recognition of the federal Clean Water Act<sup>105</sup> requirement to reduce or eliminate non-point source pollution, the state legislature amended Metro's enabling statute, RCW 35.58.200, substituting the term "water pollution abatement" for "sewage disposal." The amended statute authorizes the County:

(1) To prepare a comprehensive water pollution abatement plan including provisions for waterborne pollutant removal, water quality improvement, sewage disposal, and storm water drainage for the metropolitan area.

(2) To . . . maintain, operate and regulate the use of metropolitan facilities for water pollution abatement, including but not limited to, removal of waterborne pollutants, water quality improvement, sewage disposal and storm water drainage within or without the metropolitan area . . . .

. . . .  
(4) To fix rates and charges for the use of metropolitan water pollution abatement facilities, and to expend the moneys so collected for authorized water pollution abatement activities.

RCW 35.58.200 (emphasis added). Courts must broadly construe the County's authority. RCW 35.58.900.

As the trial court noted, RCW 35.58.200 authorizes King County to engage in water quality improvement projects such as Culver Fund activities.<sup>106</sup> Metro had statutory authority to undertake "water pollution

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<sup>105</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*

<sup>106</sup> Findings of Fact & Conclusions of Law at 12, ¶ 46.

abatement” functions as defined by RCW 35.58.200. *See, e.g.,* *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885, 889 (W.D. Wash. 1990) (“The statute [RCW 35.58] grants the Metro Council legislative, financial, and other decision-making powers to carry out [Metro’s] functions of water pollution abatement and public transportation throughout King County.”).

The trial court also correctly held that the County has implied authority to use the WQF for Culver Fund expenditures under *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695, 743 P.2d 793 (1987).<sup>107</sup> A particular government act is within the government’s implied powers if:

(1) [T]he city is exercising a proprietary power; (2) the action is within the purpose and object of the enabling statute, (3) the action is not contrary to express statutory or constitutional limitations, and (4) the action is not arbitrary, capricious, or unreasonable.

*Okeson v. City of Seattle*, 159 Wn.2d 436, 447, 150 P.3d 566 (2007) (citing to *City of Tacoma*). King County satisfied these requirements. The Districts concede that wastewater treatment is a “proprietary” function. *See Smith v. Spokane County*, 89 Wn. App. 340, 362, 948 P.2d 1301 (1997). The Culver Fund expenditures are within WTD’s enabling statute. RCW 35.58.200(2). The Districts did not establish that expenditures were

contrary to any statutory or constitutional limitations, or were arbitrary, capricious, or unreasonable.

The trial court properly rejected the Districts' strained argument that King County is unauthorized to do anything related to water pollution abatement except for "sewage disposal" because voters never approved the 1974 legislative amendment. The statute regarding voter approval – RCW 35.58.100 – refers only to the initial authorization to perform a metropolitan function, not to a function previously authorized. The legislature made it clear "sewage disposal" includes "water pollution abatement" and "water quality improvement" activities in response to changes in the requirements under the federal Clean Water Act. The "water pollution abatement" authority did not involve an entirely new "function" like those authorized by RCW 35.58.050 ("garbage disposal" or "public transportation").<sup>108</sup>

Moreover, voters did approve Metro's water pollution abatement functions by approving the King County/Metro merger on November 2, 1992. For example, the ballot measure's "Explanatory Statement" stated that Metro provided "water pollution abatement services within its service

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<sup>107</sup> Findings of Fact & Conclusions of Law at 14, ¶ 52.

<sup>108</sup> Witnesses also testified that Metro engaged in the same type of water quality activities since its inception. RP 26:2041-42, 2058-63; 27:2212-15, 2218-25.

area,” and “water pollution abatement” includes “water quality improvement” under RCW 35.58.200.<sup>109</sup>

4. The County properly includes Culver Fund expenditures in the monetary requirements of the wastewater system under the Contracts.

The Contracts authorize the County to include all costs of the “Metropolitan Sewerage System” in the rates. Metro’s enabling statute establishes the relationship between sewage treatment and water-quality improvement by defining water pollution abatement to include water quality improvement activities, and this relationship was established factually at trial.<sup>110</sup>

The Contracts evince the parties’ intent that Metro engage in water quality improvement activities:

Whereas, the public health, welfare and safety of . . . the residents of Metro require . . . the elimination of water pollution and the preservation of the fresh and salt water resources of the area . . . .<sup>111</sup>

The Contracts also state that the County shall accept sewage delivered for treatment “subject to such rules and regulations as may be adopted from time

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<sup>109</sup> Tr. Ex. 277.

<sup>110</sup> The County’s witnesses testified about the benefits to the wastewater system from individual Culver projects. *See, e.g.*, 26:2117-19; 28:2504-06.

<sup>111</sup> Tr. Ex. 3 at 1. The Contracts also contain provisions relating to storm and ground waters. *See* Tr. Ex. 3 at 8.

to time” by the County.<sup>112</sup> County witnesses testified that those “rules and regulations” include the Culver Fund financial policy.<sup>113</sup> For more than 12 years, the County has funded Culver Fund projects in reliance on the Districts’ approval of the RWSP. *See City of Tacoma v. Bonney Lake*, 173 Wn.2d 584, 590, 269 P.3d 1017 (2012) (historic “course of dealing” persuasive in determining intent of contracting parties).

The legislature authorized Metro “[t]o fix rates and charges for the use of metropolitan water pollution abatement facilities, and to expend the moneys so collected for authorized water pollution abatement activities.” RCW 35.58.200(4) (emphasis added). “Authorized water pollution abatement activities” include “water quality improvement” projects, like those under the Culver Fund. RCW 35.58.200(2).<sup>114</sup>

The Contracts must be construed to be consistent with the relevant statutory framework in which they exist. *See Caritas Serv., Inc. v. Dep’t*

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<sup>112</sup> Tr. Ex. 3 at 3.

<sup>113</sup> RP 24:1805-10.

<sup>114</sup> The act also authorizes Metro to “take all actions necessary” to “meet the requirements of that Act,” and specifies that

[a]doption of such regulations and compliance therewith shall not constitute a breach of any sewage disposal contract between a metropolitan municipal corporation and its component agencies nor a defense to an action for the performance of all terms and conditions of such contracts not inconsistent with such regulations[,] and such contracts, as modified by such regulations, shall be in all respects valid and enforceable.

RCW 35.58.200(7) (emphasis added).

*of Soc. & Health Servs.*, 123 Wn.2d 391, 405, 869 P.2d 28 (1994) (party contracting regarding an activity “already regulated in the particular to which he now objects” is deemed to have contracted “subject to further legislation upon the same topic”) (citation omitted); *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass’n*, 83 Wn.2d 523, 539, 520 P.2d 162 (1974) (“[N]ot only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.”) (citation omitted). Parties must expect evolution of contract rights due to legislative enactments in regulated fields such as wastewater treatment:

[W]e are to consider whether the industry the complaining party has entered has been regulated in the past. . . . The Court long ago observed: “One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.”

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of “the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying the legislature’s adoption.” Unless the State itself is a contracting party, “[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.”

*Energy Reserves Group, Inc. v. Kansas Power & Light Co.* 459 U.S. 400,

411-12, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (addressing alleged impairment of contractual relationship) (citations omitted). The legislature amended RCW 35.58.200 to make it clear that the term “sewage disposal” includes “water pollution abatement” and to conform Metro’s enabling statute with the Clean Water Act.

WTD incurs many costs to meet statutory and regulatory requirements that did not exist when Metro was formed and the Contracts first were signed. Just because a new regulation requires a cost that did not exist in 1959 does not excuse the ratepayers’ obligation to pay for it.

5. The Districts cannot establish a “hidden tax.”

The Districts’ argument that the Culver Fund is a “hidden tax” foreclosed by the Wash. Const. art. VII, § 5 and the *Okeson* cases lacks analysis and support.<sup>115</sup> They do not even mention *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 325 (1995), which provides the “tax vs. regulatory fee” analysis. The Districts bear the burden of overcoming the presumption of constitutionality. *Carillo v. City of Ocean Shores*, 122 Wn. App. 592, 608, 94 P.3d 961 (2004) (citation omitted) (“If facts justifying an ordinance can reasonably be conceived to exist, we will

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<sup>115</sup> The *Okeson* analysis does not apply because the County had express statutory and contractual authority for the Culver charges, and need not rely on “implied” authority.

presume the facts exist and the ordinance will be presumed to have been passed in conformity with those facts.”).

Even if this Court undertook the *Covell* analysis, as a matter of law and fact, the Culver expenditures are a proper regulatory fee. Sewage disposal fees used to pay for the Culver Fund are akin to “local stormwater facility fees” given as examples of regulatory fees in *Okeson v. City of Seattle*, 150 Wn.2d 540, 552, 78 P.3d 1279 (2003). Ratepayers pay sewage disposal charges, which are put in a dedicated fund (indicative of a “fee”) only if they receive services from the WTD. The charges are used for wastewater treatment and “water quality improvement” activities, which are authorized WTD regulatory purposes. Finally, a relationship exists between the fee charged and the “burden produced” by the ratepayer. The ratepayers generate sewage, producing a “burden” on WTD to treat it, with all of the related regulatory and water quality issues.

**E. The Trial Court Correctly Dismissed the Districts’ StockPot Claim After Trial.**

1. Relevant factual background.

The Brightwater site included property leased to StockPot, a manufacturer and distributor of specialty soups.<sup>116</sup> Originally, the County did not intend to acquire the StockPot site. Nonetheless, StockPot filed an

appeal of the County's EIS;<sup>117</sup> complained that the County's operation of a wastewater facility would violate existing Conditions, Covenants, and Restrictions ("CCRs") for the business park where StockPot was located; and alleged that the plant would cause "probable, significant adverse impacts" to its operations. King County became concerned that StockPot could disrupt its construction schedule, causing expensive delays.<sup>118</sup>

Ultimately, King County decided to acquire the StockPot site. On March 22, 2004, King County notified StockPot that it intended to condemn the StockPot property, and that StockPot was eligible to receive relocation assistance under the Uniform Relocation Assistance and Real Property Acquisitions Act ("Relocation Assistance Act"), RCW 8.26 *et seq.*<sup>119</sup> On October 4, 2004, the King County Council authorized condemnation of the StockPot property.<sup>120</sup>

Condemnation of StockPot posed unique challenges.<sup>121</sup> StockPot owned both real and personal property at the site. Its production facility

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<sup>116</sup> Findings of Fact & Conclusions of Law at 15, ¶¶ 56-58. StockPot was a subsidiary of the Campbell Soup Company.

<sup>117</sup> Findings of Fact & Conclusions of Law at 15, ¶¶ 59-60.

<sup>118</sup> Findings of Fact & Conclusions of Law at 17, ¶ 66; RP 24:1866-67; 27:2321.

<sup>119</sup> Findings of Fact & Conclusions of Law at 16, ¶ 62; RP 17:804-05; Tr. Ex. 67. The StockPot acquisition was just one of more than twenty acquisitions by the County for Brightwater, involving forty different parcels. RP 17:799.

<sup>120</sup> Findings of Fact & Conclusions of Law at 16, ¶ 64; Tr. Ex. 83.

<sup>121</sup> Findings of Fact & Conclusions of Law at 17, ¶ 66.

included tenant-owned fixtures like electrical, water treatment, freezer and refrigeration systems, a sophisticated ammonia treatment system, and extensive ventilation systems (real property).<sup>122</sup> StockPot also owned substantial personal property used for food production, distribution, and marketing.<sup>123</sup> StockPot insisted that if the condemnation shut down its business for more than 72 hours, it would suffer significant and irreparable losses of customers and revenues.<sup>124</sup> After its own investigation, King County concluded it would take more than 30 days to move StockPot.<sup>125</sup>

Simultaneously, King County suspected that StockPot intended to use the condemnation to pay for its relocation out of the Puget Sound region.<sup>126</sup> StockPot told King County it contemplated moving elsewhere, leading the County to conclude that StockPot already had planned to relocate its business outside of the region before the County decided to condemn the StockPot property, and would use any money received for the fortuitously-timed condemnation to fund that already-planned move.<sup>127</sup> King County reasoned that if StockPot planned to move independently of

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<sup>122</sup> RP 17:802-03; Tr. Ex. 77 at 4-11.

<sup>123</sup> Tr. Ex. 77 at 4-11.

<sup>124</sup> Findings of Fact & Conclusions of Law at 17-18, ¶ 69; RP 16:714; 17:811-12.

<sup>125</sup> Findings of Fact & Conclusions of Law at 18, ¶ 70; RP 16:740-42; 17:811-12; *see also* Tr. Ex. 77 at 4-11.

<sup>126</sup> Findings of Fact & Conclusions of Law at 18, ¶ 71.

<sup>127</sup> Findings of Fact & Conclusions of Law at 18-19, ¶ 72.

the condemnation, StockPot itself would have addressed the need for virtually-continuous operation, and it would be unreasonable and unnecessary<sup>128</sup> for the County to pay for “substitute personal property” and other expenses to permit uninterrupted operation.<sup>129</sup>

In January 2005, after lengthy negotiations, King County and StockPot entered into an Agreement for the Purchase and Sale of Property in Lieu of Condemnation (“StockPot Agreement”). The StockPot Agreement settled all issues relating to King County’s acquisition of StockPot’s property and relocation.<sup>130</sup> Regarding the latter, the parties agreed to two options: a “Local Replacement Site Option” and a “Non-Local Replacement Site Option,” with different relocation assistance provided for each.<sup>131</sup> Under the Local Option, King County agreed (based on RCW 8.26, WAC 468-100-301 and the County’s relocation policies) to reimburse StockPot’s actual relocation costs up to a negotiated “cap” of \$16.17 million, including reimbursement of StockPot’s expenses to acquire and install substitute personal property that StockPot could not

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<sup>128</sup> A displaced person is only entitled to payment actual moving and related expenses, “as the agency determines to be reasonable and necessary . . .” WAC 468-100-301(1)(a).

<sup>129</sup> Findings of Fact & Conclusions of Law at 18-19, ¶¶ 71-73; RP 24:1874-76.

<sup>130</sup> Tr. Ex. 90; RP 17:824-26.

<sup>131</sup> Findings of Fact & Conclusions of Law at 17, ¶¶ 67-68; Tr. Ex. 90 at 2-3.

timely remove and reinstall at a new location.<sup>132</sup> The County based the cap (later reduced to \$15.6 million) on an inventory of the StockPot equipment, an assessment of the property StockPot would have to replace, and other costs reasonably necessary for the relocation.<sup>133</sup> Under the Non-Local Option, the County agreed only to reimburse StockPot up to \$5.5 million, the estimated cost to physically transport StockPot's property the 50 miles provided by statute, with no payment for substitute personal property or other expenses. *See* WAC 468-100-301(a).<sup>134</sup>

King County officials recognized that limiting the Non-Local Option was “a risky strategy” because StockPot could legitimately have

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<sup>132</sup> Findings of Fact & Conclusions of Law at 19, ¶ 75; 16:740-42; 17:811-12. King County also paid relocation costs for other businesses at the Brightwater site. RP 17:798-800. A similar situation was presented by *Union Elevator & Warehouse Co., Inc. v. State of Wash.*, 144 Wn. App. 593, 183 P.3d 1102 (2008), *rev'd on other grounds*, 171 Wn.2d 54, 248 P.3d 83 (2011). There, the court considered whether, following condemnation of real property, the Act required the State to pay for substitute equipment at a replacement site. The Court of Appeals held that it did:

[T]he DOT's highway project virtually destroyed Union Elevator's East Lind grain elevator business. This taking forced Union Elevator to build a new elevator so that it could keep its customers in the Lind area. It was not feasible to move the equipment from its East Lind facility. Therefore Union Elevator spent \$235,000 on substitute machinery and equipment at the replacement site. Union Elevator should not have to bear the burden of the state's highway project.

*Id.* at 607 (emphasis added).

<sup>133</sup> RP 17:819-20; 25:2014 (independent appraiser valued property).

<sup>134</sup> Finding of Fact & Conclusions of Law at 19, ¶ 74; RP 17:781-82. The regulation includes, as an “eligible actual moving expense,” “[t]ransportation of the displaced person and personal property,” but specifies that “[t]ransportation costs for a distance beyond fifty miles are not eligible, unless the agency determines that relocation beyond fifty miles is justified.”

insisted on more (including costs of purchasing and installing substitute personal property) even if it moved out of the area.<sup>135</sup> Nonetheless, the StockPot Agreement foreclosed StockPot from seeking additional amounts under the Relocation Assistance Act if it relocated non-locally.

The Districts argue that the \$5.5 million under the “Non-Local Option” was the reasonable cost of a local StockPot relocation. This is contrary to the trial evidence, which included receipts to the County for the actual costs of StockPot’s move. After reviewing StockPot’s documentation, the County reimbursed StockPot \$15.6 million of its relocation costs.<sup>136</sup> WTD did not pay StockPot “a dollar more than it was entitled to . . . .”<sup>137</sup> StockPot incurred millions more than King County reimbursed.<sup>138</sup>

2. Washington law required the County to pay StockPot’s reasonable relocation costs.

As the trial court correctly held, King County properly reimbursed StockPot only for relocation assistance required by the Relocation Assistance Act, RCW 8.26 *et seq.* and WAC 468-100 *et seq.*<sup>139</sup> The Act

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<sup>135</sup> RP 27:2332-39; *see also* Findings of Fact & Conclusions of Law at 19-20, ¶ 76.

<sup>136</sup> RP 18:842-47; Tr. Exs. 462-64.

<sup>137</sup> RP 18:849; *see also* RP 25:1995; 27:2336-37.

<sup>138</sup> RP 18:846-47; Tr. Exs. 462-64.

<sup>139</sup> State law requires providing relocation assistance to “displaced persons,” such as StockPot, required to move as a result of a condemnation. *See* RCW 8.26.020(4)(a)(i).

required King County to reimburse StockPot's "[a]ctual reasonable expenses in moving [StockPot's] business." RCW 8.26.035. "Actual reasonable moving and related expenses" are defined by regulation:

(1)(a) Any owner-occupant or tenant who qualifies as a displaced person . . . who moves from a business . . . is entitled to payment of his or her actual moving and related expenses, as the agency determines to be reasonable and necessary.

....  
(7) *Eligible actual moving expenses.*

....  
(c) Disconnecting, dismantling, removing, reassembling, and reinstalling relocated . . . personal property. For businesses, . . . this includes machinery, equipment, substitute personal property, and connections to utilities available within the building. . . .

....  
(g) Other moving-related expenses that are not listed as ineligible under subsection (8) of this section as the agency determines to be reasonable and necessary.

....  
(l) Professional services as the agency determines to be actual, reasonable and necessary for:

....  
(iii) Installing the relocated personal property at the replacement location.

....  
(p) Purchase of substitute personal property. If an item of personal property, which is used as a part of a business . . . , is not moved but is promptly replaced with a substitute that performs a comparable function at the replacement site, the displaced person is entitled to the payment of the lesser of [the cost of the substituted item including installation, minus any proceeds from the sale or trade-in of the replaced item, or the estimated cost of moving and reinstalling the replaced item].

WAC 468-100-301 (emphasis added).

In this case, StockPot's "eligible actual moving expenses" included improvements at the replacement site to accommodate its personal property; purchase of substitute personal property; and technicians' services required to install and connect the property.<sup>140</sup> The Districts introduced no evidence at trial in support of their allegation that King County's reimbursements exceeded StockPot's actual relocation costs, or that the difference between the amounts agreed to under the Local and Non-Local options was "to preserve jobs." The evidence was to the contrary.<sup>141</sup> *See Union Elevator*, 144 Wn. App. at 607 (itemized invoices adequate evidence of reimbursable costs under RCW 8.26).

3. The County reimbursed StockPot its relocation costs as part of a good faith settlement of a bona fide dispute under *Warburton*.

The County entered the StockPot Agreement as a good faith settlement of a bona fide dispute with StockPot. *Warburton*, 55 Wn.2d at 751-52. Resolving a dispute with a company displaced by a condemnation is a "subject matter upon which [King County] has general power to contract." *Id.* The County established the "bona fides" of the dispute with StockPot at trial.<sup>142</sup> The Districts offered no contrary evidence.

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<sup>140</sup> RP 18:842-47; Tr. Exs. 462-64.

<sup>141</sup> RP 18:843-46; Tr. Exs. 462-64.

<sup>142</sup> *See, e.g.*, RP 17:815, 824-25; 24:1866-67, 1874-75; 27:2321.

4. The County did not breach the Contracts by including StockPot relocation costs in WTD's total monetary requirements.

The Contracts provide a non-exclusive list of costs that the County may include in the sewage disposal charges, including capital costs. Brightwater's capital costs include payment of StockPot's relocation costs.<sup>143</sup> The County would not have paid any sums to StockPot *but for* condemnation of the StockPot site to construct Brightwater.<sup>144</sup> Because the expenditures were required to build the facility, any StockPot costs included in sewage disposal charges were proper under the Contracts.

In fact, the County did not include most of StockPot's relocation costs in sewage disposal charges. The County's witnesses testified without rebuttal that bond proceeds were the sole source of the funds to reimburse StockPot.<sup>145</sup> "Capacity charges" will be used to repay almost all of those bonds. Capacity charges are unrelated to the Contracts.<sup>146</sup>

**F. The Trial Court Erred in Entering Judgment for the Districts on their StockPot Mitigation Claim.**

1. Relevant factual background.

When King County settled with StockPot, the Snohomish County

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<sup>143</sup> RP 19:1131.

<sup>144</sup> *See, e.g.*, RP 24:1865-66

<sup>145</sup> *See* RP 19:1047, 1131-32, 1141-45; 28:2432-34, 2440-43, 2448-49.

<sup>146</sup> A different statute governs capacity charges. *See* RCW 35.58.570. The lawsuit did not involve any allegation that the County improperly used capacity charges.

Code required King County to obtain a Conditional Use Permit (“CUP”) to construct Brightwater.<sup>147</sup> Snohomish County’s EPF Ordinance (No. 04-019) authorized issuance of a CUP only if:

(4) The proposal, as conditioned[,] adequately mitigates adverse impacts to . . . economic development and other identified impacts; [and]

. . .  
(6) The project sponsor has proposed mitigation measures that provide substantial assistance to displaced or impacted businesses in relocating within the county.<sup>148</sup>

To comply with this Ordinance, the County deemed StockPot eligible to receive up to \$2 million in mitigation funds. In a section entitled “Mitigation of Brightwater Project Impacts,” the StockPot Agreement states:

As part of the mitigation of the Brightwater project impacts, King County shall commit \$2.0 million of mitigation funds to a job retention program to retain employment in the Puget Sound Region . . .<sup>149</sup>

To qualify, Stockpot had to employ a substantially similar number of employees (at least 300) for five years, and meet other conditions, including investing \$35 million in a new local business site.<sup>150</sup>

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<sup>147</sup> Findings of Fact & Conclusions of Law at 22, ¶¶ 85-86.

<sup>148</sup> Tr. Ex. 65 at 8; Findings of Fact & Conclusions of Law at 22, ¶ 86.

<sup>149</sup> Tr. Ex. 90 at 11.

<sup>150</sup> Tr. Ex. 90 at 9-11. The StockPot Agreement required StockPot to document that it met these requirements. If StockPot failed to meet the requirements, a formula provided for repayments to King County. Tr. Ex. 90 at 9-11. The Districts refer to the StockPot Agreement’s “claw-back” provision as evidence that the County paid StockPot to

2. The undisputed evidence is that Snohomish County's EPF Ordinance required mitigation of economic impacts and substantial assistance to displaced businesses.

The trial court erroneously stated in its Findings that the Growth Management Hearing Board ("GMHB") invalidated the entire EPF Ordinance on May 24, 2004. The evidence was that the GMHB directed Snohomish County to change parts of the EPF Ordinance, but upheld the mitigation criteria at issue:

The Board finds that the other criteria listed at SCC 30.42.C.090 and .100 are sufficiently clear that they are not impermissibly vague and over-reaching when applied to regional, state or federal EPFs.<sup>151</sup>

Both the Thurston County Superior Court and the GMHB (on remand) subsequently affirmed the appropriateness of the mitigation criteria.<sup>152</sup>

The requirements that King County sought to satisfy by this element of the StockPot settlement remained part of Snohomish County's Code.<sup>153</sup>

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preserve jobs, but the trial court rejected the same assertion after considering all of the trial testimony. As the County's witnesses testified, the County included the "claw-back" provision as further assurance that StockPot would comply with the agreement. RP 17:826-27.

<sup>151</sup> Tr. Ex. 70 at 17 (emphasis added). The referenced section, SCC 30.42.C.090, includes a typographical error, as the appropriate section is SCC 30.42.D.090. That section includes the condition that a sponsor of a regional EPF must have "proposed mitigation measures that provide substantial assistance to displaced or impacted businesses in relocating within Snohomish County . . ." Tr. Ex. 65 at 8.

<sup>152</sup> See CP 4124-44, 4146-70.

<sup>153</sup> Snohomish County also had appealed the GMHB decision and the outcome of that appeal was highly uncertain. Findings of Fact & Conclusions of Law at 22, ¶ 87. Former County Executive Kurt Triplett testified that even if the Thurston County Superior Court ultimately affirmed the GMHB decision and invalidated the then-existing Ordinance,

Based in part on its incorrect assumptions about the EPF Ordinance, the trial court held that the County's \$2 million payment to StockPot was not proper mitigation of Brightwater impacts, and should not have been included in sewer rates.<sup>154</sup> The trial court also concluded that ratepayers should not have had to pay the expense because it "primarily benefited the general public."<sup>155</sup>

But whether there was a benefit to the general public or not, the only reason King County paid the mitigation was to meet Snohomish County Code requirements and build Brightwater for the benefit of ratepayers who use the system. The undisputed evidence at trial was that King County would not have paid any mitigation but for Brightwater and the EPF Ordinance.<sup>156</sup> Former King County Executive Kurt Triplett and former WTD Director Christie True so testified at trial.<sup>157</sup> Had King County not agreed to provide substantial assistance to StockPot, it faced the significant risk that Snohomish County would deny, delay, or

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King County reasonably believed Snohomish County would enact a new EPF Ordinance containing the conditions at issue. The "likely outcome [was that] we're going to be required to have some sort of job relocation element in Snohomish County's siting ordinance and permitting process." RP 27:2348.

<sup>154</sup> Findings of Fact & Conclusions of Law at 23, ¶ 92, at 25, ¶ 104.

<sup>155</sup> Findings of Fact & Conclusions of Law at 25, ¶ 106.

<sup>156</sup> RP 27:2349.

<sup>157</sup> RP 24:1878-81; 27:2348-49.

condition King County's permits.<sup>158</sup> King County's agreement to provide mitigation to StockPot to satisfy the EPF Ordinance was not an arbitrary and capricious act. *See City of Tacoma v. Welcker*, 65 Wn.2d 677, 685-86, 399 P.2d 330 (1965) ("A 'stitch in time' has never been considered capricious.").

The trial court's "general public benefit" conclusion came from the *Okeson* line of cases, which applies only to determine a municipal corporation's implied authority – not where a statute expressly requires the action at issue and/or where a contract defines the parties' rights and obligations. Incidental benefit to the public does not change the character of a payment.<sup>159</sup>

The Districts also cannot challenge the mitigation payment to StockPot because it was part of a good faith settlement. The Districts offered no evidence of fraud, manifest abuse of discretion, or bad faith in the County's settlement of bona fide disputes with StockPot. *Warburton*,

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<sup>158</sup> Findings of Fact & Conclusions of Law at 22, ¶ 85 ("County was justifiably concerned . . ."); RP 24:1879-80; 27:2347-48. The Districts claimed that the EPF Ordinance did not apply because King County did not apply for a CUP. But at the time of the StockPot settlement, King County believed it would need to obtain a CUP. King County avoided a CUP only because, a year later, Snohomish County agreed (by virtue of a settlement) not to require one.

<sup>159</sup> *See City of Tacoma*, 108 Wn.2d at 806; *see also Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 687, 202 P.3d 924 (2009) (In deciding whether an action is sovereign or proprietary, "[t]he distribution of benefits is irrelevant.").

55 Wn.2d at 751-52; *Abrams v. City of Seattle*, 173 Wash. at 502 (city’s power to settle claims “does not depend on the possible ultimate decision for or against the validity of the asserted claim”).

3. The Contracts allow the StockPot mitigation costs.

The same authority to make good faith settlements and business decisions applies in the contractual context under the business judgment rule, since the County was acting in its proprietary capacity in making the mitigation payments.<sup>160</sup> The trial court erred in holding that the mitigation payment to StockPot was a general governmental cost, not a cost of the “Metropolitan Sewerage System” under the parties’ Contracts. Based on the conditions in the EPF Ordinance upheld as “permissible,” the County agreed to mitigate the economic impacts of Brightwater’s construction and provide assistance to a displaced business. These costs fall within the Contracts’ plain language as capital costs of the wastewater system.

4. The Districts suffered no damages as a result of the County’s payment of mitigation to StockPot.

The undisputed evidence at trial was that the County used bond proceeds to pay Brightwater’s capital costs, including any StockPot

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<sup>160</sup> See *Lane*, 164 Wn.2d at 882 (government treated differently when acting in proprietary rather than governmental capacity; “we review business decisions under the business judgment rule and infrequently reverse a business decision”).

expenses.<sup>161</sup> The County will repay those bonds over the next 30 years almost entirely through “capacity charges.”<sup>162</sup> Future users of the wastewater system will pay capacity charges directly to the County. The Contracts do not address capacity charges and the Districts do not represent users who pay those charges.<sup>163</sup>

The County established that current ratepayers pay only a fraction of the cost of the financing associated with the bonds the County issued.<sup>164</sup> Even for those costs, existing ratepayers will recoup virtually all of the costs.<sup>165</sup> To the extent the County used sewage disposal fees for the mitigation payment to StockPot, the trial court erred in granting any remedy to the Districts. The Districts admit that they “pass through” all of the County’s charges to their ratepayers, who are not parties to the case.<sup>166</sup>

5. The trial court erred in awarding prejudgment interest.

The trial court found that the StockPot mitigation payment was inappropriate because the expenditure “primarily benefited the general

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<sup>161</sup> RP 19:1047, 1131-32.

<sup>162</sup> RP 19:1047, 1131-32, 1141-45; 28:2432-34, 2440-43, 2448-49. The mitigation payment’s impact to ratepayers is \$524,000. RP 30:2835-86; King County’s Resp. to Plfs.’ Mot. for Award of Common Fund at 3 (May 27, 2011) (designated as “SCP”).

<sup>163</sup> A statute unrelated to the Districts governs capacity charges. *See* RCW 35.58.570.

<sup>164</sup> RP 19:1141-45; 28:2448-49; 30:2835-36.

<sup>165</sup> RP 19:1141-45; 28:2448-49; 30:2835-36.

<sup>166</sup> RP 31:2896, 2900.

public” rather than being proprietary in nature.<sup>167</sup> But if the expenditure was for a non-proprietary purpose requiring payment from the General Fund, then the County acted in its general governmental capacity and no prejudgment interest is awardable.<sup>168</sup> As a matter of sovereign immunity, a county “cannot, without its consent, be held to interest on its debts.” *See Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 455-56, 842 P.2d 956 (1993) (citations omitted); *see also Teevin v. Wyatt*, 75 Wn. App. 110, 876 P.2d 944 (1994) (no waiver of sovereign immunity without ordinance so providing). The Districts offered no evidence that the County waived its immunity for an award of prejudgment interest for a “General Fund” expense. *See also Union Elevator & Warehouse Co. v. Dep’t of Transp.*, 171 Wn.2d 54, 248 P.3d 83 (2011) (sovereign immunity not waived for prejudgment interest).

**G. The Trial Court Correctly Dismissed the Districts’ Allocation Claims After Trial.**

When Metro merged with King County in 1992, King County’s

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<sup>167</sup> Findings of Fact & Conclusions of Law at 23, ¶ 91, at 25, ¶ 106; RP 33:3021. Had the expense been held proprietary in nature, the General Fund would have had no obligation to reimburse the WQF. *See* RP 34:33-38, 40-42; *see also* Tr. Ex. 3 at 11 § 10 (liability incurred by Metro is its “sole liability”).

<sup>168</sup> The County has designated its briefing as supplemental clerk’s papers. *See* King County’s Resp. to Plfs.’ Mot. for Award of Common Fund (May 27, 2011); Decl. of Randall Thomsen in Oppos. to Plfs.’ Mot. for Award of Common Fund (May 27, 2011).

centralized services began incurring additional costs.<sup>169</sup> The County retained the accounting firm of Deloitte & Touche to advise it on how best to allocate the centralized costs to the County's departments, including WTD, to reflect the benefits they received from the County.

Deloitte evaluated various allocation methodologies, including the "time charges method," *e.g.*, time sheets for each County department or division. Deloitte concluded that it could not be shown that such a method would result in improved accuracy over other, less burdensome methods, and that it would be "counterproductive." It instead recommended that the County adopt a "direct budgeted" approach to allocate costs to benefited departments.<sup>170</sup> Under that approach, the County allocates centralized costs according to the share of the County's total operating budget that each benefited department represents.<sup>171</sup> Thus, if a particular department comprises 12 percent of the County's total operating budget, it is allocated 12 percent of the centralized costs. The County established at trial that this methodology provides a fair and reasonable estimate of the actual cost of services rendered.<sup>172</sup>

Following Deloitte's recommendation, the County allocated to

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<sup>169</sup> Tr. Ex. 15 at 1.

<sup>170</sup> Findings of Fact & Conclusions of Law at 27, ¶ 113; Tr. Ex. 15 at 7.

<sup>171</sup> Findings of Fact & Conclusions of Law at 26, ¶ 112.

WTD its share of centralized government expenses each year, including those incurred by “General Government Cost Pool,” which included costs of the County Executive, Council, and their staffs.<sup>173</sup> Those employees spend substantial time on WTD issues, which is not surprising given the size and complexity of WTD’s operating and capital budgets.<sup>174</sup> The trial court held, based on the trial evidence:

WTD receives significant benefit from the work performed by the units that comprise the General Government Cost Pool. But for the performance of those functions on a centralized basis by the units in the General Government Cost Pool, WTD would have to employ other employees and managers to perform those functions for itself.<sup>175</sup>

The King County Code requires the County to allocate administrative overhead as costs of the wastewater system’s operation and administration, calculated “in a fair and consistent manner, utilizing a methodology that best matches the estimated cost of the services provided to the actual overhead charge.” KCC 28.86.160.1.FP-9; *see also* KCC 4.04.045. King County demonstrated at trial that its allocations to WTD

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<sup>172</sup> Findings of Fact & Conclusions of Law at 27-28, 30, ¶¶ 117, 119-22, 130-31.

<sup>173</sup> Findings of Fact & Conclusions of Law at 26, ¶ 110.

<sup>174</sup> *See, e.g.*, Findings of Fact & Conclusions of Law at 27, ¶¶ 115, 129. The Executive and Council provide overall leadership and policy direction for WTD; oversee WTD’s capital program; participate in committees created as a result of the County’s merger with Metro; establish WTD’s operating budgets; establish sewage disposal and capacity charge rates; and deal with a host of other issues involved in a large and complicated enterprise such as WTD.

<sup>175</sup> Finding of Fact & Conclusions of Law 27, ¶ 115.

satisfy these standards. The County's accounting expert, Bob Wagner, and other witnesses testified that the County's methodology "best matches the estimated cost of the services provided to the actual overhead charge," particularly when factors such as cost, accuracy, and workability are considered.<sup>176</sup> The Districts did not offer any contrary evidence.

The trial court correctly concluded:

Plaintiffs bear the burden to establish that the County's allocation approach violates KCC § 4.04.045, and that the General Government Cost Pool allocations to WTD are unauthorized and/or breach the Contracts.

Plaintiffs have not carried their burden of proof. Plaintiffs have not shown that WTD does not benefit from the centralized services of the General Government Cost Pool whose costs are allocated to WTD; the evidence is to the contrary. Moreover, plaintiffs have not established that the allocation method used by the County is unfair, applied inconsistently, or does not "best match" the estimated cost of the services to the actual allocated charges.<sup>177</sup>

The County's allocations are required under the "Local Government Accounting Act," RCW 43.09.210, which requires that each department pay "full and full value" for all services rendered to it. "True and fair value" is applied "flexibly and practically"; proving "precise

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<sup>176</sup> RP 30:2820-21; *see also* RP 27:2357-59; 28:2424. Bob Cowan, King County's former Director of Office of Management and Budget, testified that there is no current allocation methodology that would be a "better match." RP 30:2736. Both Mr. Cowan and Mr. Wagner also testified that the County's methodology was consistent with GAAP. RP 29:2656; 30:2815-18, 2823.

<sup>177</sup> Findings of Fact & Conclusions of Law 30, ¶¶ 128-29.

value” is not required where it would be impracticable. *Bonney Lake*, 173 Wn.2d at 592. The County established that if anything, departments in the General Government Cost Pool undercharge WTD for the services it receives because the County does not consider WTD’s capital budget in its allocation methodology.<sup>178</sup> If the County’s allocation model included capital budgets, allocation to WTD for its share of centralized services would nearly double.<sup>179</sup>

In their brief, the Districts entangle the issues of allocation methodology and adequate documentation. The Districts offered no evidence that the County’s methodology was inappropriate.<sup>180</sup> The Districts offered two State Auditor Office (“SAO”) reports and the testimony of SAO representative Chris Cortines. But the SAO reports criticize only an alleged lack of documentation.<sup>181</sup> Mr. Cortines testified

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<sup>178</sup> RP 30:2790-91.

<sup>179</sup> RP 30:2791-94. The Districts also allege that an arithmetic error resulted in a \$200,000 overallocation to WTD. The Districts did not meet their burden to show that an error of that size affected sewage disposal rates based on total monetary requirements in excess of several hundred million dollars. If an error occurred, the amount is immaterial in light of the allocation of \$19 million for centralized costs among operating budgets in excess of \$1 billion. *See, e.g.*, Finding of Fact & Conclusions of Law at 31, ¶ 132.

<sup>180</sup> The Districts argue that an Office of Management and Budget “study” recommended a “time spent” method. But the “study” was a memo of a non-testifying employee who had surveyed other jurisdictions. *See* Tr. Ex. 130. The County accepted some of the employee’s recommendations and rejected others. RP 21:1495-1501; 22:1615-21.

<sup>181</sup> Findings of Fact & Conclusions of Law at 27, ¶ 116; Tr. Exs. 107, 187; *see also* RP 23:1685-86 (Auditor did not instruct any change to allocation approach); 27:2360 (“[T]he fundamental disagreement [with the Auditor] was essentially about the documentation, and that they believed our overhead method met the standard accepted practices . . .”).

that the audits did not challenge the County's methodology.<sup>182</sup>

The 2005 Audit report recommended only that "the County document and demonstrate that general government costs allocated to other funds are reflective of the fair and true value of services actually rendered to those funds."<sup>183</sup> In response, the County reevaluated its approach to documentation. It also eliminated the costs of the County Executive and Council for 2008 and subsequent budget years. The testimony at trial was that if the Auditor thought a material problem existed with the County's allocation methodology, the Auditor would have identified the problem in its annual financial audits. But the Auditor did not make any such finding.<sup>184</sup>

In 2009, the Auditor again questioned WTD's documentation of benefits. The trial testimony was that the County offered documentation but the Auditor declined to review the County's records.<sup>185</sup> The County's accounting expert, Mr. Wagner, did review extensive County documents, interviewed numerous County employees, and concluded that sufficient

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<sup>182</sup> RP 21:1431-32; *see also* RP 30:2810-13 (State Auditor's financial audits not raise any issue of methodology).

<sup>183</sup> Tr. Ex. 107 at 11 (emphasis added); *see also* Findings of Fact & Conclusions of Law at 27, ¶ 116.

<sup>184</sup> RP 21:1416-23; 30:2810-13.

<sup>185</sup> RP 27:2264-65; *see also* Findings of Fact & Conclusions of Law at 27, ¶ 117.

documentation supported the allocations.<sup>186</sup> The trial court weighed this evidence, correctly finding:

Sufficient documentation exists to support the County's allocations. During the course of the 2009 performance audit, the County offered to provide documentation to the Auditor's representative, including meeting minutes, staff reports, and rate models, but the Auditor did not accept the County's offer to review that documentation.<sup>187</sup>

The Districts also failed to offer proof of any damages from alleged inadequate documentation. In fact, Mr. Cortines testified that the SAO did not know whether, if documentation existed, the allocation to WTD would go up or down.<sup>188</sup>

The Districts also complained that the County did not perform a "true-up" of allocated costs using actual data at the end of each year. But King County began performing true-ups on a going-forward basis as soon as the Auditor identified the issue.<sup>189</sup> As the trial court concluded, "there is nothing in the law or the facts of this case that requires the County to perform a retroactive 'true up' of centralized costs allocated to WTD," and "the results of such a true-up would be immaterial in the context of

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<sup>186</sup> RP 30:2822-23.

<sup>187</sup> Finding of Fact & Conclusions of Law at 27, ¶ 117.

<sup>188</sup> RP 21:1428-30.

<sup>189</sup> RP 23:1692.

WTD's and/or the County's overall annual budgets.”<sup>190</sup>

Finally, the Districts argue that the County violated a contractual one-percent limitation for “general overhead administrative costs.” The trial court correctly dismissed that claim after the Districts rested, holding that under the Contracts, the “one percent” clause applies to costs other than WTD administrative and operational costs. The Contract states:

[King County] shall determine its total monetary requirements for the disposal of sewage during the next succeeding calendar year. Such requirements shall include the cost of administration, operation, maintenance, repair and replacement of the Metropolitan Sewerage System, . . . plus not to exceed 1% of the foregoing requirements for general administrative overhead costs.<sup>191</sup>

As the trial court correctly ruled, the word “plus” preceding the one-percent clause forecloses the Districts' argument.<sup>192</sup> The phrase “cost of administration and operation” allows WTD to include in its monetary requirements all administrative and operating activities it would pay if it was a stand-alone utility. The “general administrative overhead” clause authorizes the County to use sewage disposal charges to pay other general overhead costs unrelated to water pollution abatement, albeit limited to

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<sup>190</sup> Finding of Fact & Conclusions of Law at 31, ¶ 132; RP 23:1692-94.

<sup>191</sup> Tr. Ex. 3 at 7 (emphasis added).

<sup>192</sup> RP 25:1948.

one percent.<sup>193</sup> The County never has included any costs within the total monetary requirements under the one-percent clause.<sup>194</sup>

**H. The Trial Court Correctly Dismissed the Districts' Credit Enhancement Fee Claim After Trial.**

Under the RWSP, the County finances WTD's capital program by "long-term general obligation or sewer revenue bonds . . . ." KCC 28.86.160.C.2.FP-13. The County mainly uses sewer revenue bonds secured with a first lien on WTD revenues.<sup>195</sup> King County, however, also can issue Long-Term General Obligation ("LTGO") bonds for WTD's capital program. The County secures LTGO bonds with the County's "full faith and credit" and a pledge of property tax revenues as well as sewer revenues.<sup>196</sup> These "double barrel bonds," with two potential sources of repayment, bear a lower interest rate because the bond markets perceive the bonds as more secure. As a result, WTD pays substantially less in financing costs when the County issues LTGO bonds on WTD's behalf rather than sewer revenue bonds.

To finance part of WTD's capital program, in 2005, 2008, and 2009, the County issued three series of LTGO bonds on WTD's behalf,

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<sup>193</sup> See, e.g., RP 19:1042-43 (1% provision addresses costs entirely unrelated to WTD).

<sup>194</sup> RP 19:1043-44.

<sup>195</sup> RP 29:2534; Tr. Ex. 438.

<sup>196</sup> RP 29:2534.

exceeding \$737 million. In exchange for its guaranty and the benefits conferred, the County assessed WTD (like other benefited divisions) a “credit enhancement fee” of one-half of the difference between financing costs for sewer revenue and LTGO bonds. As the trial court found,

[t]he credit enhancement fee is measured using basis points, one basis point being 1/100 of a percent. For LTGO bond issuances prior to 2009, the County annually charges WTD an amount equal to 12.5 basis points, multiplied by the outstanding principal balance of the bonds. For the LTGO principal balance in 2009 and subsequent years, the County charges an amount equal to 10 basis points, reflecting an estimated narrowing of the “spread.”<sup>197</sup>

As shown at trial, if WTD financed its capital program only from sewer revenue bonds, WTD would pay millions more in financing costs over the duration of the bonds than it pays for LTGO bonds of similar size and maturity.<sup>198</sup> In addition to lower financing rates, the trial court found that WTD benefited from LTGO bonds by avoiding the cost of establishing a debt service reserve.<sup>199</sup>

But there are costs to the County for issuing LTGO bonds for WTD projects, including lost debt capacity, risk of a reduction in the County’s credit rating, and increased borrowing costs for other County

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<sup>197</sup> Finding of Fact & Conclusions of Law at 32, ¶ 139.

<sup>198</sup> RP 29:2556-59; Tr. Ex. 447.

<sup>199</sup> Findings of Fact & Conclusions of Law at 33, ¶¶ 142-144. For sewer revenue bonds, WTD must establish a debt reserve. It holds the reserve in conservative investments and

projects.<sup>200</sup> Based on the testimony of the County's expert economist, Dr. Alan Hess, the trial court found that as the County's total debt (leverage) increases, it will pay a higher interest rate on subsequent issuances of LTGO bonds.<sup>201</sup> Dr. Hess also identified other costs to the County from reducing the County's limited debt capacity and assuming the risk of a WTD default.<sup>202</sup> Dr. Hess testified that the actual costs to the County exceeded the credit enhancement fee it charged WTD.<sup>203</sup>

A case on which the Districts rely, *Griffin v. City of Tacoma*, 49 Wash. 524, 529, 95 P. 1107 (1908), in fact held that a City was under "legal obligation to see that the general fund is seasonably reimbursed" from a water fund when the general fund provided funds to construct an addition to the water system.<sup>204</sup> The same principle applies here: WTD

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earns less than the financing costs for the bonds, resulting in additional costs to WTD. RP 29:2536, 2546-48; Tr. Exs. 438, 447. LTGO bonds do not require a debt reserve.

<sup>200</sup> Findings of Fact & Conclusions of Law at 34, ¶¶ 147-51.

<sup>201</sup> Findings of Fact & Conclusions of Law at 34, ¶ 147.

<sup>202</sup> Findings of Fact & Conclusions of Law at 34-35, ¶¶ 147-51. The Districts argue that the County must "quantify" these costs, but neither the Contracts nor the law require quantification.

<sup>203</sup> RP 29:2624-25.

<sup>204</sup> While the trial court correctly ruled that the "Local Government Accounting Act," RCW 43.09.210 ("Accountancy Act") does not allow a private right of action, the County still must comply with the Act's accounting standard. If the Districts prevailed on their credit enhancement claim, WTD ratepayers would, in effect, benefit at County's taxpayers' expense, in violation of the Accountancy Act. "True and fair value" is applied "flexibly and practically"; proving "precise value" is not required where it would be impracticable. *Bonney Lake*, 173 Wn.2d at 592; *see also Lane v. City of Seattle*, 164

must “seasonably reimburse” the County for the value of its guarantee.<sup>205</sup> RCW 43.09.210, which requires that “full and full value” shall be paid for “[a]ll services rendered by one department, public improvement, undertaking, institution, or public service industry to another,” requires such reimbursement.

The Districts contend that the County can use the General Fund for any legitimate purpose. The issue, however, is not whether the General Fund can lawfully incur the cost, but whether WTD must reimburse the County for the value of services WTD receives and the costs the County incurs. WTD is not exempt from the obligation to pay the “true and full value” of services it receives from the County.<sup>206</sup> In fact, the trial court correctly concluded that the fee could fairly be higher, “since the fee the County receives is only one-half of the spread between the interest rate of

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Wn.2d 875, 889, 194 P.3d 977 (2008) (Lake Forest Park must reimburse Seattle for its share of fire hydrant costs under RCW 43.09.210).

<sup>205</sup> See also 1974 Wash. Att’y Gen. Op. No. 21 (Accountancy Act violated if district’s general operating fund pays for interscholastic athletic activities without reimbursement from the student body fund); 1961 Wash. Att’y Gen. Op. No. 29 (county permitted to make temporary loan from one solvent fund to another, but the Accountancy Act requires charging interest to avoid a gift); *Uhler v. City of Tacoma*, 87 Wash. 1, 151 P. 117 (1915) (expenses relating to bond issuance for waterworks not payable from general fund).

<sup>206</sup> See 1965-1966 Wash. Att’y Gen. Op. No. 43 (county general fund treated the same as every other governmental unit for purposes of crediting and deducting receipts).

a LTGO bond and a revenue bond of like size and maturity . . . .”<sup>207</sup>

The Contracts authorize the County’s assessment of a credit enhancement fee for bonds issued to build WTD’s capital facilities.<sup>208</sup> Section 5 of the Contracts authorizes the inclusion of the costs of financing WTD’s capital program, which includes the credit enhancement fee, as well as “the facilities to be constructed . . . as part of the [RWSP].”

Finally, the credit enhancement fee is no more a “hidden tax” than any other charge for services one department provides to another.

Applying *Covell*, a direct relationship exists between the County’s fee and the services WTD receives; the fee represents a portion of the benefits WTD receives from financing part of its capital program with LTGO bonds rather than sewer revenue bonds. *See Lane*, 164 Wn.2d at 890 (rejecting Lake Forest Park’s argument that reimbursement of hydrant charges would impose a tax); *see also King County Fire Prot. Dists. No. 16 v. Housing Auth. of King County*, 123 Wn.2d 819, 833, 872 P.2d 516 (1994) (“Where the charge is related to a direct benefit or service, it is generally not considered a tax . . .”).

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<sup>207</sup> Findings of Fact & Conclusions of Law at 35, ¶ 152. The County’s expert, Dr. Hess, testified that the charge should be the entire difference between the financing costs, *i.e.*, the entire benefit conferred on WTD by the County’s taxpayers. RP 29:2624-25, 2635.

<sup>208</sup> The RWSP, in fact, dictates that “[c]onsideration [be] given to competing demands for use of the county’s overall general obligation debt capacity. . . .” KCC 28.86.160.C.2.FP-13 (emphasis added).

**I. The Trial Court Erred in Dismissing on Summary Judgment King County's Affirmative Defenses of Offset and Recoupment.**

The County contended below that the General Fund could offset the value of benefits WTD and the Districts received from the County, including the full value of the County's LTGO bond guarantees.<sup>209</sup> The trial court dismissed the County's defense, holding that the Accountancy Act did not require offset or recoupment and the unjust enrichment doctrine did not apply.<sup>210</sup> That ruling was in error. If this Court affirms the judgment against King County on the Districts' claim related to the mitigation payment to StockPot, or reverses any of the other rulings favoring the County, it also should reverse the summary judgment ruling dismissing the County's offset and/or recoupment defense.

While the trial court previously held that the Accountancy Act confers no private right of action, the County does not seek affirmative relief under the Accountancy Act, but merely application of its principle that a government entity must pay "true and full" value for services by another department. RCW 43.09.210. Recoupment is a defense, not a

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<sup>209</sup> The County's briefing related to its entitlement to claim an offset of the value of benefits WTD and the Districts received is found at CP 16689-703, 17592-613.

<sup>210</sup> RP 10;44; CP 17879-81; Order Granting in Part & Den. in Part Plfs.' Mot. for Partial S.J. RE: Alleged Bond & Ins. Benefits (June 4, 2010) (designated as "SCP").

claim for affirmative relief.<sup>211</sup> *Seattle First Nat'l Bank, N.A. v. Siebol*, 64 Wn. App. 401, 407, 824 P.2d 1252 (1992) (“The defense goes to the justice of the plaintiff’s claim, and although no affirmative judgment can be had, recoupment is available as a defense even when barred as an affirmative cause of action”) (emphasis added). *See also Lane*, 164 Wn.2d at 889 (Accountancy Act requires Lake Forest Park to reimburse Seattle for share of hydrant costs).

The County must treat the General Fund the same as any other governmental department for purposes of the Accountancy Act. *See* 1965-1966 Wash. Att’y Gen. Op. No. 43 (county general fund is treated the same as other governmental units for purposes of crediting and deducting receipts); *see also Griffin*, 49 Wash. at 529 (city under “legal obligation to see that the general fund is seasonably reimbursed” from water fund when general fund pays capital expenses of water system).

King County also based its offset and recoupment defenses on the doctrine of unjust enrichment. *Bailie Communic’ns v. Trend Bus. Sys.*, 61

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<sup>211</sup> As stated by one treatise:

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. Thus, recoupment is a doctrine of an intrinsically defensive nature. . . . As a defense, recoupment cannot be used to obtain affirmative relief. Moreover, recoupment applies only by way of reduction, mitigation, or abatement of damages claimed by the plaintiff and is not an independent action.

20 AM. JUR. 2D *Counterclaim, Recoupment and Setoff* § 5 (2010) (citations omitted).

Wn. App. 151, 159-60, 810 P.2d 12 (1991). It would be inequitable if the Districts could obtain reimbursement of the StockPot mitigation or other WTD expenditures that directly benefit them, and not pay the full value of services they received from the County. In effect, County taxpayers would be paying costs that WTD's ratepayers should bear.

#### V. CONCLUSION

The Court should affirm the trial court with two small exceptions. This Court should (1) reverse the StockPot job mitigation ruling, and (2) permit King County to recoup and offset against any recovery the value of benefits the County conferred on the Districts, including the value of the County's guarantee of bonds issued on WTD's behalf.

DATED this 13<sup>th</sup> day of April, 2012.

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## GLOSSARY

Allocation Claims – Term used to describe the Districts’ challenges to the County’s allocation of certain central service expenses to Wastewater Treatment Division (“WTD”).

Biosolids – The solids produced by wastewater treatment processes that can be beneficially recycled.

Brightwater – Term used to describe either the “Brightwater Treatment Plant” or “Brightwater Treatment System.” The Brightwater Treatment Plant is a new regional wastewater treatment plant recently constructed by King County in Snohomish County. The Brightwater Treatment Plant is part of the Brightwater Treatment System, which comprises the treatment plant, conveyance lines, pump stations, and additional facilities constructed in King and Snohomish Counties.

Capacity Charge – A “hook-up” fee levied on a new Wastewater Treatment Division (“WTD”) customer to recover capital costs needed to construct facilities to serve new customers. Capacity charges are not the subject of the contracts with the component agencies but governed by RCW 35.58.570.

Component Agencies – A phrase used to collectively describe those entities that have “Agreements for Sewage Disposal” with King County. Component agencies include 34 entities comprised of cities, sewer, utility districts, the State of Washington, a limited liability corporation, and an Indian tribe.

CSO – Combined Sewer Overflow – A facility or wastewater collection system in which sanitary sewage and stormwater runoff are combined. A CSO facility is designed to allow for overflows and discharges directly into other water bodies, such as Puget Sound, Lake Washington, or the Duwamish River, when volumes exceed the capacity of the wastewater collection system.

Contracts – Term used to refer to the “Agreements for Sewage Disposal” between the component agencies and King County.

Credit Enhancement Fee Claim – Term used to describe the Districts’ challenges to King County’s charge to the Wastewater Treatment Division

("WTD") for the issuance of Long-Term or Limited Tax General Obligation ("LTGO") bonds on WTD's behalf.

Culver Fund Claim – Term used to describe the Districts' challenges to the use of 1.5% of Wastewater Treatment Division's ("WTD") operating budget for water quality improvement activities. The Culver Fund is codified as Financial Policy 8 (KCC 28.86.160.C.I.FP-8) as adopted by the Regional Wastewater Services Plan ("RWSP").

CX – Current Expense – A term used to describe the King County current expense fund, also known as the "General Fund," established under RCW 36.33.010.

Districts – A term used to describe the Appellants Cedar River Water & Sewer District and Soos Creek Water & Sewer District.

DNRP - Department of Natural Resources and Parks – The department of King County in which the Wastewater Treatment Division ("WTD") and the Water Land Resources Division ("WRLD") is located. The former director of DNRP was Pam Bissonnette. The current director of DNRP is Christie True.

Double-Barrel Bonds – Bonds issued by King County that are secured both by the County's tax revenue but also a second revenue stream, such as sewage disposal fees. The term is used at times to describe "Long-Term" or "Limited Tax General Obligation" ("LTGO") bonds.

EPF – Essential Public Facilities – Term used under the Growth Management Act, RCW 36.70A.200(1), to describe facilities that are typically difficult to site because of perceived impacts to surrounding areas, such as airports, jails, sewage treatment plants, and landfills.

EMP – Environmental Mitigation Policies – The policies in the Regional Wastewater Services Plan ("RWSP") that provide guidance and direction to King County for mitigation relating to the Wastewater Treatment Division's ("WTD") capital program and construction activities. The policies are codified in the King County Code at KCC 28.86.140.

FP – Financial Policies – The policies in the Regional Wastewater Services Plan ("RWSP") that provide guidance and direction to King

County regarding financial activities. The policies are codified in the King County Code at KCC 28.86.160.

General Fund – A term used to describe that fund established under RCW 36.33.010. The General Fund also may be referred to as the “CX” or “Current Expense” fund.

I/I, I&I – “Inflow/Infiltration” – A term used to describe water that enters the wastewater system that does not originate from wastewater customers. For example, I&I can originate from surface water or groundwater that enters through manholes or leaks in pipes.

LTGO – Long-Term or Limited Tax General Obligation – A term used to describe a particular type of bonds issued by King County that is secured by the tax revenue of King County. The bonds may, at times, also be referred to as “GO” bonds (i.e., General Obligation). If repayment of the bonds is also secured by a second revenue source, LTGO bonds may also be referred to as “double-barrel” bonds.

Metro – Municipality of Metropolitan Seattle – The former local governmental entity established under RCW 35.58 *et seq.* Metro merged with King County in 1992 as a result of the United States District Court’s ruling in *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885 (W.D. Wash. 1990).

MWPAAC – Metropolitan Water Pollution Abatement Advisory Committee – A committee established by statute, RCW 35.58.210, that advises King County on its water pollution abatement functions.

OMB – Office of Management and Budget – The department of King County responsible for establishing the County’s budget and, for purposes germane to this lawsuit, preparing the cost allocation methodology applied to the allocation of certain central services. A former director of OMB was Bob Cowan. The current director is Dwight Dively.

Parity Bonds – A term that is occasionally used as a synonym for sewer revenue bonds.

Reclaimed Water Claim – Term used to describe the Districts’ challenges to King County’s development of a reclaimed water distribution system as

part of Brightwater. The physical distribution system for the reclaimed water is commonly referred to as the “backbone.”

Robinswood – Term used to describe a seminal meeting of the Regional Water Quality Committee (“RWQC”) that occurred on October 29, 1998 at the Robinswood Mansion in Bellevue, Washington, in which the RWQC reached an agreement on the final financial policies to be contained within the Regional Wastewater Services Plan (“RWSP”).

RWQC – Regional Water Quality Committee – A regional committee established as a result of the merger of King County and the Municipality of Metropolitan Seattle (“Metro”). The RWQC develops, reviews, and recommends countywide policies and plans for water quality and sewer service issues. Members include representatives from King County, City of Seattle, suburban cities, and sewer districts.

RWSP – Regional Wastewater Services Plan – The current version of the comprehensive plan developed pursuant to Metro’s enabling statute, RCW 35.58.200. The RWSP is codified in the King County Code at KCC 28.82 *et seq.*, 28.84 *et seq.*, and 28.86 *et seq.*

Sewer Revenue Bonds – Term used to describe bonds issued on behalf of the Wastewater Treatment Division (“WTD”) that are secured by sewer revenues. Sewer Revenue Bonds occasionally are referred to as parity bonds.

Snohomish County Mitigation Claim – A term used to describe the Districts’ challenges to the County’s agreement to fund particular mitigation projects as part of a settlement with Snohomish County.

StockPot or StockPot Soups – A business displaced as a result of Brightwater’s construction.

StockPot Claim - A term used to describe the Districts’ challenges to the County’s payment of relocation assistance to StockPot.

SWM – Surface Water Management – A section within King County’s Water and Land Resources Division (“WLRD”).

WLRD – Water and Land Resources Division – A division in King County within the Department of Natural Resources and Parks (“DNRP”).

WLRD manages a portion of the responsibilities formerly performed by Metro. WLRD is a “sister” division to the Wastewater Treatment Division (“WTD”). The current director is Mark Issacson.

WTD – Wastewater Treatment Division – A division in King County within the Department of Natural Resources and Parks (“DNRP”). WTD performs most of the responsibilities formerly performed by Metro. Former directors of WTD were Don Theiler and Christie True. The current director is Pam Elardo.

WQF – Water Quality Fund – A fund that receives sewage disposal revenues generated by the Wastewater Treatment Division (“WTD”), including sewage disposal fees from the component agencies. WTD uses the WQF to pay its operating and a small portion of its capital costs.