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SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re:

BOND ISSUANCE OF GREATER WENATCHEE  
REGIONAL EVENTS CENTER PUBLIC FACILITIES DISTRICT

\* \* \* \* \*

GREATER WENATCHEE REGIONAL EVENTS CENTER PUBLIC  
FACILITIES DISTRICT,

Appellant,

v.

CITY OF WENATCHEE, WASHINGTON,

Respondent.

---

**BRIEF OF APPELLANT**

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ORIGINAL

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## I. INTRODUCTION

This appeal raises a question of fundamental importance to local and state government agencies in Washington -- the meaning of "debt" under Article VIII of the Washington Constitution. In particular, this case addresses whether constitutional and statutory limitations on indebtedness restrict the ability of one public entity to promise to loan money to another public entity, a common form of financing and financial management among Washington's governmental agencies.

The proposed interlocal agreement at issue would provide for loans from the City of Wenatchee, Washington (the "City") to the Greater Wenatchee Regional Events Center Public Facilities District (the "District"), to be repaid with interest by the District. The loans would, if and when necessary, support the District's debt service payments on District municipal bonds that would be used to refinance \$41.8 million of outstanding bond anticipation notes.

The City's contingent loan obligations under the proposed Interlocal Agreement do not constitute "debt" of the City subject to the limitations of Article VIII for several independent reasons: (1) the City would be *lending* money to the District, not *borrowing*, and "debt" in the constitutional sense requires borrowing; (2) the City's obligation to make loans, if any, is contingent on future events that cannot now be known, and contingent obligations are not "debt" subject to Article VIII; and, (3) "debt" arises only when a borrowing entity pledges its future general tax

revenues to repayment of the borrowing, and the City would not do so here.

**II. ASSIGNMENTS OF ERROR AND RELATED ISSUES**

**A. Assignments of Error.**

1. The trial court erred in entering its September 8, 2011 Order Regarding City of Wenatchee's Motion for Summary Judgment, granting the City's Motion for Summary Judgment and denying the District's Motion for Summary Judgment (the "Order"), concluding that the City's obligations under the proposed contingent loan agreement constitute "debt" of the City under Article VIII, § 6 of the Washington Constitution and RCW 39.36.

2. The trial court erred in entering the Order, concluding that the City's total potential future loan obligations over the lifetime of the bonds issued by the District must be counted against the City's debt limit.

3. The trial court erred in entering the Order, concluding that the City's obligations under the proposed contingent loan agreement exceed the City's debt limit under RCW 39.36.

4. The trial court erred in entering the Order, concluding that interest payments, as well as principal payments, must be counted against the City's debt limit.

5. The trial court erred in entering the Order, concluding that the City's obligations under the proposed contingent loan agreement pledged the City's full faith and credit and exceeded the City's rights and authority.

6. The trial court erred in considering Exhibit 1 to the Declaration of Deanne McDaniel, and references thereto and reliance thereon in ¶¶ 10-13 of that Declaration.

7. The trial court erred in considering the Declaration of Steve Smith in Support of the City of Wenatchee's Summary Judgment Briefing and Exhibit 1 thereto.

**B. Issues Pertaining to Assignments of Error.**

1. Does the City's potential obligation to make future loans to the District under the proposed Contingent Loan Agreement (the "City's Obligation") constitute "debt" of the City subject to the restrictions of Art. VIII, § 6 and RCW 39.36, where the City would, if required, be *lending* money to the District, not *borrowing* money? (Assignments of Error 1 and 3)

2. Does the City's Obligation constitute "debt" of the City subject to the restrictions of Art. VIII, § 6 and RCW 39.36, where the City's obligation to make loans, and the amount and timing of any loans

that might be required, are contingent upon future events that cannot now be ascertained? (Assignments of Error 1, 2, and 3)

3. Does the City's Obligation constitute "debt" of the City subject to the restrictions of Art. VIII, § 6 and RCW 39.36, where the City is not obligated to borrow money payable from general taxes to fund any loans, but, instead, has the sole discretion to determine the source of loan funding? (Assignments of Error 1, 3, and 5)

4. Does the City's Obligation constitute "debt" of the City subject to the restrictions of Art. VIII, § 6 and RCW 39.36, where the creditors of the District are explicitly denied any recourse against the City and precluded from seeking repayment of the District's debts from the City, the City's assets, the City's taxpayers, or the City's future revenues? (Assignments of Error 1, 3, and 5)

5. Does the City's Obligation constitute "debt" of the City subject to the restrictions of Art. VIII, § 6 and RCW 39.36, where the District has the absolute and unconditional obligation to repay any loans? (Assignments of Error 1, 3, and 5)

6. If the City's Obligation constitutes City "debt," should the entire amount of potential City loans be counted against the City's debt limit, where any loans the City might be required to make would occur, if

at all, only at defined intervals in the future and in amounts that depend upon future events? (Assignments of Error 2 and 3)

7. If the City's Obligation constitutes City "debt," is interest, as well as principal, to be counted against the City's debt limit? (Assignment of Error 4)

8. Does the agreement setting forth the City's Obligation pledge the City's full faith and credit and exceed the City's rights and authority, where the City would not pledge its general taxing authority? (Assignment of Error 5)

9. Should the trial court have considered unauthenticated hearsay and irrelevant documents and references thereto in the declarations submitted by the City in violation of Civil Rule 56(e) and Evidence Rules 802, 402, and 901? (Assignments of Error 6 and 7)

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

#### **A. Statement of Facts.**

##### ***1. The Parties and the Regional Center.***

The District is a public facilities district and a municipal corporation organized under RCW 35.57. CP 93. The City is a non-charter code city operating under RCW 35A. CP 93.

The District was formed solely for the purpose of constructing, operating, and maintaining the Greater Wenatchee Regional Events Center

("Regional Center"). Located within Wenatchee's redeveloping waterfront district, the Regional Center is a 167,531 square foot facility seating approximately 4,300 people. The Regional Center hosts the Wenatchee Wild hockey team, concerts, trade shows, family shows, sporting events, rodeos, motocross, agricultural shows, consumer shows, community events, and other gatherings. CP 321-25. Construction of the Regional Center began on September 12, 2006, and was completed in November 2008. CP 321.

## ***2. Interlocal Agreements Governing the District's Operations and Financing of the Regional Center.***

The District was formed by an Interlocal Agreement dated June 15, 2006 (the "June 2006 Interlocal Agreement") between the City, the Counties of Chelan and Douglas, the Cities of East Wenatchee, Cashmere, Chelan, Rock Island, and Entiat, and the Town of Waterville, for the sole purpose of constructing and operating the Regional Center. CP 101-15.<sup>1</sup> The June 2006 Interlocal Agreement authorized the District to finance acquisition and operation of the Regional Center. CP 104-05. In order to support the financing, the June 2006 Interlocal Agreement required the District to impose a sales tax within the boundaries of the participating

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<sup>1</sup> Under the Interlocal Cooperation Act, RCW 39.34, Washington municipalities are authorized to enter into interlocal agreements to finance and carry out joint endeavors cooperatively. RCW 35.57 authorizes municipalities to form public facilities districts to finance, construct, own, operate, and maintain regional events centers, and to impose charges, taxes, and fees.

counties, and authorized the District to impose admissions taxes, parking taxes, and other taxes. CP 105.

The June 2006 Interlocal Agreement makes clear that any debt the District issues to finance purchase of the Regional Center is the District's alone, and that the District's creditors have no recourse to the assets or property of the City or any of the other parties to the Interlocal Agreement.

All liabilities incurred by the District shall be satisfied exclusively from the assets, credit, and property of the District, and no creditor or other person shall have any right of action against or recourse to the parties hereto, their assets, credit, or services, on account of any debts, obligations, liabilities or acts or omissions of the District.

CP 105. The City's ordinance approving its participation in the District (consistent with those of the other cities and counties that are District members) contains substantively identical language. CP 271. The District's Charter also contains such language and, in addition, prohibits the District from creating any liability that would allow recourse to the assets of its members, including the City. CP 279-81.

To carry out efficiently the design, construction, financing, and accounting activities necessary to construct the Regional Center, the City and the District entered into a separate Interlocal Agreement for the Regional Center on September 6, 2006 (the "September 2006 Interlocal Agreement"), in which the City agreed to make certain contributions of

property and to undertake the planning and administrative functions related to development and construction of the Regional Center. CP 117-23. To support District financing of the Regional Center through the sale of municipal bonds, the City agreed in the September 2006 Interlocal Agreement to execute a contingent loan agreement "in a form approved by the [District]," which would, to the extent the taxes and operating income received by the District are insufficient to cover the District's semi-annual debt service payments, require the City to loan funds to the District to cover any temporary deficiency. CP 119-20.

In November 2008, the District issued short-term Bond Anticipation Notes (the "2008 Notes") in the total principal amount of \$41,770,000 that allowed purchase of the Regional Center. CP 94, 301-40. As the Official Statement describing the 2008 Notes states, "[i]f necessary," interest on the Notes is to be repaid "from the proceeds of loans received by the District from the City under the terms of the Contingent Loan Agreement between the District and the City." CP 301. However, the Official Statement repeatedly makes clear that the 2008 Notes "are not an obligation of the State, the City, or another municipal corporation, subdivision or agency of the State other than the District." CP 301, 308, 311, 314.

In accordance with its obligation under the September 2006 Interlocal Agreement, the City on November 13, 2008 entered into a contingent loan agreement, in which it agreed to loan money to the District sufficient to cover the anticipated interest payments on the 2008 Notes to the extent taxes and operating income collected by the District are insufficient to cover interest obligations related to the 2008 Notes. CP 424-37 (the "2008 Contingent Loan Agreement"). Pursuant to that Agreement, the City has made loans to the District totaling \$2,617,521.89, including loans of \$230,000 made in 2009, \$1,591,681.20 in 2010, and \$795,840.63 in May 2011. The City anticipates it will make another loan to the District of \$795,840.63 under the 2008 Contingent Loan Agreement in November 2011, so that the District can pay interest on the 2008 Notes coming due on December 1, 2011. CP 94. The City did not fund these loans from new City borrowings. RP 59-60.

Although the Regional Center operated at a loss in 2009, its financial performance has steadily improved. Revenues exceeded expenses in 2010 and, but for legal expenses, revenues are expected to exceed expenses again in 2011. CP 545-46.

### ***3. The Proposed 2011 Contingent Loan Agreement.***

Because of unfavorable bond market conditions in 2008, the 2008 Notes were issued as a temporary funding mechanism. CP 94. In

anticipation of the maturity of the 2008 Notes on December 1, 2011, the District took steps to issue bonds in early 2011. On June 23, 2011, the District adopted a Motion reaffirming its commitment to issue Revenue and Special Tax Bonds (the "2011 Bonds") to refinance the 2008 Notes. CP 196. In support of the 2011 Bonds, the Motion encouraged the City to work with the District to adopt a Contingent Loan Agreement so that the City could make loans to the District "if and to the extent" the District's revenues are insufficient to meet debt service on the 2011 Bonds, but recognized that "[a]ll liabilities incurred by the District, including but not limited to the [2011] Bonds, are obligations solely of the District and shall not be liabilities or obligations of the City." CP 196.

The District then requested that the City, in keeping with its obligation under the September 2006 Interlocal Agreement, enter into the 2011 Contingent Loan Agreement at issue in this appeal (the "2011 Contingent Loan Agreement").<sup>2</sup> Under the 2011 Contingent Loan Agreement as proposed, "the City will make loans to the District to assist the District in providing for the payment of principal of and interest on the [2011] Bonds in the event that revenues received from the operation of the

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<sup>2</sup> The proposed 2011 Contingent Loan Agreement (CP 450-66) is attached as **Appendix A** to this Brief.

Regional Center, and available taxes pledged to the repayment of the Bonds are insufficient to make such payments.” CP 454 (App. A p.2).

Under the 2011 Contingent Loan Agreement, on April 1 and October 1 of each year, the District and City would review the funds available to the District to pay the next semi-annual debt service payment, due on June 1 and December 1 of each year. CP 454 (App. A § 1.01 (a)). If the amount of the District’s immediately available funds is insufficient to meet the upcoming debt service payment, the District would then provide a notice to the City of the existence and amount of the deficiency. CP 454, 466 (App. A § 1.01(b) & Ex. A). Upon receiving such a notice, the City will then “loan to the District an amount that, when added to the District’s Debt Service Fund and the District Reserve and Contingency Account balances, is sufficient to pay all principal of . . . and interest on the Bonds coming due” on the next semi-annual Bond payment date. CP 455 (App. A § 1.01(c)). However, the 2011 Contingent Loan Agreement makes clear that “[t]he City shall in its sole discretion determine how it will fund each Loan, (*i.e.*, from available City funds, from City borrowings or from any other legally available source), and nothing herein shall be deemed to require the City to borrow money in order to provide Loans to the District.” CP 455 (App. A § 1.01(c)).

Defining the nature of the City's obligations to make loans, the 2011 Contingent Loan Agreement provides:

The City's obligation to make Loans to the District hereunder is contingent on the amount of Regional Center Revenue and District Tax Revenue received by the District and available to pay debt service as it comes due on the Bonds. The Parties recognize that the City's obligations hereunder do not constitute City "debt" subject to constitutional or statutory limitations.

CP 455 (App. A § 1.01(f)). The 2011 Contingent Loan Agreement also incorporates language in two different sections again making clear that purchasers of the 2011 Bonds will have no recourse against the City. CP 455, 465 (App. A §§ 1.01(f), 6.09).

If the City is required to make loans to the District, the District is obligated to repay those loans, and the 2011 Contingent Loan Agreement incorporates a number of protections to ensure that the District has sufficient funds available to repay any loans. Specifically, the 2011 Contingent Loan Agreement would make the District's obligation to repay loans "absolute and unconditional," and would pledge the District's tax and operating revenues to repay loans. CP 457 (App. A § 1.02(d)). The District would be obligated to pay the City interest at the "average rate of return on the State of Washington Local Government Investment Pool."

CP 457 (App. A § 1.02(b)).<sup>3</sup> All loans would mature in 2041 if the 2011 Bonds are not paid off earlier. CP 457 (App. A § 1.02(c)). The District's loan repayment obligations to the City are recognized as a "debt" of the *District* subject to applicable constitutional and statutory limits. CP 457 (App. A § 1.02(d)).

To ensure that adequate funds are available to repay loans, the District pledges to maintain adequate debt capacity to repay its obligations and to impose sales and use taxes for so long as any District debts to the City remain outstanding. CP 457 (App. A § 1.01(d)).<sup>4</sup> Similarly, at any time the City has made loans to the District, even if the District is not in default, the City may, with the approval of the other government entities participating in the June 2006 Interlocal Agreement forming the District, require the District to impose any tax available that is within its non-voted debt capacity and, if the District's non-voted debt capacity is exhausted, require the District to seek approval of the voters for an additional tax levy. CP 458-59 (App. A Art. II(c)-(d)).

Further, if the District has exhausted its debt capacity (that is, it has incurred debt up to its allowed statutory and constitutional limits), so it has no remaining debt capacity to receive loans from the City, any further

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<sup>3</sup> See CP 366 (describing Local Government Investment Pool).

<sup>4</sup> Under RCW 82.14.390, the District is authorized to impose a sales tax of 0.033% on sales occurring within its boundaries through July 2031.

amounts required to be loaned to the District by the City under the 2011 Contingent Loan Agreement are deemed payments for equity in the Regional Center, and, rather than receiving repayment of the loan from the District, the City will receive a tenancy-in-common equity interest in the Regional Center. CP 457-58 (App. A § 1.02(e)).

The City's obligation to provide loans to the District terminates when the District has paid off its bond obligations. CP 455 (App. A §§ 1.01(c), (f)). However, the District's obligation to repay loans to the City continues until all loans by the City have been repaid. CP 457 (App. A § 1.02(d)).

**B. Procedural History of Lawsuit.**

Although the City executed two previous contingent loan agreements without controversy,<sup>5</sup> on July 14, 2011, the City passed a Resolution requiring the City to obtain a judicial declaration under RCW 7.25 that the City has the right and authority to enter into the 2011 Contingent Loan Agreement as a condition of signing that Agreement. CP 127-28. Accordingly, the City filed a Complaint in Chelan County

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<sup>5</sup> In addition to the November 2008 Contingent Loan Agreement, on October 23, 2009, the City and the District entered into a contingent loan agreement related to the District's acquisition of kitchen equipment for the Regional Center. CP 439-48. The District has not requested a loan from the City under that Agreement. CP 500. The City has not challenged the validity of either the November 2008 or October 2009 Contingent Loan Agreements.

Superior Court seeking a declaratory judgment that the proposed 2011 Contingent Loan Agreement constitutes "debt" under Art. VIII (CP 3-34), followed by a First Amended Complaint. CP 35-86. The trial court granted the District's Application to Intervene (CP 89-91) and an Application for Appointment of [Taxpayer] Representative. CP 87-88. The City filed a Second Amended Complaint (CP 92-145), which the District answered on August 25, 2011. CP 503-08.

The City and the District each moved for summary judgment, and, after expedited briefing and argument, on September 8, 2011, the trial court granted the City's motion for summary judgment and denied the District's motion. CP 663-65. The District then sought direct review and expedited consideration by this Court. The Chief Justice granted the District's Motion for Accelerated Review, as reflected in the Court's letter dated October 26, 2011, setting oral argument for January 10, 2011.

#### IV. SUMMARY OF ARGUMENT

Only the City's "debt" is limited by Art. VIII, § 6 and RCW 39.36. The City's contingent obligation to make loans is not "debt" for several independent reasons. A finding in the District's favor on any one ground requires reversal.

City as Lender, not Borrower. This Court has for decades defined "debt" under Art. VIII to mean "borrowing," a definition

supported by Art. VIII's history, and recognized by respected scholars, bond counsel, and the Attorney General. The 2011 Contingent Loan Agreement would require the City (in specified circumstances) to *lend* money to the District, not *borrow* money. Therefore, the City's obligation is not "debt", and Art. VIII, § 6 does not apply. The trial court improperly defined debt to include "any obligation," not just borrowing. The trial court's conclusion that the City's obligation is "debt" was error.

**No City Requirement to Borrow With a Pledge of Future Taxes.** This Court similarly has held that no "debt" is incurred if a city pays its obligations out of current-year taxes, rather than borrowing against future taxes. Because the City is not required to borrow against future taxes to fund any loans that may be required, the 2011 Contingent Loan Agreement does not require the City to incur indebtedness. The trial court's holding is not only contrary to this Court's precedent, but threatens to make Art. VIII, § 6 a straitjacket on public finances never intended by the framers of Washington's Constitution, who wanted to ensure that cities had adequate borrowing capacity to pay for the needs of a rapidly expanding population and rebuild from fires that devastated Washington's cities in the territorial period.

**Intergovernmental Loans Between Two Separate Municipal Corporations.** The trial court similarly ignored this Court's jurisprudence

concerning inter-governmental lending, which makes clear that one government entity may make loans to another government entity, and the loan does not convert the debts of the borrowing entity into the debts of the lending entity.

**Washington Constitution Art. VIII, § 6, and Art. VIII, § 7.**

Lending by municipalities is governed by Art. VIII, § 7, not by Art. VIII, § 6, which governs borrowing. The Constitution's framers were deeply concerned about government lending to *private* entities, and therefore barred loans to private parties under Art. VIII, § 7, but they did not bar government lending to other *public* entities. The trial court erred by reading into the Constitution a limit on government lending to *public* entities that lacks textual support in Art. VIII and is contrary to the intent of Art. VIII's drafters. The trial court also overstepped its role in concluding that the risks of the City's loans may be too great. This Court's jurisprudence makes clear that weighing the risks of inter-governmental loans is the province of elected officials, not the courts.

**City Loan Obligations Are Contingent.** The existence and size of the City's loan obligations is contingent on future events that cannot now be known -- whether and the extent to which District funds are insufficient to meet future semi-annual debt service payments. This Court has for decades held that no "debt" is created if obligations are contingent.

Because the City's obligations are contingent under the relevant test, they are not "debt." Further, even if the City in the future is obligated to make loans to the District, it would not incur "debt" unless it borrows money to fund the loans, and nothing in the 2011 Contingent Loan Agreement requires that funding source.

In concluding that the City's loan obligations are not contingent, the trial court misread the plain language of the 2011 Contingent Loan Agreement and erroneously relied on the City's "expectations" and other speculation about future events to conclude that the City's obligations are definite and certain. If the obligations are not definite and certain, they are contingent and are not "debt."

**No Pledge of Future City General Taxes.** Under this Court's decisions dating back almost to Statehood, no "debt" is created if a city does not pledge its future general tax revenues to the repayment of borrowing. Every relevant document makes clear that the City has not pledged its tax revenues or any other assets to the repayment of the 2011 Bonds. Therefore, the City's obligations are not "debt" under Art. VIII, § 6.

The trial court erred in concluding that the District's bondholders can use their status as third-party beneficiaries of the 2011 Contingent Loan Agreement to breach the contractual barriers protecting the City's

assets. Third-party beneficiaries have no greater rights than the parties to a contract, and the District's bondholders, acting as third-party beneficiaries, would, therefore, be bound by contractual language barring any recourse against the City and giving the City the sole discretion to decide on the source of funds for any loans.

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Based on its conclusion that City "debt" would be created by the 2011 Contingent Loan Agreement, the trial court reached three additional issues. If this Court concurs that no "debt" was created, it need not address these issues. In any case, the trial court erred in its decision on each issue.

**"Debt" Calculated When Actually Incurred.** The City will not incur any liability to make loans at the start of the 2011 Contingent Loan Agreement. Instead, it may incur liability only if, at future semi-annual intervals, the District's available funds are insufficient to meet its immediately-due debt service payment. The trial judge erred in concluding that the entire amount of the City's loans must immediately be counted against the City's debt limitations. In such situations, the courts require debt to be counted against the government incurring the debt only at the future interval when it is actually incurred.

**“Debt” Includes Only Principal.** This Court has, consistent with the overwhelming weight of authority, found that municipal “debt” includes only the principal portion of borrowing and does not include unearned interest. The trial court erred in ignoring this holding.

**No Pledge of Full Faith and Credit.** The trial court also erred in concluding that the City lacked authority to pledge its full faith and credit. Nothing in the 2011 Contingent Loan Agreement requires the City to pledge its full faith and credit.

**Erroneous Evidentiary Rulings.** The trial court also erred in considering two City exhibits and declarations related thereto, in violation of Evidence Rules 802, 402, and/or 901, and Civil Rule 56(e).

## V. ARGUMENT

### A. Standard of Review.

Because the court below acted on summary judgment, its decision is reviewed *de novo*. *Unruh v. Cacchiotti*, 172 Wn.2d 98, 106, 257 P.3d 631 (2011); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

A municipal corporation’s legislative enactment is presumed constitutional, and the party challenging the enactment bears the burden of proving it unconstitutional beyond a reasonable doubt. *Citizens for More Important Things v. King Co.*, 131 Wn.2d 411, 415, 932 P.2d 135 (1997).

**B. The Contingent Loan Agreement Does Not Create a "Debt" of the City.**

Under Washington Constitution Art. VIII, § 6, no city may “become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property” in the city without “the assent of three-fifths of the voters therein.”<sup>6</sup> RCW 39.36.020 (2)(a)(ii) contains a substantively identical statutory maximum debt limitation. *See Dept. of Ecology v. State Finance Comm.*, 116 Wn.2d 246, 253 n.7, 804 P.2d 1241 (1991) (applying the same definition of “debt” to Art. VIII and statutory debt limits).

The trial court erred in concluding that the obligation of the City in the 2011 Contingent Loan Agreement to make *loans* to the District, contingent on certain future developments, to assist the District in servicing the *District's* debt, constitutes “indebtedness” of the *City* subject to constitutional and statutory limits.

**1. *By Lending Funds to the District, the City Does Not Incur “Indebtedness” Within the Meaning of Art. VIII, § 6 or RCW Chapter 39.36.***

**a. *The Trial Court Disregarded This Court's Precedent Defining “Debt” as Borrowing, Not Lending.***

This Court has for decades defined “debt” under Article VIII to mean “borrowed money.” *State ex rel. Wittler v. Yelle*, 65 Wn.2d 660,

<sup>6</sup> Article VIII, § 6 is attached as **Appendix B** to this Brief.

668-69, 399 P.2d 319 (1965); *State ex rel. Troy v. Yelle*, 36 Wn.2d 192, 217 P.2d 337 (1950). “This court has many times said what Article VIII means by the word ‘debt’. We think that it means borrowed money.” *Wittler*, 65 Wn.2d at 668. As used in Article VIII, debt “denotes an obligation created by bonds,” in which a government entity borrows money from private investors on the promise of repayment with interest. *Id.* at 668-69.<sup>7</sup> This Court has continued to define “debt” under Article VIII as “borrowed money.” *See Dept. of Ecology*, 116 Wn.2d at 254.

In addition to this Court’s decisions, respected scholars and practitioners of Washington constitutional law agree that the Washington courts have consistently defined “indebtedness” under Article VIII and RCW 39.36 to include only “borrowed money payable from taxes.” *See Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE*, at 145 (2002). CP 478.

Mr. Spitzer of Foster Pepper PLLC, acting as bond counsel to the District in connection with the District’s issuance of the 2011 Bonds, reiterated this same legal principle under Washington law in a May 2011 Memorandum to the City and the District (CP 625-644), in which he concluded that, because the City would be a lender, not a borrower, “the

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<sup>7</sup> *Cf. Washington Higher Education Facilities Authority v. Gardner*, 103 Wn.2d 838, 845-46, 699 P.2d 1240 (1985) (in Art. VIII, §§ 5 and 7, the Constitution’s framers were concerned about “creation of a public debt” to benefit private interests, and “the term ‘debt’ was used in its traditional ‘borrower’, ‘lender’ sense”).

City's obligation to make future Loans to the District under the terms of the Proposed [Contingent Loan Agreement] will not create City 'debt' for purposes of calculating debt capacity." CP 629. Bond counsel Nancy Neraas of Foster Pepper PLLC reached the same conclusion a month later in a July 5, 2011 Memorandum and draft opinion sent to the City. CP 649. ("The City's obligations to the District with respect to ... Loans regarding District debt service on the Bonds, do not constitute 'indebtedness' of the City as that term is used in Article VIII, Section 6 of the Washington State Constitution and RCW 39.36.020(2)(a)(ii), and as that term has been interpreted by the Washington State Supreme Court ...") (citations omitted).<sup>8</sup>

Consistent with the case law, scholarly commentary, and legal opinions, the history of Art. VIII, § 6, also demonstrates that the Constitution's drafters considered "indebtedness" to mean borrowing. For example, Theodore J. Stiles, a delegate to the Constitutional Convention and one of the first members of this Court, explained that, in adopting Article VIII, the framers were concerned about the misuse of "borrowed money" by state and local governments. Theodore L. Stiles, *THE CONSTITUTION OF THE STATE AND ITS EFFECTS UPON PUBLIC INTERESTS*, 4

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<sup>8</sup> Ms. Neraas and her former law firm (K&L Preston Gates Ellis LLP) had issued the bond counsel opinions with respect to the 2008 Notes. CP 601-623.

Washington Historical Quarterly 281, 284 (1913).<sup>9</sup> Hence, as this Court has observed, “when the men who drafted the constitution used the word ‘debt,’ they were thinking solely in terms of borrowed money.” *Troy*, 36 Wn.2d at 197.<sup>10</sup> Indeed, as the City itself conceded below, under the 2011 Contingent Loan Agreement, “the City would not be obliged to borrow money and therefore would not incur ‘debt’ in the traditional usage of the term.” CP 514; RP 23.

Rather than following this Court’s consistent direction that “debt” requires borrowing, the trial court concluded that “debt” means “*any obligation* which in law must be paid from any taxes levied generally.” RP 69 (emphasis added).<sup>11</sup> But this definition is vastly broader than any definition in this Court’s relevant rulings, discussed above, and is contrary to this Court’s precedent defining “debt” under Article VIII as borrowing

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<sup>9</sup> Excerpts of relevant pages from Justice Stiles’ article are attached as **Appendix C**. The full text is available at: <http://lib.law.washington.edu/waconst/sources/Stiles.pdf>.

<sup>10</sup> The case law, scholarly commentary, bond counsel opinions, and constitutional history discussed above demonstrate that “debt” under Art. VIII, § 6 requires borrowing, and are contrary to Respondents’ arguments below that the word “indebtedness” in Art. VIII, § 6 (municipal debt) means something different from the word “debt” in 1972 amendments to Art. VIII, § 1 (state debt).

<sup>11</sup> The trial court relied on out-of-context language from in *State ex rel. Washington State Finance Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963). But *Martin* did not hold that “debt” under Art. VIII is something other than borrowing. On the contrary, *Martin* involved state-issued bonds, the classic form of government borrowing. Rather, *Martin* addressed the source of repayment of bonds, and concluded that if bonds were repaid from “any taxes generally levied,” “debt” is created, and the test is whether taxes are “generally levied” rather than the particular type of tax involved. 62 Wn.2d at 661 (overruling *Gruen v. State Tax Commission*, 35 Wn.2d 1, 211 P.2d 651 (1949)). The trial court, therefore, erred by failing to heed this Court’s admonition that *Martin*’s holding “must be deemed peculiarly applicable to the facts then before us” and “limited in their application to the points actually involved.” *Wittler*, 65 Wn.2d at 670.

to be repaid from general taxes. *See also Affiliated FM Ins. Co. v. State*, 338 N.J. Super. 540, 550, 770 A.2d 741, 748 (N.J. Ct. App. 2001) (loans from state “did not affect its debt limit for the simple reason that the loans did not create a debt”); *Village of Chefornek v. Hooper Bay Constr. Co.*, 758 P.2d 1266, 1269 (Alaska Sup. Ct. 1988) (“debt” under Alaska constitutional limit “was intended to refer to a municipality’s right to *borrow money*” (emphasis in original)).

Consistent with the case law, commentary, constitutional history, and legal opinions, the Washington Attorney General has also recognized the difference between “debt” and other contractual obligations, citing *Wittler*. 1982 Wash. Att’y Gen. Letter Op. No. 7 at 3 (“See, for a discussion of the distinction between “debt” and contractual liability, *State ex rel. Wittler v. Yelle*, 65 Wn.2d 660, 339 P.2d 319 (1965)”).

Under the 2011 Contingent Loan Agreement, the City would commit to be a *lender*, not a borrower. The 2011 Contingent Loan Agreement requires the City to “loan” money to the District, if required to meet a semi-annual debt service payment (CP 454-55; App. A §§ 1.01)), requires the District to repay the loans with interest (CP 457; App. A § 1.02(b)), provides the City with specific remedies if the loans are not repaid (CP 457-59, 461-62; App. A §§ 1.02(d), (e), Art. II, Art. VI), and specifically disclaims any requirement that the City undertake new

borrowing to meet its obligations. CP 455 (App. A § 1.01(c)). The City may also, at its option, direct that the proceeds of any loan be used by the District to pay operations and maintenance expenses, and for the District to use revenues from taxes and Regional Center operations to pay debt service rather than operations and maintenance. CP 55; App. A § 1.01(d). The trial court's conclusion that the 2011 Contingent Loan Agreement requires the City to assume "debt" was error.

**b. The Trial Court Erred By Disregarding This Court's Holdings That "Debt" Does Not Include Obligations Paid From Current-Year Taxes.**

In concluding that "debt" under Article VIII includes "any obligation," the trial court not only ignored this Court's precedent defining "debt" to require borrowing, but also ignored this Court's repeated holdings that "debt" excludes obligations that are paid from current-year taxes, rather than from the proceeds of borrowing. *See, e.g., Comfort v. City of Tacoma*, 142 Wash. 249, 257, 252 P. 929 (1927). The Court has reached this conclusion even where current-year obligations may have significant economic consequences. For example, this Court concluded that, in paying teacher pension obligations from current-year tax receipts rather from bond proceeds, the state was not taking on "debt" within the meaning of the Washington Constitution or relevant statutes. *State ex rel. Wittler v. Yelle*, 65 Wash.2d at 668-71.

For similar reasons, the state may issue warrants payable from current-year tax revenues without taking on “debt,” even if those tax revenues have yet to be collected. *State ex rel. Troy v. Yelle*, 36 Wn.2d at 195-98; *State ex rel Attorney General v. McGraw*, 13 Wash. 311, 318-19, 43 P. 176 (1895); *Allen v. Grimes*, 9 Wash. 424, 37 P. 662 (1894); 1982 Att’y Gen. Letter Op. No. 7.

In short, under Washington law, the City can, like an ordinary household, pay its bills out of monthly income or savings, or charge them to a credit card. That is, if the City is required under the 2011 Contingent Loan Agreement to lend money to the District, the City can fund any loans from current tax receipts or reserves, or issue new debt in the form of general obligation bonds to fund the loans. Washington law is clear that unless and until the City resorts to the general obligation bond “credit card” rather than paying its obligations from current revenues or reserves, no City “debt” is created.

Here, there is no obligation on the City to borrow money to fund any loans that may be required. The 2011 Contingent Loan Agreement expressly preserves the City’s right to fund any loans from City reserves or current tax receipts rather than issuing bonds or other debt instruments. CP 455 (App. A, § 1.01(c)). The City to date has not funded loans from new indebtedness. RP 59-60. Unless and until the City elects to fund any

loans through the issuance of new bonds or other borrowing, it will not have assumed any "debt" under Article VIII. *Comfort*, 142 Wash. at 257.

By treating "any obligation" payable from taxes, including even ordinary non-borrowing obligations such as service, pension, construction, and employment contracts, as "debt" the trial court's ruling threatens to turn Art. VIII, § 6 into a fiscal straitjacket on local governments never intended by the framers. The delegates to the Washington Constitutional Convention were particularly concerned that, if the extreme limitations on municipal indebtedness under territorial law were carried forward into the Washington Constitution, the ability of Washington's cities to meet the demands of their rapidly growing population for municipal services such as sewers, water, and lighting, would be crippled, Wilfred J. Airey, A HISTORY OF THE CONSTITUTION AND GOVERNMENT OF WASHINGTON TERRITORY, at 478-79 (Ph.D. dissertation, Univ. of Washington, 1945); Utter & Spitzer at 144 (CP 477),<sup>12</sup> concerns that were heightened by devastating fires in many cities, requiring significant borrowing to rebuild. Utter & Spitzer at 144 (CP 477).<sup>13</sup>

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<sup>12</sup> Excerpts of relevant material from the Airey dissertation are attached as **Appendix D**. A full text of the Airey dissertation is available at: <http://lib.law.washington.edu/waconst/sources/airey.pdf#page=1>.

<sup>13</sup> For example, a major fire that destroyed much of Seattle less than a month before the Constitutional Convention, see Beverly Paulik Rosenow, ed., JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 667 (1999) (analytical index by Quentin Shipley Smith), and another major fire burned much of Spokane Falls while the convention was in session. *Airey*, at 480. The delegates believed

While the delegates recognized the need for some limitation on municipal borrowing to make bonds attractive to investors, Utter & Spitzer at 144-45 (CP 477-78), the drafters adopted Art. VIII, § 6 in its current form, giving the advocates for expanded municipal *borrowing* capacity “precisely what [they] asked for.” *Airey* at 480-81. The trial court’s ruling, by defining “debt” to include not just borrowing but ordinary municipal contract obligations, threatens to restrict municipal finances far beyond what the framers intended. *See Troy*, 36 Wn.2d at 197 (applying debt limitations only to borrowing and not to obligations paid from current revenues “is the only interpretation that fits the practicalities of the situation which existed in 1889, when the constitution was adopted”).

**c. The Trial Court Erred By Ignoring This Court’s Jurisprudence Making Clear That Inter-Governmental Loans Are Not To Be Considered “Debt” of the Entity Making the Loan.**

The trial court erred in concluding that the 2011 Contingent Loan Agreement would convert the debts of the *District* into the debts of the *City*. RP 70. Because the District and the City are separate municipal

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these fires required Washington cities to “go into debt to rebuild.” *Journal*, at 678. Excerpts of relevant materials from the Journal of the Washington State Constitutional Convention are attached as **Appendix E**. The full text of the Journal is available at: <http://lib.law.washington.edu/waconst/Sources/Rosenow.pdf>.

corporations, CP 93; RCW 35.57.010(4), this conclusion is directly at odds with this Court's jurisprudence concerning inter-governmental loans.

This Court has held that, under Art. VIII, § 6, the debts of one municipal corporation are not to be considered the debts of a separate municipal corporation. *Pierce County v. State*, 159 Wn.2d 16, 43 n.14, 148 P.3d 1002 (2006). And, where one government entity makes loans to a second, separate government entity, the "debt" of the entity borrowing money remains the debt of that entity, and the government making the loan does not thereby take on "debt." *See, e.g., Dept. of Ecology v. State Finance Comm.*, 116 Wn.2d at 256 (obligation of building authority is not an obligation of the state where the building authority is not an agency of state government); *State ex rel. Washington State Toll Bridge Authority v. Yelle*, 61 Wn.2d 28, 34-35, 377 P.2d 466 (1962) ("*Toll Bridge II*"); *State ex rel. Washington State Toll Bridge Authority v. Yelle*, 56 Wn.2d 86, 96-98, 351 P.2d 493 (1960) ("*Toll Bridge I*").

For example, as in this case, *Toll Bridge II* involved "temporary borrowing" from the state's Puget Sound reserve account to the Toll Bridge Authority "as may be necessary to make payments of bond principal and interest" by the Toll Bridge Authority, and "require[d] the repayment of all amounts so borrowed." 61 Wn.2d at 39. The bonds were not "general obligations of the state," but remained obligations of the Toll

Bridge Authority; because the Toll Bridge Authority was obligated to repay loans from the state, all bond obligations were ultimately to be repaid from toll bridge revenues, even if state loans were needed to meet immediate debt service obligations. *Id.* at 35.

City loans to the District, a separate municipal corporation, are not “debt” of the City.

**d. The Trial Court’s Ruling That the City’s Loans Constitute Debt Lacks Textual Support in Art. VIII, § 6 and § 7, and Is Contrary to the Intent of the Framers.**

Article VIII, § 6 limits municipal *borrowing*. Article VIII, § 7 prohibits municipal *lending*, but only to private parties.

The drafters of the Constitution specifically considered the extent to which governments should be allowed to *lend* money, and encapsulated limitations on *lending* in Art. VIII, §§ 5 & 7. *See* 1982 Att’y Gen. Letter Op. No. 7 at 2 (Art. VIII, § 7 “comes into play where others seek to borrow from the subject municipality”). The framers concluded that lending to *private* entities should be barred, but that lending to *public* entities should not be restricted. Therefore, this Court has for a century held that Article VIII, § 7 does not restrict inter-governmental loans. *See, e.g., City of Marysville v. State*, 101 Wn.2d 50, 52-56, 676 P.2d 989 (1984); *Toll Bridge I*, 56 Wn.2d at 104; *Rands v. Clarke County*, 79 Wash. 152, 157, 139 P. 1090 (1914). In fact, governments frequently loan or

otherwise transfer funds among themselves under the Interlocal Cooperation Act. RCW 39.34.030(3)(d).

The trial court's ruling disregards this precedent, and reads into Art. VIII, § 6 a new restriction on lending by one government entity to another that is expressly *not* included in Art. VIII, § 7, in violation of the intent of Constitution's framers. That was error.

**e. The Trial Court Decision Improperly Weighed Economic Risk.**

The trial court also erred in concluding that lending by the City to the District would represent an unacceptable risk of non-payment. *See* RP 70. Those risk judgments are the province of elected officials, not the courts. The role of the courts is not to "weigh the economic risks but only to ascertain that the risk to the state remains within public control and is not abdicated to the private sector." *Washington State Housing Finance Comm'n v. O'Brien*, 100 Wn.2d 491, 498, 671 P.2d 247 (1983); *see also* 2000 Wash. Att'y Gen'l Op. No. 5 at 6 (concluding that "risk of loss" analysis is not relevant where state guarantee program supports recognized government purpose). When, as here, a transaction between two public entities is contemplated, the risk of loss "is a *matter left to the wisdom of the Legislature*, and we cannot and will not assume that the purposes it had in mind will fail of attainment. Rather we will assume that the results

anticipated will be realized until the contrary clearly appears.” *Comfort*, 142 Wash. at 258-59 (emphasis added).

The trial court impermissibly second-guessed the financial risk analysis undertaken by elected officials and, thereby, committed error.

**2. *Because the City’s Obligation to Make Loans Is Contingent Upon Future Events that Cannot Be Ascertained At This Time, The City’s Contingent Obligation Is Not “Debt” Under Washington Law.***

Washington’s courts “recognize a marked distinction between the creation of a debt and the creation of a condition upon which a debt might arise.” *Twichell v. City of Seattle*, 106 Wash. 32, 52, 179 P. 127 (1919). Contingent liabilities are not “debt” subject to Article VIII or statutory debt limitations. This principle is supported by an unbroken line of Washington cases and Attorney General Opinions stretching back well over a century. *See, e.g., Dept. of Ecology*, 116 Wn.2d at 257 (only “an *unconditional and legal* obligation” is “debt” subject to Article VIII) (emphasis added); *Kelly v. City of Sunnyside*, 168 Wash. 95, 11 P.2d 230 (1932); *Comfort*, 142 Wash. at 255-56; 1988 Wash. Att’y Gen’l Op. No. 26 at 8; 1952-53 Wash. Att’y Gen’l Op. No. 162 at 1-2. If a liability is “only a contingent liability as far as the city is concerned,” it is “in no sense a debt proper” and is, therefore, outside the scope of Art. VIII, § 6 and related statutes. *Comfort*, 142 Wash. at 255; *see also* 15 E. McQuillin, *The Law of Municipal Corporations* § 41:22 at 480 (3d rev. ed. 2005)

(“Merely incurring a contingent future liability does not create an indebtedness”) (CP 486).

The leading Washington case, *Comfort*, demonstrates that the City’s obligations under the 2011 Contingent Loan Agreement are contingent and, therefore, are not “debt.” *Comfort* involved bonds issued by the City of Tacoma to be redeemed from a “local improvement fund” derived from special property assessments. In addition, the City provided a guarantee fund that would ensure repayment of bondholders if the special property assessments proved inadequate to meet debt service obligations.

The petitioners in *Comfort* asserted that, by guaranteeing payment of the local improvement bonds, “the city thereby becomes liable for their payment and a debt is created.” 142 Wash. at 253. This Court squarely rejected this contention. As the Court stated, “[i]t is ... essential to the idea of a debt that an obligation should have arisen out of a contract . . . which entitles the holder thereof *unconditionally* to receive from the promisor a sum of money, which the latter is under a legal or moral duty to pay *without regard to any future contingency*.” 142 Wash. at 256-57 (citation omitted; emphasis added). Because Tacoma’s guarantee obligation would be called upon only if special tax assessments proved inadequate to meet debt service obligations, the obligation was contingent,

and a contingent liability does not create a "debt" of the city. 142 Wash. at 255-56.<sup>14</sup>

The facts here are analogous – at least three contingencies must occur before the City would incur "debt" subject to Art. VIII, § 6. First, the City would be called upon to make loans to the District only if, at some point in the future, the funds available to the District are insufficient to meet an upcoming semi-annual debt service payment on the 2011 Bonds. If the District has sufficient funds to service its debt, the City has no obligation to make any loans under the Contingent Loan Agreement. CP 455 (App. A § 1.01(f)) ("The City's obligation to make Loans to the District hereunder is contingent on the amount of Regional Center Revenue and District Tax Revenue received by the District and available to pay debt service as it comes due on the Bonds.").

Second, the amount of any loan the City would be required to make cannot be determined at this time, but can be determined only during the two-month period leading up to a semi-annual bond payment, at which

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<sup>14</sup> Further, the Court in *Comfort* concluded, as discussed above, that even if Tacoma eventually incurred an obligation to make good on its guarantee, there still would be no "debt of the city as that term is used in construing the constitutional limitation" because an insufficiency of funds would be paid out of current taxes rather than new indebtedness, and "[i]t is well recognized legal principle that those obligations which, as soon as they become such, are provided for by taxation for the current year, are not to be included in the debts that are taken into consideration in determining . . . the constitutional limit." 142 Wash. at 257. That is, Tacoma's obligation would become "debt" only if Tacoma paid its obligations by issuing new municipal bonds creating a debt service obligation to be paid from future general tax revenues.

time the District can determine the extent, if any, of the insufficiency in its funds to meet debt service payments. CP 454 (App. A §§ 1.01(a), (b)). Hence, the existence, the amount, and the timing of any City loan obligation cannot be ascertained at this point. The City's obligation is, therefore, contingent, and not "debt" subject to the restrictions of Article VIII, § 6, and RCW 39.36. *See Comfort, supra; Dept. of Ecology*, 116 Wn.2d at 255 (*quoting Webster's Third New International Dictionary* 1556 (1976)) (an obligation is contingent, and not "debt" unless it is "a formal and binding agreement . . . to pay a *specified sum* or do a *specified thing*) (emphasis added)).

Third, if the City is called upon to make loans to the District, to constitute City "debt," the City must borrow money to fund those loans rather than paying for them from funds on hand or current taxes. As discussed above, there is no requirement that the City undertake new borrowing to fund any loans and nothing in the record demonstrating it would do so.

Relying on these precedents, Washington's Attorney General in 1988 advised that contingent loan obligations like those contemplated here are not "debt" under Article VIII, § 6 or RCW 39.36. As the Attorney General stated:

We do not believe either a line of credit or the type of letter of credit arrangement [discussed in the opinion]

would constitute municipal borrowing subject to constitutional and statutory limitations on indebtedness. *The rule in Washington, as elsewhere, is that incurring a contingent future liability does not create an indebtedness.*

1988 Wash. Att’y Gen’l Op. No. 26 at 8 (emphasis added). As with the letter of credit and line of credit arrangements addressed by the Attorney General, the Contingent Loan Agreement “does not create an obligation to repay until drawn” and a draw can occur only under “certain terms and conditions.” *Id.*

The City stands in the shoes of the lender in a line of credit transaction, and those transactions create only “a contingent liability, rather than a debt subject to limitation” under Article VIII, § 6 and RCW 39.36. 1988 Wash. Att’y Gen’l Op. No. 26 at 8.

Despite this Court’s clear precedent and the unequivocal language of the 2011 Contingent Loan Agreement, the trial court was apparently persuaded that, because the City was required to make loans during the first three years of the Regional Center’s existence, and the City “expects” to make loans in the future (RP 56), the contingencies requiring the City to make loans in the future have already occurred. Nothing in the record, however, apart from the City’s speculation that the Regional Center’s performance during its first three years of operation will continue into the indefinite future (CP 675, ¶ 7), supports either the inference the City will

be required to make loans for the entire twenty- to thirty-year life of the 2011 Bonds, or that the District will be unable to repay any loans as required under the proposed 2011 Contingent Loan Agreement. In fact, the Regional Center's performance has substantially improved over its initial three years of operation. CP 545-546. As the City itself conceded below, "[i]t simply does not know how much or at what time it [its obligation to make loans] will be incurred." CP 528; RP 24.

Further, the trial court was required to assume that the Contingent Loan Agreement will operate as anticipated, rather than making unfounded projections about the District's inability to repay any loans in the future. As this Court has made clear, "the court should not anticipate" that future District revenues will be inadequate to make debt service payments. *Martin*, 62 Wn.2d at 659-60; *see also Comfort*, 142 Wash. at 258; *Von Herberg v. City of Seattle*, 157 Wn. 141, 150-51, 288 P. 646 (1930). Again, the "wisdom" of the 2011 Contingent Loan Agreement is not for a court's consideration. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 601, 949 P.2d 1260 (1997).

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The City's obligation under the Contingent Loan Agreement is contingent on future events that cannot now be foreseen with any

certainty. It is not “debt” subject to the restrictions of Article VIII, § 6 or RCW 39.36. For this independent reason, the trial court erred.

***3. The Contingent Loan Agreement Does Not Create a Debt of the City Because the City Has Not Pledged Its Future Tax Revenues to Repay Debt Associated With the Regional Center.***

As discussed in Section B(1)(b), above, the City will take on “debt” in the constitutional sense only if it pledges its future general tax revenues to the repayment of borrowing. The 2011 Contingent Loan Agreement, as well as every other relevant document, makes absolutely clear that the City is not pledging its general tax revenues, or any other asset, for repayment of the District’s debt, and the District’s bondholders have no recourse against the City. Accordingly, the 2011 Contingent Loan Agreement creates no “debt” of the City under Washington law.

The 2011 Contingent Loan Agreement states:

All liabilities incurred by the District, including but not limited to the [2011] Bonds, are obligations solely of the District and shall not be liabilities or obligations of the City. Neither a registered owner of the [2011] Bonds nor any other person shall have any right of action against or recourse to the City, its assets, credit, or services, on account of the [2011] Bonds or any other debts, obligations, liabilities or acts or omissions of the District.

CP 455 (App. A § 1.01(f)). Additional language in the Agreement similarly provides:

All liabilities incurred by the District shall be satisfied exclusively from the assets, credit, and properties of the District, and no creditor or other person shall have any right of action against or recourse to the Members [including the City], its assets, credit, or services, on account of any debts, obligations, liabilities or acts or omissions of the District.

CP 465 (App. A at § 6.09). Identical or substantially similar language is contained in the other documents governing the District's formation and the City's obligations to the District. CP 105, 196, 271, 279-81, 301, 308, 311, 314.

Because this language makes unequivocally clear that there is no recourse against the City for unpaid District debts, the Contingent Loan Agreement does not create a City "debt" under Washington law. In a line of authority extending back almost to statehood, this Court has consistently held that, where a bond states that it "shall not be a general obligation or debt of the city, . . . the obligation thus incurred is not a general indebtedness of the city." *Schooley v. City of Chehalis*, 84 Wash. 667, 677, 147 P. 410 (1915); *see also Dep't of Ecology*, 116 Wn.2d at 250 n.3 and 256; *Ajax v. Gregory*, 177 Wash. 465, 474, 32 P.2d 560 (1934) (where bonds state that "the State of Washington" shall not "incur any liability or obligation," the bonds are not a "state indebtedness"). Because the relevant documents make unequivocally clear that the City has not pledged any asset toward repayment of the District's borrowings and the

District's creditors have no recourse against the City, no "debt" of the City is created by the 2011 Contingent Loan Agreement.

While acknowledging that "there can be no debt created unless the City's general tax revenues have been pledged for repayment of the District's bonds," RP 66, the trial court nonetheless concluded that the 2011 Contingent Loan Agreement creates a City "debt" because the District's bondholders might somehow overcome the bar against access to the City's general tax revenues by relying on their rights as third-party beneficiaries under the 2011 Contingent Loan Agreement. RP 70-71. But a third-party beneficiary "can enforce the contract only to the extent" it is enforceable by a principal party, and "any defenses available" against a principal are also available against a third-party beneficiary. *Kinne v. Lampson*, 58 Wn.2d 563, 567, 364 P.2d 510 (1961). Every relevant document provides that the District's debts are the District's debts alone and not those of the City, that the City's general tax revenues and other assets have not been pledged for repayment of District bonds, and that District creditors have no recourse against the City. As third-party beneficiaries of the 2011 Contingent Loan Agreement, the District's bondholders are fully bound to these provisions. In fact, many of these provisions explicitly bind the District's bondholders as well as the District itself.

Accordingly, because the 2011 Contingent Loan Agreement explicitly disclaims any pledge of the City future tax revenues or any other City assets for the repayment of the District's bonds, no "debt" of the City is created by the Contingent Loan Agreement. This additional independent ground requires reversal of the trial court's decision.

C. **The Trial Court's Conclusions Ascribing The Entire District Debt to the City, That Municipal "Debt" Includes Unrealized Interest, and That the City Is Required to Pledge Its Full Faith and Credit Should Be Reversed.**

Based on its conclusion that the City's contingent obligation to make loans under the 2011 Contingent Loan Agreement constitutes "debt," the trial court made three additional rulings: (1) that the entire amount of future loans to be made by the City must be counted against the City's debt limitations; (2) that the City's "debt" includes both principal and interest; and, (3) that the City exceeded its authority by pledging its full faith and credit to make loans. If the Court agrees with the District that the City's contingent obligation to make loans does not create "debt" for any of the reasons discussed above, these issues are moot and need not be addressed. In any event, each conclusion was error.

***1. The Trial Court Erred In Concluding That The Entire Amount That Might Be Loaned By The City Must Now Be Counted Against Its Debt Limitation.***

Although the City conceded that it cannot calculate with certainty what, if any, amounts might be loaned to the District over the twenty- to thirty-year life of the 2011 Bonds (CP 528; RP 24), the trial court nonetheless concluded that the *entire* amount to be borrowed by the *District* over the lifetime of the 2011 Bonds must be counted against the *City's* debt limitation. CP 664, RP 71-72. This conclusion is unsupportable.

The 2011 Contingent Loan Agreement is clear that the City would be called upon to make loans in the future only if, at semi-annual intervals, the District has insufficient funds to meet the semi-annual debt service payment next coming due. Only after receiving a deficiency notice from the District would the City know whether it is required to make a loan and the amount of the loan. CP 454-55 (App. A § 1.01). Hence, as the City conceded, it is impossible to determine at this stage the number or amount of loans the City will be required to make. CP 528; RP 24. The City's obligations are, therefore, contingent, and will not become "debt" unless and until the City at some point in the future is called upon to make loans to the District and elects to meet its obligations through borrowing that

pledges the City's general tax revenues as a source of repayment. *Dept. of Ecology*, 116 Wash.2d at 258; *Comfort*, 142 Wash. at 255.

Because the total amount the City might be required to loan cannot be determined at this time, it also cannot be determined that this amount would exceed the City's debt limitations now or in the future. The trial court's ruling, thus, creates potentially insurmountable problems for government entities attempting to calculate their remaining debt capacity, because they would have to count against that capacity "any obligation," including contingent liabilities that cannot be quantified. It also discourages the use of long-term contracts for goods and services, which will work to the disadvantage of taxpayers, who will lose the lower prices and protection from market volatility that long-term contracts offer. *See Rider v. City of San Diego*, 18 Cal.4<sup>th</sup> 1035, 77 Cal. Rptr. 2d 189, 959 P.2d 347, 354 (1998).

The courts have not required such an irrational result. "[C]onstitutional debt limitations do not arbitrarily telescope multi-year agreements into a single year." *Rider*, 959 P.2d at 355. The trial court's conclusion that the entire amount that might be loaned by the City must be counted against the City's debt limitation was error.

**2. Under Washington Law, Unearned Interest Is Not Included in "Debt."**

The trial court concluded, without explanation, that "debt" incurred by the City includes both the principal and interest to be paid by the District under the 2011 Bonds. CP 664, RP 71-72. Since this Court's 1916 decision in *State ex rel. State Capitol Commission v. Lister*, 91 Wash. 9, 156 P. 858 (1916), municipal "indebtedness" under Art. VIII has not included unearned interest, 91 Wash. at 15, a holding in accord with the overwhelming weight of authority. 15 McQuillin § 41:26 ("Interest is not a debt, within the meaning of debt-limit provisions, until it is earned and becomes due"). The trial court's decision in this regard was error.

**3. The Trial Court's Conclusion That The City Is Required to Pledge Its Full Faith and Credit was Error.**

The trial court concluded, without explanation, that the City exceeded its authority by pledging its "full faith and credit" to make loans to the District. CP 665, RP 72. This was error. The 2011 Contingent Loan Agreement nowhere requires the City to pledge its full faith and credit.<sup>15</sup> CP 450-66 (App. A). Furthermore, the 2011 Contingent Loan

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<sup>15</sup> While the Sept. 6 Interlocal Agreement, and the November 2008 and October 2009 Contingent Loan Agreements contain language pledging the City's full faith and credit to make loans to the District, those agreements have not been challenged. Because the 2011 Contingent Loan Agreement does not contain any pledge of the City's full faith and credit and further makes clear that it "supersede[s] provisions" of the Sept. 6 Interlocal Agreement "if and to the extent of any conflict between those provisions" (CP 165; App. A § 6.10), the Contingent Loan Agreement controls the City's obligations at issue here, and that Agreement does not pledge the City's full faith and credit.

Agreement expressly does not obligate the City to fund any loans from future general taxes, instead leaving the source of loan funds to the City's "sole discretion." CP 455 (App. A § 1.01(c)). The trial court's ruling in this regard was error.

**D. The Trial Court Erred in Considering Unauthenticated Hearsay and Irrelevant Documents and Declarations.**

***1. The Court Erred in Considering the Piper Jaffray Document and References Thereto in the Declaration of Deanne McDaniel.***

The Declaration of Deanne McDaniel in Support of the City's Motion for Summary Judgment, with exhibit, was considered by the trial court in rendering its decision. CP 668, ¶ 1; RP 58-59. The McDaniel Declaration attaches an Exhibit 1, which Ms. McDaniel references in her Declaration as projections received from Piper Jaffray. CP 677, ¶¶ 10-12. The District raised the inadmissibility of Exhibit 1 and references to it in the McDaniel Declaration in its briefing. CP 530, n.5. The Piper Jaffray document was unauthenticated (Evidence Rule 901), hearsay (Evidence Rule 802), and irrelevant because it was based on the entire amount that might (or might not) be loaned. (Evidence Rule 402). Therefore, it was not properly considered on summary judgment because it would not be admissible in evidence, and because the information was not made on personal knowledge. Civil Rule 56(e).

The same is true of the references and use of the Piper Jaffray document in the McDaniel Declaration. CP 677, ¶ 10 (entire paragraph, with the exception of the first sentence, should not have been considered), ¶ 11 (entire paragraph should not have been considered), and ¶ 12 (entire paragraph should not have been considered). The trial court erred in considering these materials.

***2. It Was Error For The Trial Court to Consider The Declaration of Steve Smith and Exhibit 1 Thereto.***

The trial court considered the Declaration of Steve Smith and Exhibit 1 thereto (an email string from an assistant attorney general communicating information from another state employee), which were submitted with the City's Reply. CP 664, ¶ 6. The District moved to strike the Smith Declaration and Exhibit 1 at the September 8, 2011 hearing. RP 28. The trial court denied the motion to strike, but commented that the outcome of the lawsuit would not turn on that. RP 51. Nevertheless, the trial court's oral opinion expressly referenced Exhibit 1 to the Smith Declaration (RP 60), and the court's Order expressly listed it as part of the record considered on the cross-motions. CP 664, ¶ 6.

The Smith Declaration and Exhibit 1 were unauthenticated (Evidence Rule 901), double or triple hearsay (Evidence Rule 802), and irrelevant (Evidence Rule 402). They were improperly considered on summary judgment (Civil Rule 56(e)). That was error.

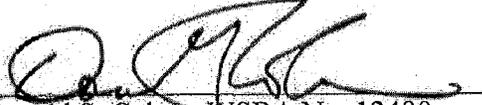
## VI. CONCLUSION

Not every long-term contractual commitment by a municipal corporation constitutes “debt” under Art. VIII, § 6 of the Washington Constitution and RCW 39.36. For the state or a local government to incur “debt” in this sense, it must *borrow* money, its obligation must be *non-contingent*, and it must *pledge future tax revenues*. None of these is true here. The City is a lender, not a borrower. The existence, amount, and timing of any loans cannot be predicted at this point. The City has no obligation to fund any loans from future City borrowing supported by a pledge of general taxes. This is a loan arrangement involving one municipal corporation as lender, and one as borrower. The “debt” of the District is not “debt” of the City. Respondents have not overcome the presumption of constitutionality and proved beyond a reasonable doubt that the City’s action authorized entering into the 2011 Contingent Loan Agreement would be unconstitutional.

Based on the foregoing, this Court should reverse the trial court decision and enter judgment for the District.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of November, 2011.

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# APPENDIX A

DRAFT 6/27/11

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**INTERLOCAL AGREEMENT**

**between**

**CITY OF WENATCHEE, WASHINGTON**

**and**

**GREATER WENATCHEE REGIONAL EVENTS CENTER  
PUBLIC FACILITIES DISTRICT**

**Dated as of**

\_\_\_\_\_, 2011

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0-0450

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## INTERLOCAL AGREEMENT

THIS INTERLOCAL AGREEMENT (this "Agreement") is dated as of \_\_\_\_\_, 2011, between the CITY OF WENATCHEE, a code city duly organized and existing under the laws of the state of Washington (the "City"), and the GREATER WENATCHEE REGIONAL EVENTS CENTER PUBLIC FACILITIES DISTRICT, a municipal corporation of the state of Washington (the "District");

### WITNESSETH:

WHEREAS, pursuant to Ordinance No. 2006-19 passed by the City Council on June 15, 2006, the City entered into an Interlocal Agreement with the City of East Wenatchee, the City of Cashmere, the City of Chelan, the City of Rock Island, the City of Entiat, the Town of Waterville, Chelan County and Douglas County, relating to the creation of the District; and

WHEREAS, the District was formed pursuant to the authority granted by chapter 35.57 RCW for the specific purpose of acquiring, constructing, owning, remodeling, maintaining, equipping, re-equipping, repairing, financing, and operating (either directly or by contract) a multipurpose regional special events center with associated parking (the "Regional Center"); and

WHEREAS, chapter 39.34 RCW authorizes public agencies to enter into agreements for cooperative action; and

WHEREAS, in an Interlocal Agreement for the Greater Wenatchee Regional Events Center Project, dated September 6, 2006, between the City and the District, as amended by a First Amendment to Interlocal Agreement for the Greater Wenatchee Regional Events Center Project dated May 30, 2007, and a Second Amendment to Interlocal Agreement for the Greater Wenatchee Regional Events Center dated September 25, 2008 (the "Existing City-District Interlocal Agreement"), the City agreed to enter into a contingent loan agreement with the District to provide security for bonds issued by the District, through the execution of a contingent loan agreement providing that if and when the District were not to have sufficient money to pay debt service on its bonds issued for the Regional Center when due and payable, the City would make loans to the District to enable the District to make those debt service payments; and

WHEREAS, the District issued its Limited Sales Tax Bond Anticipation Notes, Series 2008 in the principal amount of \$5,135,000 (the "Sales Tax Notes") and its Revenue and Special Tax Bond Anticipation Notes, Series 2008A and 2008B (Taxable) in the principal amount of \$36,635,000 (the "Revenue Notes") to acquire the Regional Center; and

WHEREAS, in connection with the issuance of the Revenue Notes, the City and the District entered into a Contingent Loan Agreement dated November 13, 2008 (the "Notes Contingent Loan Agreement"), under which the City agreed to lend money to the District if necessary to pay interest on the Revenue Notes; and

WHEREAS, the City has made loans to the District to pay interest due on the Revenue Notes pursuant to the Notes Contingent Loan Agreement, and the aggregate outstanding principal amount of such loans owed by the District to the City is \$2,617,521.89 as of June \_\_, 2011; and

WHEREAS, pursuant to a resolution adopted by the District (the "Bond Resolution"), the District will issue its Revenue and Special Tax Bonds, Series 2011A and Series 2011B (Taxable) (together, the "Bonds") to repay certain outstanding revenue notes (the "Revenue Notes") and to pay costs of issuance for the Bonds; and

WHEREAS, the District and the City now desire to enter into this Agreement to provide that the City will make loans to the District to assist the District in providing for the payment of principal of and interest on the Bonds in the event that revenues received from the operation of the Regional Center, and available taxes pledged to the repayment of the Bonds are insufficient to make such payments;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained, the parties agree as follows.

#### ARTICLE I LOANS TO THE DISTRICT; REPAYMENT TERMS

Section 1.01 City Contingent Loan Commitment to the District. In the event that the District has insufficient amounts available from sales taxes (after providing for the payment of debt service on the District's Limited Sales Tax Bonds, Series 2011 (the District's "Sales Tax Bonds")) and from Regional Center Revenue, to provide for the timely payment of principal of and interest on the Revenue and Sales Tax Bonds, the City shall lend money to the District at the times and in the amounts set forth in this section (each, a "Loan") for the purpose of assisting the District in providing for the payment of debt service on the Bonds. The aggregate principal amount of outstanding Loans to be made by the City pursuant to this Agreement shall not exceed the original principal amount of Bonds, plus all unpaid interest accrued and to accrue on the Bonds. Loans made to the District hereunder shall not be used to pay the principal of or interest on the District's Sales Tax Bonds or any other obligations of the District. As used in this Agreement, "Regional Center Revenue" means all earnings, revenue and money received by the District from or on account of its ownership and/or operation of the Regional Center, including any amount received as a federal or state government reimbursement of costs of maintenance and operation of the Regional Center.

(a) Review of Debt Service Fund. No later than April 1 and October 1 of each year, the District and the City shall review the amount on deposit in the District's Debt Service Fund and in the District Reserve and Contingency Account to determine whether any further City budgetary action may be required prior to the upcoming June 1 and December 1, respectively, debt service payment dates for the Bonds (each a "Debt Service Payment Date").

(b) Debt Service Loans. If on any May 1 and November 1 (or, in each case, the next business day if such day is not a business day), the amount on deposit in the Debt Service Fund and the District Reserve and Contingency Account is insufficient to make the required debt service payment on the Bonds coming due on the upcoming Debt Service Payment Date, the District immediately shall provide the City a Deficiency Notice in the form set forth at Exhibit A.

(c) Funding of Loans. For as long as the Bonds remain outstanding, if the City receives a Deficiency Notice, the City shall loan to the District an amount that, when added to the District's Debt Service Fund and the District Reserve and Contingency Account balances, is sufficient to pay all principal of (including mandatory sinking fund installments) and interest on the Bonds coming due on the upcoming Debt Service Payment Date. The City shall cause the amount of each Loan hereunder to be transferred to the District, for deposit into the Debt Service Fund, in immediately available funds. Such Loan shall be made prior to the applicable Debt Service Payment Date. The City shall in its sole discretion determine how it will fund each Loan, (i.e., from available City funds, from City borrowings or from any other legally available source), and nothing herein shall be deemed to require the City to borrow money in order to provide for Loans to the District.

(d) Direction of the City. At the City's sole option, the City may direct that a Loan be used by the District to pay costs of maintenance and operation of the Regional Center and for the District to use Regional Center Revenue to pay debt service on the Bonds to the extent that there is Regional Center Revenue available to make such payment. This provision shall not be construed as obligating the City to pay costs of maintenance and operation or any other costs of the Regional Center or to make Loans in an amount greater than the amount of principal and interest on the Bonds on an upcoming Debt Service Payment Date for which net Regional Center Revenue is not available.

(e) Method of Notice. Deficiency Notices shall be sent by the Treasurer on behalf of the District to the City's Finance Director by facsimile or electronic mail, which facsimile or electronic mail shall be promptly confirmed by telephone communication to the Finance Director. Any failure by the District to send such notices by facsimile or electronic mail shall not nullify the City's absolute obligation to make Loans to the District hereunder, but may result in a delay by the City in transferring Loan amounts to the District.

(f) Nature of City's Obligation. The City's obligation to make Loans to the District in the amounts, at the times and in the manner described herein shall be absolute and unconditional, and shall not be subject to diminution by setoff, counterclaim, abatement or otherwise. The City agrees to make Loans to the District hereunder regardless of whether the Regional Center is operating at any particular time. The obligations of the City to make Loans hereunder shall terminate upon payment in full of the principal of and interest on all Outstanding Bonds. The City's obligation to make Loans to the District hereunder is contingent on the amount of Regional Center Revenue and District Tax Revenue received by the District and available to pay debt service as it comes due on the Bonds. The City and the District recognize that the City's obligations hereunder do not constitute City "debt" subject to constitutional or statutory limitations. All liabilities incurred by the District, including but not limited to the Bonds, are obligations solely of the District and shall not be liabilities or obligations of the City. Neither a Registered Owner of the Bonds nor any other person shall have any right of action against or recourse to the City, its assets, credit, or services, on account of the Bonds or any other debts, obligations, liabilities or acts or omissions of the District. The City and the District shall follow the specified procedures set forth herein for determining whether the Regional Center Revenue and District Tax Revenue are insufficient to pay debt service coming due on the Bonds and whether and when any City Loans shall be required hereunder.

(g) City Acknowledgments. The City acknowledges that the District will pledge any Loan proceeds it receives under this Agreement to the payment of the Bonds, except to the extent that the City may direct that Loan proceeds be used by the District to pay costs of maintenance and operation of the Regional Center. The City also recognizes that the District's pledge will be material to the offer and sale of the Bonds, and will be disclosed to potential purchasers and purchasers of the Bonds. The City and the District consider this Agreement to be a binding contract and acknowledge that Registered Owners and financial institutions providing credit support for Bonds, if any, will rely on the terms of this Agreement, including the commitment by the City to make the Loans to the District at the times and in the amounts set forth in this Section 1.01.

Section 1.02 Repayment Terms.

(a) Source of Repayment. The principal amount of each Loan to the District, together with interest thereon as provided in the following subsection, shall be repaid by the District from Regional Center Revenue and other non-Sales Tax Revenue after reasonable provision has been made for the expenditures required under the flow of funds provision of the District resolution authorizing issuance of the Bonds, and from other available funds of the District. Such payments will be applied as follows:

*First*, to the interest on all outstanding loans from the City to the District under the Notes Contingent Loan Agreement in the order in which such loans were incurred;

*Second*, to the principal of all outstanding loans from the City to the District pursuant to the Notes Contingent Loan Agreement in the order in which such loans were incurred;

*Third*, to the interest on all outstanding Loans in the order in which such Loans were incurred; and

*Fourth*, to the principal of all outstanding Loans in the order in which such Loans were incurred.

For purposes of this Agreement, the requirements of the flow of funds provision of the District resolution authorizing issuance of the Bonds means the disbursement of Regional Center Revenue and other District non-Sales Tax Revenue in the following order of priority:

(i) to provide for Costs of Maintenance and Operation to the extent not paid from other sources;

(ii) to pay the interest on any Bonds and additional bonds issued on parity therewith;

(iii) to pay the principal and mandatory sinking fund installments of any Bonds and additional bonds issued on a parity therewith;

(iv) to repay any loans made by the City pursuant to the Notes Contingent Loan Agreement and this Agreement;

(v) to make deposits into the District Reserve and Contingency Account;

(vi) to make repay the principal and interest of bonds subordinate to the Bonds; and

(vii) to retire by redemption or purchase any outstanding bonds of the District, to provide for costs of and reserves for long-term capital repairs, renewals and replacements of the Regional Center, and for other lawful purposes, in no particular order.

(b) Interest. Each Loan made under the terms of this Agreement will bear interest from the date of the Loan until the date such Loan is repaid. Interest on the Loans will be calculated on the basis of a 365/366-day year, for the actual number of days elapsed. The rate of interest borne by each Loan hereunder shall be a variable rate equal to the monthly average rate of return on the State of Washington Local Government Investment Pool (or its successor), as determined as of the last day of each month in which a Loan is outstanding, and shall change monthly as of the first day of each month in which a Loan is outstanding. The City may in its discretion charge a lower rate of interest.

(c) Term. Unless paid earlier pursuant to paragraph (a) of this Section 1.03, all Loans hereunder shall mature on \_\_\_\_\_, 2041, or six months after the Bonds are no longer Outstanding, if earlier.

(d) Nature of District's Obligation. The District's obligation to repay Loans made to the District under this Agreement shall be absolute and unconditional, and shall not be subject to diminution by setoff, counterclaim, abatement or otherwise. The District is obligated to repay Loans made hereunder as set forth in Section 1.02(a), above. The full faith, credit and resources of the District are hereby pledged for the payment of all amounts owed to the City under this Agreement, and the City and the District recognize that the District's obligation to repay Loans will constitute "debt" subject to constitutional and statutory limitations. Consequently, the District agrees to maintain adequate non-voted debt capacity to accommodate its obligation to repay any Loan, and the District acknowledges that the City may, pursuant to Section 1.01(d), require the District to use Regional Center Revenue to pay debt service in order to enable the District to maintain adequate non-voted debt capacity. The District's obligations under this Agreement shall continue in effect and shall survive the satisfaction of the District's obligations under the Bonds and the Bond Resolution until such time as principal and interest due to the City pursuant to any Loan or Loans made hereunder have been repaid, together with any costs owed to the City hereunder. To further its ability to make such payments to the City, the District hereby irrevocably covenants and agrees to continue imposing the sales and use tax as permitted under RCW 82.14.390, as it may be amended from time to time, for so long as the Bonds remain outstanding or any District obligation to pay any amount to the City under this Interlocal Agreement remains outstanding. Notwithstanding the foregoing, the District and the City acknowledge that RCW 82.14.390 currently provides that such sales and use tax may only be imposed for 25 years after it is first collected, which is until July 2031.

(e) Insufficient District Debt Capacity to Incur Loan Amounts. In the event the District lacks sufficient non-voted debt capacity to incur additional indebtedness resulting from a Loan from the City, any subsequent Loan amount greater than the District's then-remaining non-voted debt capacity shall be deemed an equity payment by the City to the District in exchange for an interest in the Regional Center, which amount need not be repaid pursuant to Subsection 1.02(a), above. Within 60 days after the end of any fiscal year in which any equity payment has

been made by the City, the District shall deliver to the City a quitclaim deed conveying to the City a tenancy-in-common interest in the Regional Center. Such interest shall be a percentage ownership interest in the Regional Center, the numerator of which shall be the sum such equity payment and the costs of transferring title and recording such quitclaim deed, and the denominator of which shall be the aggregate original principal amounts of: (a) the Bonds, (b) all other bonds issued by the District to finance the Regional Center (excluding the previously-issued notes that no longer remain outstanding). The City will reconvey to the District, by means of a quitclaim deed, all of the City's interest in the Regional Center acquired pursuant to this section if the District pays to the City an amount equal to the sum of:

- (i) all payments made by the City to the District in exchange for an interest being reconveyed to the District; *plus*
- (ii) all costs incurred by the City relating to the transfer of title and recording of deed(s); *plus*
- (iii) interest on the sum of the amounts described by clauses (i) and (ii), calculated from the date(s) of the City's payment thereof; *plus*
- (iv) the costs of transferring title to the District and recording such quitclaim deed.

The rate of interest to be used for purposes of this calculation shall be the rate described in Subsection 1.02(b), above. The City's acquisition of equity interests in the Regional Center under this Subsection 1.02(e) shall not alter the District's rights and obligation to operate and manage the Regional Center as a regional center under chapter 35.57 RCW.

(f) Appropriateness of Interest Rates and Transfers of Equity Interests. The interest rates set forth in Section 1.02(b) and the provision for the potential transfer of equity interest in the Regional Center under Subsection 1.02(e), are intended to reflect the joint and cooperative nature of the financing of the Regional Center pursuant to chapters 35.57, 35.59, and 67.28 RCW and other applicable law.

## ARTICLE II RIGHTS OF CITY UPON MAKING LOANS

If the City has made any Loans to the District under this Agreement and such Loans have not been repaid in full (whether or not the Loan is in default), the City may take any one or more of the following steps:

(a) The City may request that the District call the Bonds for redemption to the extent permitted under and in accordance with the Bond Resolution; *provided* that the City provides funds to accomplish such redemption (taking into account available funds of the District).

(b) The City may have access to and inspect, examine and make copies of the books and records and any and all accounts and data of the District.

(c) Upon approval of all the parties to the interlocal agreement among nine jurisdictions and approved by City Ordinance No. 2006-19 (the "District Formation Interlocal Agreement"), the City may require that the District, and the District agrees to, levy any tax that

the District is permitted to levy without a vote of its electors. The City may at any time require the District to seek such approval from the nine jurisdictions.

(d) Upon approval of all the parties to the District Formation Interlocal Agreement, the City may require that the District, and the District agrees to put a proposition on the ballot seeking approval to levy or increase a tax the District is authorized to levy with a vote. The City may at any time require the District to seek such approval from the nine jurisdictions.

(e) Once the Bonds, the Sales Tax Bonds and any other debt of the District are no longer Outstanding, the City may require that the District transfer the ownership of the Regional Center to the City.

### ARTICLE III RESERVE AND CONTINGENCY FUND AND ISSUANCE OF BONDS

Section 3.01 Reserve and Contingency Fund. The District shall establish and maintain a District Reserve and Contingency Account (the "District Reserve and Contingency Account"). Money in the District Reserve and Contingency Account may be used to fund any proper expenditure of the Regional Center, including paying or reimbursing costs of renewing, repairing, rehabilitating and replacing facilities at the Regional Center, as agreed by the City and the District. To the extent available, amounts in the District Reserve and Contingency Account may be used to pay debt service on the Bonds. The City and the District acknowledge that there are no assurances money will be available in the District Reserve and Contingency Account on any Debt Service Payment Date or otherwise if the District encounters financial difficulties.

After the District is providing for current costs of maintenance and operation and for debt service on the Bonds from Regional Center Revenue, the District, in consultation with the City, shall determine an initial minimum fund balance in the District Reserve and Contingency Account, and shall develop a plan to build up amounts in that account to provide for part of the cost of anticipated capital and extraordinary expenses of the District. The District shall make deposits to the District Reserve and Contingency Account from Regional Center Revenue, District Tax Revenue and earnings thereon, if any, pursuant to the requirements of the flow of funds provision of the District resolution authorizing issuance of the Bonds, or from other available funds of the District, in an amount necessary to replenish any withdrawal from the District Reserve and Contingency Account until the minimum fund balance is maintained.

Section 3.02 Issuance of Bonds. The District shall issue the Bonds in accordance with the Bond Resolution and this Agreement.

Section 3.03 Refinancing. The City may request the District to redeem or defease the Bonds if the City reasonably determines that: (a)(i) the District is able to issue and sell refunding bonds (or to obtain other refinancing) *without* the City's agreement to make Loans, and (ii) the District is financially able to pay the debt service on such refunding bonds (or other refinancing); or (b)(i) the District is able to issue and sell refunding bonds (or to obtain other refinancing) *with* or *without* the City's agreement to make Loans, (ii) the interest rates at which refunding bonds would likely be issued (or other refinancing would likely be obtained) are less than the interest

rates on the Bonds to be refunded, and (iii) the District is financially able to pay debt service on such refunding bonds (or other refinancing). If the City makes such request, the District shall use its best efforts to obtain a contract for the purchase of such bonds (or to obtain other refinancing). The District shall not issue refunding bonds to redeem the Bonds unless the District has consulted with the City, and the City has approved the terms and conditions of the issuance of such refunding bonds.

Section 3.04 Additional Bonds. The District shall not pledge Regional Center Revenue or District Tax Revenue to any other purpose or issue any Additional Revenue and Special Tax Bonds or Additional Sales Tax Bonds without the prior written consent of the City. [[Such consent shall not be unreasonably withheld if the following conditions are met at that future time:

- (a) The District is not in default under this Agreement or under the Bond Resolution;
- (b) The District provides the City with a certificate of the type required prior to the issuance of additional District bonds issued with a pledge of Regional Center Revenue and District non-Sales Tax Revenue as the pledge that is on a par with the pledge provided by the District with respect to the Bonds; and
- (c) No Loans hereunder are then outstanding.

Unless specified in a separate agreement or an amendment hereto, the City shall be under no obligation to make Loans hereunder to pay debt service on any Additional Revenue Bond.

Section 3.05 Regional Center. The District shall cause the Regional Center to be operated and maintained as a regional center (as such term is defined in chapter 35.57 RCW) in a business-like fashion (including the maintenance of proper and customary property and liability insurance with respect to the Regional Center) and will cause all books and records to be maintained in accordance with applicable State law. The District shall use its best efforts to cause the Regional Center to be maintained in good condition and repair; will maintain, and will honor, all valid restrictions on the uses to which the Regional Center may be subject; and will not alienate, sell, convey or transfer the Regional Center other than as provided in this Agreement.

Section 3.06 Operation and Maintenance of the Regional Events Center. The City shall provide an agreement to the PFD for its review and approval for the operation and maintenance of the Regional Events Center. The PFD shall, at all times operate the Regional Center, or cause the Regional Center to be operated, properly as a "regional center" (as that term is defined in chapter 35.57 RCW) and in a sound and economical manner and shall maintain, preserve and keep the same, or cause the same to be maintained, preserved and kept, with the appurtenances and every part and parcel thereof, in good repair, working order and condition, and shall from time to time make, or cause to be made, all necessary and proper repairs, replacements and renewals so that at all times the operation thereof may be properly and advantageously conducted.

Section 3.07 Strategic Financial Analysis and Business Plan. Upon the City's request, the District shall undertake, jointly with the City, a strategic planning review of the District's operating model, business plan and financial projections. The District shall not be required to

undertake such a strategic review more often than once every two years unless the City provides for the costs of that review.

Section 3.08 Annual District Budget. The District shall provide a proposed budget to the City not less than 90 days prior to each fiscal year and shall provide the City the opportunity to comment on the budget and to participate in a joint workshop with the District Board concerning the budget and any proposed amended budget.

Section 3.08 Restrictions on use of Sales Tax Revenue. The District covenants, and shall covenant in the resolution authorizing the Sales Tax Bonds, that Sales Tax Revenue shall only be used to pay debt service on the Sales Tax Bonds and to provide for a reserve for those bonds, and then to pay debt service on the Revenue Bond, and for no other purpose except as otherwise permitted under this Agreement. As used in this Agreement, "Sales Tax Revenue" means the money received by the District from the Washington State Department of Revenue on account of the sales and use tax imposed by the District pursuant to Resolution No. 2006-02, adopted by the Board on July 5, 2006, pursuant to RCW 82.14.390.

#### ARTICLE IV REMEDIES UPON DEFAULT

Section 4.01 Remedies of City Upon District Default. Upon the occurrence of a default by the District in its obligations hereunder, the City may proceed to protect and enforce its rights in equity or at law, either in mandamus or for the specific performance of any covenant or agreement contained herein, or for the enforcement of any other appropriate legal or equitable remedy, as the City may deem most effectual to protect and enforce any of its rights or interests hereunder.

Section 4.02 Remedies of District upon City Default. Upon the occurrence of a default by the City in its obligations hereunder, the District may proceed to protect and enforce its rights in equity or at law, either in mandamus or for the specific performance of any covenant or agreement contained herein, or for the enforcement of any other appropriate legal or equitable remedy, as the District may deem most effectual to protect and enforce any of its rights or interests hereunder.

Section 4.03 No Remedy Exclusive. No remedy conferred upon or reserved to either party by this Agreement is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative. Either party shall be free to pursue, at the same time, each and every remedy, at law or in equity, which it may have under this Agreement, or otherwise.

Section 4.04 No Implied Waiver. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. For the exercise of any remedy, it shall not be necessary to give any notice, other than such notice as may be expressly required herein.

Section 4.05 Agreement to Pay Attorneys' Fees and Expenses. If a default arises under any of the provisions of this Agreement and either party hereto should employ attorneys or incur

other expenses for the collection of amounts due under this Agreement or the enforcement of performance or observance of any obligation or agreement on the part of the other party contained in this Agreement, on demand therefor, the nonprevailing party shall pay or reimburse the prevailing party for the reasonable fees of such attorneys and such other expenses so incurred.

ARTICLE V  
COMPLIANCE WITH CONTINUING DISCLOSURE REQUIREMENTS

Section 5.01 Annual Financial Information To Be Provided. To meet the conditions of paragraph (b)(5) of United States Securities and Exchange Commission Rule 15c2-12 (the "Rule"), as applicable to a participating underwriter for the Bonds, the City undertakes for the benefit of holders of the Bonds to provide information as follows:

(a) To the MSRB, with copies to the District, the following annual financial information and operating data (the "annual financial information"): (1) annual financial statements, which statements may or may not be audited, showing ending fund balances for the City's general fund prepared in accordance with the Budget Accounting and Reporting System prescribed by the Washington State Auditor pursuant to RCW 43.09.200 (or any successor statute); (2) the assessed valuation of taxable property in the City; (3) property taxes due, property taxes collected and property taxes delinquent; (4) property tax rates per \$1,000 of assessed valuation, and (5) outstanding general obligation debt of the City. Items 2-5 shall be required only to the extent that such information is not included in the annual financial statements.

(b) To the MSRB, with copies to the District, timely notice of a failure by the City to provide required annual financial information on or before the date specified in paragraph (c) of this section.

(c) The annual financial information shall be provided to the MSRB, not later than the last day of the ninth month after the end of each fiscal year of the City (currently, a fiscal year ending December 31), as such fiscal year may be changed as required or permitted by Washington law, commencing with the City's fiscal year ending December 31, 2011.

The annual financial information may be provided in a single or multiple documents, and may be incorporated by reference to other documents that have been filed with the MSRB, or, if the document incorporated by reference is a "final official statement" with respect to other obligations of the City, that has been filed with the MSRB.

Section 5.02 Amendment of Continuing Disclosure Undertaking. This Article VI is subject to amendment after the primary offering of the Bonds without the consent of any holder of any Bond, or of any broker, dealer, municipal securities dealer, participating underwriter, rating agency, or the MSRB, under the circumstances and in the manner permitted by the Rule. The City will give notice to the MSRB the substance (or provide a copy) of any amendment to this Article and a brief statement of the reasons for the amendment. If the amendment changes the type of annual financial information to be provided, the annual financial information

containing the amended financial information will include a narrative explanation of the effect of that change on the type of information to be provided.

Section 5.03 Termination of Continuing Disclosure Undertaking. The City's obligations under this Article VI shall terminate upon the legal defeasance of all of the Bonds. In addition, the City's obligations under this Article shall terminate if those provisions of the Rule which require the City to comply with this Article become legally inapplicable in respect of the Bonds for any reason, as confirmed by an opinion of nationally recognized bond counsel or other counsel familiar with federal securities laws delivered to the City, and the City provides timely notice of such termination to the MSRB.

Section 5.04 Remedy for Failure to Comply with Continuing Disclosure Undertaking. As soon as practicable after the City learns of any failure to comply with the requirements of this Article VI, the City will proceed with due diligence to cause such noncompliance to be corrected. No failure by the City or other obligated person to comply with this Article shall constitute a default in respect of the Bonds or bonds issued by the City. The sole remedy of any holder of a Bond shall be to take such actions as that holder deems necessary, including seeking an order of specific performance from an appropriate court, to compel the City or other obligated person to comply with the requirements of this Article.

Section 5.05 Agreement To Assist District's Undertaking. The City agrees to submit to the MSRB copies of the District's annual financial information as well as material event notices, as and when required of the District under the Bond Resolution. The District hereby authorizes and directs the City to make such filings on its behalf.

#### ARTICLE VI MISCELLANEOUS

Section 6.01 Governing Law; Venue. This Agreement is governed by and shall be construed in accordance with the substantive laws of the State of Washington and shall be liberally construed so as to carry out the purposes hereof. Except as otherwise required by applicable law, any action under this Agreement shall be brought in the Superior Court of the State of Washington in and for Chelan County.

Section 6.02 Notices. Except as otherwise provided herein, all notices, consents or other communications required hereunder shall be in writing and shall be sufficiently given if addressed and mailed by first-class, certified or registered mail, postage prepaid and return receipt requested, as follows:

To the City:

CITY OF WENATCHEE  
Attn: Finance Director  
129 S. Chelan Ave.  
P.O. Box 519  
Wenatchee, Washington 98807

To the District:

GREATER WENATCHEE REGIONAL EVENTS CENTER  
PUBLIC FACILITIES DISTRICT  
Attn: General Manager  
1300 Walla Walla Avenue  
Wenatchee, Washington 98801

The City or the District may, by notice given hereunder, designate any further or different addresses to which subsequent notices, certificates, requests or other communications shall be sent. Notices shall be deemed served upon deposit of such notices in the United States mail in the manner provided above.

Section 6.03 Binding Effect. This Agreement shall inure to the benefit of and shall be binding upon the City and the District and their successors. This Agreement may not be assigned.

Section 6.04 Severability. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 6.05 Amendments.

(a) This Agreement. This Agreement may not be effectively amended, changed, modified or altered, except by an instrument in writing duly executed by the City and the District (or their successors); *provided*, that any such amendment shall not materially adversely affect the Registered Owners of the Bonds. The obligation of the City to make Loans under this Agreement may not be terminated until the Bonds have been paid in full or defeased.

(b) The Bond Resolution. The District shall not amend the Bond Resolution without the prior written consent of the City so long as this Agreement is in effect and the City is performing its obligations hereunder.

Section 6.06 Third Party Rights. Except as otherwise expressly provided herein, the terms of this Agreement are not intended to establish nor to create any rights in any persons or entities other than the City and the District and the respective successors and assigns of each; *provided*, that so long as the Bonds are Outstanding, the Registered Owners are intended to be and shall be third-party beneficiaries of this Agreement.

Section 6.07 Time of Essence. Time and all terms and conditions shall be of the essence of this Agreement.

Section 6.08 Effective Date of and Termination of Agreement. This Agreement shall take effect upon its execution. This Agreement shall terminate upon the later of (a) payment in full of all principal of and interest on the Bonds (or defeasance thereof pursuant to the District resolution authorizing the Bonds, and (b) repayment of all principal and interest due to the City pursuant to any Loan or Loans made hereunder, together with any costs owed to the City hereunder.

Section 6.09 Disclaimers with Respect to Loans and the District. ORAL AGREEMENTS OR ORAL COMMITMENTS TO LEND MONEY, EXTEND CREDIT, OR FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

The District is organized pursuant to RCW 35.57.010 and the Interlocal Agreement among the City, the City of East Wenatchee, the City of Cashmere, the City of Chelan, the City of Rock Island, the City of Entiat, the Town of Waterville, Chelan County and Douglas County (together, the "Members"). The Interlocal Agreement provides as follows: "All liabilities incurred by the District shall be satisfied exclusively from the assets, credit, and properties of the District, and no creditor or other person shall have any right of action against or recourse to the Members, its assets, credit, or services, on account of any debts, obligations, liabilities or acts or omissions of the District."

Section 6.10 Relationship to Existing City-District Interlocal Agreement. This Agreement supplements the Existing City-District Interlocal Agreement, and provisions of this Agreement shall supersede provisions of the Existing City-District Interlocal Agreement if and to the extent of any conflict between those provisions.

IN WITNESS WHEREOF, the City and the District have caused this Agreement to be executed in their respective names by their duly authorized officers, and have caused this Agreement to be dated as of the date set forth on the first page hereof.

APPROVED:

CITY OF WENATCHEE, WASHINGTON

By \_\_\_\_\_  
Mayor

GREATER WENATCHEE REGIONAL EVENTS  
CENTER PUBLIC FACILITIES DISTRICT

By \_\_\_\_\_  
Chair

**EXHIBIT A**  
Form Deficiency Notice

City of Wenatchee  
Attn: Administrative Services Director  
P.O. Box 519  
Wenatchee, Washington 98807

VIA FACSIMILE OR EMAIL  
(with telephone confirmation)

Re: DEFICIENCY NOTICE — Greater Wenatchee Regional Events Center Public Facilities District Revenue and Special Tax Bonds, Series 2011A and Series 2011B (Taxable)

The undersigned, the duly authorized Treasurer of the Greater Wenatchee Regional Events Center Public Facilities District (the "District"), hereby certifies to the City of Wenatchee, Washington (the "City"), with reference to the Interlocal Agreement (the "Agreement") dated as of \_\_\_\_\_, 2011, by and between the City and the District, and the above-captioned bonds (the "Bonds"), that:

- (1) the next Debt Service Payment Date for the Bonds is: [June 1/December 1], 20\_\_;
- (2) the aggregate amount of principal and interest due on such date is \$\_\_\_\_\_, which represents principal of the Bonds in the amount of \$\_\_\_\_\_ and interest on the Bonds in the amount of \$\_\_\_\_\_;
- (3) the amount on deposit in the Debt Service Fund as of [\_\_\_\_ 1/\_\_\_\_ 1] 20\_\_, was \$\_\_\_\_\_ and the total amount on deposit in the District Reserve and Contingency Account as of [\_\_\_\_ 1/\_\_\_\_ 1], 20\_\_, was \$\_\_\_\_\_ and, it appears there will be insufficient money available in such funds on the upcoming Debt Service Payment Date to make the debt service payments described in clause (2); and
- (4) this is a "Deficiency Notice" within the meaning of the Agreement.

Pursuant to Section 2.02 of the Agreement, the City is requested to take such action as is necessary to budget the amount required to provide the District a Loan prior to [June 1/December 1], 20\_\_, in the maximum amount of \$\_\_\_\_\_ (which is equal to the difference between the first amount listed in clause (2) and the amount listed in clause (3)).

Any capitalized term used herein and not defined shall have the meaning assigned to such term in the Agreement or, if not therein defined, as defined in the Bond Resolution.

Dated: \_\_\_\_\_, 20\_\_.

GREATER WENATCHEE REGIONAL EVENTS  
CENTER PUBLIC FACILITIES DISTRICT

\_\_\_\_\_  
Treasurer

# APPENDIX B

## C

West's Revised Code of Washington Annotated Currentness

Constitution of the State of Washington (Refs & Annos)

Article 8. State, County and Municipal Indebtedness

→→ **§ 6. Limitations upon Municipal Indebtedness**

No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: *Provided*, That no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: *Provided further*, That (a) any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality and (b) any school district with such assent, may be allowed to become indebted to a larger amount but not exceeding five per centum additional for capital outlays.

CREDIT(S)

Adopted 1889. Amended by Amendment 27 (Laws 1951, H.J.R. No. 8, p. 961, approved Nov. 4, 1952).

Current through amendments approved 11-2-2010

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END OF DOCUMENT

# APPENDIX C

# The Washington Historical Quarterly

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THE WASHINGTON UNIVERSITY  
STATE HISTORICAL SOCIETY  
UNIVERSITY STATION  
SEATTLE, WASHINGTON

Entered at the Postoffice at Seattle as second-class mail matter.

## THE CONSTITUTION OF THE STATE AND ITS EFFECTS UPON PUBLIC INTERESTS\*

The feature of the constitution of Washington which was most frequently criticised at the time of its adoption was its length, but time and experience has shown that its principal fault is that it is really not long enough.

The American people have become so used to living under written constitutions that a sort of constitutional common law has come to exist, which enforces an unconscious uniformity in the substantial provisions of all them.

Each state is under obligation to its people to afford them republican form of government, and our ideas of such an institution are so fixed by usage and judicial interpretation that the constitution of each new state, in all the essentials, is but a copy of some older one.

Certain questions, as, for instance, the right of the people to take or injure property of individuals only upon making compensation therefor, the imperative necessity of guaranteeing the absolute secrecy of the ballot, the evils attending the public contributions to the building of railroads, and others, became so well settled in the public mind many years ago, that the people in remodeling old constitutions and in enacting new ones, insisted upon withdrawing them from possible legislative disturbances.

There is no reason why firmly settled principles or policies of government should not be expressed in written and unalterable law, even if the expression of them requires more words than were used in an older constitution. The Constitution of the United States and the constitutions of many of the older states were framed by men who had the benefit of sufficient experience or sufficient foresight to anticipate what the demands of the future would be. Yet it required twelve amendments to the federal constitution to put that instrument into satisfactory operation.

The constitution of Washington, therefore, contained little that was new, or that was not, in substance, expressed in some preceding document of like character or, at any rate, in well considered and long enacted legislation. The difficulty which most greatly embarrassed the convention, as it turns out, was in expressing definitely and certainly the meaning of many of the important acts framed and proposed by it. I doubt whether a majority of the people of the state would think it worth while

\*This article appears as Appendix 2 of Mr. Knapp's thesis published in this issue. Mr. Stiles was a member of the Constitutional Convention and was later elected a Justice of the first Supreme Court of the State.

provisions has been that election scandals are almost unknown here, and there is nowhere a more independent body of voters.

By prescribing limitations to the power of creating public indebtedness and restricting the objects for which indebtedness might be created the constitution has doubtless served a valuable purpose. Its framers certainly expected that it would be more literally construed than it has been; but the peculiar exigencies of the times have caused the provisions on this subject to be more hardly pressed than any others. Unfortunately there was no definition of indebtedness in the constitution and the legislature has never supplied the deficiency. Reckless assessments in the earlier years deceived the people and encouraged them to extravagance; and when the borrowed money was spent there were presented two miserable alternatives of repudiation or stoppage of government unless the letter of the law could be made to give way in some measure to its supposable spirit.

No other state has placed the common school on so high a pedestal. One who carefully reads Article IX. might also wonder whether, after giving to the school fund all that is here required to be given, anything would be left for other purposes. But the convention was familiar with the history of school funds in the older states, and the attempt was made to avoid the possibility of repeating the tale of dissipation and utter loss. At the minimum rate at which school lands can be sold, the state will, sometime, have an irreducible fund for its common schools of more than \$25,000,000, an endowment greater than that of any other educational system now existing.

In a few of its features, mostly original ones, the constitution has, in my judgment, not worked well. It was a good thing to do away with the old plan of granting special charters to cities and towns by special act of the legislature. Two hundred and eighty-six pages of the laws of 1896 were taken up with enactments of this kind, which, it was notorious, were passed without any consideration of the legislature; and, doubtless, by this time that record would have been distanced but for the prohibition contained in Article IX. But the concession which followed, that cities of 20,000 inhabitants and upwards might make their own charters, was a melancholy mistake. It has cost the cities capable of availing themselves of this privilege more than \$50,000 to get themselves under the provision of their present charters and there is scarcely an important provision in any of them that does not require an opinion of the supreme court to determine whether it is not in conflict with the "general law" before it can be enforced. This is one of the few instances where special interests got control of the convention. The county members did

# APPENDIX D

**A HISTORY OF THE CONSTITUTION AND GOVERNMENT OF  
WASHINGTON TERRITORY**

by

**WILFRED J AIREY**

**A thesis submitted for the degree of**

**DOCTOR OF PHILOSOPHY**

**UNIVERSITY OF WASHINGTON**

**1945**

## MUNICIPAL AND STATE INDEBTEDNESS

The major debates in the convention occurred over the economic articles in the Constitution. Lobbying here was notorious as the article on public indebtedness will illustrate. The convention had scarcely begun its work before President Hoyt received a letter from N. W. Harris of the Harris banking house in Chicago, pointing out that their bank held the entire issue of bonds for King County and for Spokane Falls and expected to purchase more. Harris recommended that in order to secure the support of eastern capitalists no "county, city, township, school district, or municipal corporation shall be allowed to become indebted...in the aggregate exceeding 5 per cent of the valuation of the taxable property thereof". He pointed out that Illinois, Wisconsin, Iowa, and Missouri had 5 per cent limits; Indiana a 2 per cent limit. Iowa with a restriction had much better credit than Minnesota without one.(1)

The Committee on State, County, and Municipal Indebtedness adopted low limits on indebtedness. Their major opposition came from the cities, particularly Seattle, which had been destroyed by fire on June 6, 1889. When it became known that the committee favored a 5 per cent limit on municipal indebtedness, Delegate D. E. Durie of Seattle presented the needs of his

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1. N. W. Harris to Chairman of the Convention, July 3, 1889, Proceedings, Op. cit., pp. 66-68.

city to them. When the committee still insisted on a constitutional limit as a wise measure, the Seattle lobby requested a provision which would allow a municipality to increase its indebtedness for a specific purpose if a two-thirds vote sanctioned this increase.(1)

In the meantime, the Seattle City Council petitioned the convention to place no limitation on municipal indebtedness if two-thirds of the people voted to remove it. Seattle must replace wharves, public buildings, and streets destroyed by the fire and needed an adequate sewage system, fire department, and water system. One million dollars was required for the water system alone, while the City Charter limited all indebtedness to the inadequate figure of \$60,000.(2)

W. R. Frost of the Seattle Board of Trade, Thomas W. Prosch of the Chamber of Commerce, and U. R. Niesz of the City Council informed the convention that the niggardly Territorial limitations on municipal indebtedness had prevented an adequate system of public improvements in Seattle.(3) The Seattle Delegation now modified its original plan to ask for no limit on municipal indebtedness by requesting a 10 per cent, rather than a 5 per cent limit. This conciliatory attitude impressed the

- 
1. Proceedings, Op. cit., p. 93; P.-I., July 9, 1889. The Seattle Post-Intelligencer hoped for the success of this exception if it were urged "strongly and judiciously".
  2. Proceedings, Ibid., p. 176; P.-I., July 17, 1889.
  3. Ibid., p. 156; Ibid., July 15, 1889. Seattle could shoulder any reasonable responsibility here.

committee to the extent that it not only added the requested 5 per cent increase for special purposes, but also decreased the vote necessary for such an increase from a two-thirds to a three-fifths vote.(1)

Agitation for this increase was not confined to Seattle. The Vancouver Independent wished Seattle well as the needs of Washington's rapidly growing cities demanded a more liberal limitation than 5 per cent on debts if their public health and welfare were to be insured. Vancouver needed sewers, electric light facilities, street improvements, a new city hall, and jail, and better fire fighting equipment.(2) On August 6 the residents of Spokane Falls telegraphed President Hoyt that the city had burned August 4 with severe losses and requested the convention to be liberal in allowing the city to incur indebtedness for necessary public improvements.(3)

The section on municipal indebtedness was said to be "precisely what the people of Seattle asked for".(4) Counties, cities, towns, school districts, and other municipal corporations could contract debts to the value of 1.5 per cent of their taxable property without restrictions. This limit could be increased

- 
1. Proceedings, Op. cit., pp. 174-176; P.-I., July 17, 1889.
  2. July 17, 1889. The editor concluded that the convention would do nothing until it got rid of the "effort now being made to turn it into a legislative body. Everyone seems to have an idea that the convention must make laws instead of making a document of declarations on which the laws are to be founded."
  3. Proceedings, Ibid., p. 510.
  4. Ibid., p. 399; Seattle Post-Intelligencer, August 1, 1889.

to 5 per cent by a three-fifths vote at an election held for that purpose. Cities and towns could increase this limit by an additional 5 per cent for supplying the city or town with water, artificial light, or sewers if these were operated by the city or town.(1) The debt limitation for the State was placed at \$400,000 except indebtedness incurred for war, repelling invasion, or some specific purpose whose object and method of payment was expressed in the bill.(2)

#### THE WALLA WALLA SUBSIDY

The Walla Walla subsidy provoked one of the major debates in the convention and stimulated more lobbying than almost any other proposal. The issue achieved prominence by July 11 when the Committee on State, County and Municipal Indebtedness reputedly considered the Walla Walla proposal to allow counties and municipalities to subsidize private corporations and found considerable objection to it within the convention.(3) Representatives from Walla Walla(4) soon appeared before the committee urging this provision to permit counties to subsidize railroads and other corporations which would allow them to rati-

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1. Proceedings, Loc. cit.; Article VIII, Sect. 6.

2. Ibid., p. 158; P.-I., July 16, 1889; Article VIII, Sects.1-3.

3. Ibid., p. 98; Ibid., July 12, 1889.

4. P. B. Johnson and D. W. Smith.

# APPENDIX E

**THE JOURNAL OF THE  
WASHINGTON STATE  
CONSTITUTIONAL CONVENTION  
1889**

**with Analytical Index**

**by**

**Quentin Shipley Smith**

**Edited by  
Beverly Paulik Rosenow**

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ARTICLE VIII

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STATE, COUNTY AND MUNICIPAL INDEBTEDNESS

Few delegates wanted to allow the state unlimited indebtedness, fearing the effect on future prosperity. Although some favored a limit based on a percentage of taxable property, those who preferred limiting by a definite amount triumphed with a four hundred thousand dollar ceiling. An attempt to allow the Legislature to incur special debts without the consent of the voters was unsuccessful.

Because of disastrous fires in Seattle, Ellensburg, and Spokane, delegates from these areas were anxious that any limitation of county or city indebtedness allow for rebuilding public facilities. Men sent by the Seattle City Council described the needs of a growing city to the committee on indebtedness.<sup>1</sup> Their mission was heartily approved of by the *Vancouver Independent*.<sup>2</sup> Two newspapers said the Convention had no right to limit municipal indebtedness<sup>3</sup> and another sharply criticized this sixth section of the committee's report.<sup>4</sup>

Finally, a debt of up to one and one half per cent of the taxable property was allowed without a vote of the people. With the consent of three-fifths of the voters a debt of up to five per cent of the taxable property could be incurred. An editorial in the *Seattle Post Intelligencer* expressed satisfaction with the final clause.<sup>5</sup> Caustic editorial disapproval was expressed in the *Spokane Falls Review*.<sup>6</sup>

Walla Walla's desire to aid in the construction of a branch line railroad caused its delegates, supported by some others from eastern Washington, to demand that counties be allowed to grant subsidies to corporations. The *Yakima Herald* said the present population should not bear the full burden of improvements which future generations would enjoy.<sup>7</sup>

The battle over the Walla Walla subsidy scheme was one of

1. *Seattle Post Intelligencer*, July 12, 17, 1889.
2. *Vancouver Independent* [Vancouver, Wash.], July 17, 1889.
3. *Post Intelligencer*, July 12; *Tacoma Daily Ledger*, July 18, 1889.
4. *Seattle Times*, July 12, 1889.
5. *Post Intelligencer*, August 1, 1889.
6. *Spokane Falls Review*, July 28, 1889.
7. *Yakima Herald*, July 18, 25, 1889.

**Motion:** E. H. Sullivan moved to increase the limit from one to one and one-half per cent.

**Action:** Motion carried 40 to 5.

**Discussion as follows:**

**For:** Warner said this increase was needed and explained that his city (Colfax) had been twice burned out and needed to go into debt to rebuild. P. C. Sullivan and Gowey favored the motion.

**Against:** Browne spoke against the motion.

**Query:** Stiles asked how city authorities were to obtain the amount of county indebtedness officially.

**Answer:** Browne replied that it would be done by going to the county records.

**Motion:** Stiles moved to insert "except that in incorporated cities the assessment shall be taken from the last assessment for city purposes."

**Action:** Motion carried.

**Motion:** P. C. Sullivan moved to add "the limitation shall not include any existing indebtedness or be applied to or affect any existing contracts."

**Action:** Motion lost.

**Discussion as follows:**

**Against:** Durie said this would then apply different measures to different localities and he opposed the motion. Lillis agreed with him. Griffiths thought the motion too indefinite.

**Motion:** Turner moved to amend to require a majority assent of the voters instead of the three-fifths requirement.

**Motion:** Blalock moved to amend the amendment to make it a majority of the votes of property taxpayers.

**Action:** Blalock's amendment carried. Turner's motion was then lost.