IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BAINBRIDGE RATEPAYERS ALLIANCE, a non-profit corporation, Appellant, v. CITY OF BAINBRIDGE ISLAND, a municipal corporation, Respondent.	No. 39850-8-II (consolidated with 40040-5-II) UNPUBLISHED OPINION

Penoyar, C.J. — The City of Bainbridge Island passed ordinances and a resolution approving the financing for improvements to its wastewater treatment plant. The Bainbridge Ratepayers Alliance[1] sued, claiming that the proposed bond issues were invalid. The trial court granted summary judgment to the City, dismissing the case. The Alliance then filed a motion for reconsideration, which the trial court denied. The Alliance appeals, arguing that (1) the City's proposed method of paying off the bonds is illegal, (2) the bonds exceed the amount the City has declared necessary to complete the proposed sewer improvements, and (3) the City must consult with the City's Utility Advisory Committee before issuing the bonds. We affirm.

[1] The Alliance is a citizen group. According to its complaint, the Alliance "is a non-profit organization. . . . [Its] members include Bainbridge Island citizens who pay utility charges imposed by the City and who are concerned about the City's utility rates, taxes, and municipal finances." Clerk's Papers (CP) at 4.

FACTS

I. Background

The City is a municipal corporation of Washington State located in Kitsap County. It operates a sewer system, a water system, and a storm and surface water management system; these utilities are collectively referred to as the waterworks utilities. Only the storm and surface water management utility provides services throughout the entire island. Bainbridge Island Municipal Code (BIMC) §§ 13.24.010, .013, .020, .060. The City's water and sewer systems provide services for only certain areas of the island. The City's unified waterworks utility is accounted for as though the sewer, water, and storm and surface water management (SSWM) utilities are separate funds. BIMC § 3.44.010.

Currently, the City is upgrading its wastewater treatment plant (WWTP). According to the City, the City Council approved the WWTP upgrade project in 2005 and construction of the WWTP upgrades began in 2008.[2] On May 5, 2009, the City's finance director said it would take an estimated $4.5 million to complete the WWTP project and that paying for this project would leave the sewer fund with no operating cash.[3]

A. Ordinance No. 2009-02

On March 11, 2009, the City passed Ordinance No. 2009-02. This ordinance provides for the issuance of limited tax general obligation bonds and notes of the City for general City

[2] According to Ordinance No. 2009-02, the City began the upgrades in 2006, "of which the Project is a part." CP at 280. In 2007, work on the project was authorized; in 2008, a contract was executed and the notice to proceed was issued.

[3] Public works trust fund loans and other sources paid for a portion of the project, and the rest was to be paid with the project bonds.

purposes to provide funds with which to (a) pay for a portion of the cost of an upgrade to the City's WWTP; (b) carry out a refunding plan with respect to the City's outstanding Limited Tax General Obligation Bonds, 1998; and (c) pay costs of issuance of the bonds, fixing certain terms and covenants of the bonds, and providing for the public sale of the bonds or notes.[4] The ordinance authorizes the issuance of project bonds in an amount up to $7.13 million and provides that "[n]o Bonds may be issued and sold except pursuant to a Bond Sale Resolution approving the terms of such sale." Clerk's Papers (CP) at 284.

The ordinance pledges "to establish, maintain and collect rates and charges for water, sewer and drainage services that will be adequate to produce Waterworks Utility Revenue fully sufficient to provide . . . for the punctual payment of the principal of and interest on all outstanding Subordinate Obligations, including the Project Bonds." CP at 288. The ordinance then states; however:

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

CP at 288. The ordinance provides that the bonds may be issued only upon "adoption by the City Council of a Bond Sale Resolution providing for the matters described in this ordinance. . . . Once adopted, the Bond Sale Resolution shall be deemed a part of this ordinance as if set forth herein." CP at 291.

B. Ordinance No. 2009-07

[4] Ordinance No. 2009-07 amended the language for "the issuance and sale of limited tax general obligation bonds" to read: "the issuance and sale of bonds." CP at 302.

On April 22, 2009, the City passed Ordinance No. 2009-07, amending provisions of Ordinance No. 2009-02 and reducing the authorized amount of project bonds to an amount up to $6 million. The City adopted the amendatory ordinance "to permit the structuring of the interim or permanent borrowing for the Project to be secured by a pledge of Net Revenue of the Waterworks Utility or, alternatively, to be secured by a pledge of revenues from the Sewer System only." CP at 301-02.

Ordinance No. 2009-02 allowed limited tax general obligation bonds, but Ordinance No. 2009-07 amends Ordinance No. 2009-02, authorizing revenue bonds as well:

> Alternatively, one or more series of Bonds issued for the purpose of providing funds for the Project or to refund bonds previously issued for utility purposes, may be issued as Revenue Obligations secured by a pledge of either (as approved by the City Council in a Bond Sale Resolution) Net Revenues of the Waterworks Utility or, Sewer System Revenues.

CP at 303.

Ordinance No. 2009-07 also amends the section in Ordinance No. 2009-02 that pledges waterworks utility revenue to read:

> The Bond Sale Resolution may provide that, for as long as any of the Project Bonds are outstanding, the City pledges to establish, maintain and collect rates and charges for water, sewer, and drainage services that will be adequate to produce Waterworks Utility Revenue fully sufficient to provide, [among other things,] for the punctual payment of the principal of and interest on all outstanding Subordinate Obligations, including the Project Bonds.

CP at 304.

Ordinance No. 2009-07 did not amend the language in Ordinance 2009-02 that states:

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

CP at 304.

Further, the amended ordinance provides:

> If the Bond Sale Resolution provides that the Project Bonds are to be Revenue Obligations (or Sewer System Obligations), then for as long as any of the Project Bonds are outstanding and designated as Revenue Obligations (or as Sewer System Obligations, as applicable), the City pledges to establish, maintain and collect rates and charges for services that will be adequate to produce Waterworks Utility Revenue (or of the Sewer System Revenues, if the Bonds are Sewer System Obligations) that are fully sufficient to provide for the punctual payment of the principal of and interest on all outstanding Revenue Obligations (or, if the Bonds are Sewer System Obligations, on all outstanding Sewer System Obligations and that portion of any Revenue Obligations allocated to the Sewer System), if any, for which payment has not otherwise been provided, all amounts that the City is obligated to set aside into a debt service fund and any reserve fund securing such Revenue Obligations (or Sewer System Obligations, if applicable), and all other payment obligations related thereto.

CP at 305. The ordinance defines sewer system revenues as "Waterworks Utility Revenue allocable solely to the Sewer System and remaining after payment of the Maintenance and Operation Expense allocable to the Sewer System within the Waterworks Utility." CP at 305. The ordinance defines sewer system obligations as "Revenue Obligations payable solely from and secured by a pledge of the Sewer System Revenues. Sewer System Obligations are not general obligations of the City and do not include any portion of any obligation secured by a general obligation pledge." CP at 306.

C. Resolution No. 2009-08

On April 22, 2009, the City also adopted Resolution No. 2009-08, approving the issuance of a sewer revenue bond anticipation note, in up to $6 million. The resolution characterizes the note as a "short-term obligation issued in anticipation of permanent financing." CP at 269. The resolution designates the note "a Sewer System Obligation for purposes of the Bond Ordinance." CP at 271. The resolution defines a "Sewer System Obligation" as "Revenue Obligations payable

solely from and secured by a pledge of the Sewer System Revenues. Sewer System Obligations are not general obligations of the City and do not include any portion of any obligation secured by a general obligation pledge." CP at 270 (emphasis added). The resolution also states, "The City irrevocably pledges to redeem the Note from the proceeds of a sufficient amount of Bonds or additional short-term obligations, and the Sewer System Revenues are pledged for the payment of the Note in accordance with the flow of funds set forth in Section 11 of Ordinance No. 2009-02 (as amended by Section 4(d) of Ordinance No. 2009-07)." CP at 272-73. The resolution also provided for the creation of a debt service fund, which is the sole source of repayment of the bond anticipation note.

II. Procedural History

On April 22, 2009, the Alliance filed a lawsuit against the City, alleging that the proposed bond issues were invalid. It also raised other issues in its complaint; however, the trial court granted the City's motion to sever these other claims from the claims relating to the bonds. The Alliance sought a declaratory judgment on the bonds claim holding the bonds invalid and an injunction enjoining issuance of the bonds. The trial court granted the City's motion for summary judgment regarding the validity of the City's proposed bond issue.

The Alliance subsequently filed a motion for reconsideration. The Alliance argued that reconsideration should have been granted because (1) Mark Dombroski's declaration,[5] which was

[5] Dombroski is the City Manager of the City of Bainbridge Island. Attached to his declaration is a spreadsheet, which lists the sources and uses of funds for the upgrades as of August 21, 2009, estimating that the remaining sources and uses of funds equaled an estimated $3,994,817 and the estimated total cost of the upgrade project would be $14,928,560. The spreadsheet lists a $1,000,000 interfund loan from the water system and a $1,364,309 temporary expenditure from sewer operations under "Proceeds of Other Borrowing." CP at 261. A footnote next to these two expenditures states that they "will be reimbursed or repaid to the appropriate fund from the

attached to the City's reply brief, raised new evidence to support the City's motion; (2) Dombroski's declaration conflicted with other evidence, so the trial court should allow discovery; and (3) Dombroski's declaration and the City's reply brief contained evidence that the proposed $6 million bond would be used to repay funds borrowed from other funds. The trial court denied the Alliance's motion, finding that (1) Dombroski's declaration was rebuttal to Sally Adams's declaration;[6] (2) the request for a continuance was untimely; and (3) the Alliance's third ground for reconsideration raised a new legal argument based on evidence that existed before the summary judgment hearing. The Alliance appeals.

ANALYSIS

I. Motion for Summary Judgment

A. Standard of Review

On review of an order for summary judgment, we perform the same inquiry as the trial court. *Jones v. Allstate Ins. Co*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The standard of review is de novo. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We consider all facts in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300. Summary judgment is proper only if reasonable persons could reach but one

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proceeds of the bond or bond anticipation note." CP at 261.

[6] In her declaration, Adams, a member of the Alliance, states that she attended a meeting of the City's finance committee. At the meeting, the City's finance director said it would take $4.5 million to complete the WWTP project, but that would leave the sewer fund with no cash to operate.

conclusion from the evidence presented. *Bostain*, 159 Wn.2d at 708.

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party cannot merely claim contrary facts and may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

B. Validity of Ordinances

First, the Alliance argues that the trial court erred in granting summary judgment to the City because the ordinances authorizing the issuance of the municipal bonds are invalid. We disagree.

Courts use the following guidelines to test the validity of a bond:

> 1. Is there legislative or constitutional authority delegated to the municipality to issue the bonds for the particular purpose?
> 2. Was the statute authorizing the bond issue constitutionally enacted? If not constitutionally enacted or if unconstitutional for any other reason, the issue is void and recitals are of no effect.
> 3. Is the purpose for which the bonds are issued, a public and corporate purpose, as distinguished from a private purpose?

King County v. Taxpayers of King County, 133 Wn.2d 584, 594-95, 949 P.2d 1260 (1997) (quoting 15 Eugene McQuillin, Municipal Corporations § 43.04, at 575 (rev. 3rd ed. 1995)). The Alliance asserts that the first of the three factors is not met, because (1) the City cannot pledge water and stormwater charges to pay off bonds issued to finance improvements to the City's sewer system; (2) the bonds exceed the amount the City needs to complete the sewer upgrades; and (3) the City must consult with and receive recommendations from the City's Utility Advisory Committee before issuing bonds.

1. Taxes v. Fees

First, we address the Alliance's assertion that the City's proposed method of paying for the bonds is illegal. The bonds here are for improvements to the sewage system. The City passed Resolution No. 2009-08, which pledged to pay for the sewer system improvements from only the sewer fund. The language of the bond ordinances, however, raises the distinct possibility that the City will borrow funds from the water and stormwater funds to temporarily finance the sewer improvements. The Alliance does not argue that cities are forbidden from making interfund loans. Instead, it argues that in this instance such loans would result in service charges that would constitute illegal taxes.

The first problem with the Alliance's argument is that the charges with which it is concerned may or may not be imposed. If, for instance, the City were able to obtain long-term bond financing at a very low interest rate, loans to the sewer fund may not prove necessary. Also, even if such loans occur, they may not result in increased water or stormwater fees.

Before a court may rule by declaratory judgment, a justiciable controversy must exist. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). A justiciable controversy is:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Walker, 124 Wn.2d at 411. "[A] claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the challenged action is final." *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 383, 940 P.2d 286 (1997).

Here, before the questioned charges could be imposed, the City must first pass a resolution approving issuance of the bonds, commit to interfund loans, and impose additional charges because of those loans. Although the Alliance has briefed the legal issues they feel may arise, the facts are undeveloped and the City's action is not final. The issue is simply not ripe.

Similarly, even if the City makes the loans and increases the water and stormwater rates, it is impossible for us to know now whether those fees will constitute a tax. We consider three factors when determining whether a charge imposed by a governmental entity is a tax or a regulatory fee. *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). The first factor is whether the primary purpose of the city is to accomplish desired public benefits that cost money, or whether the primary purpose is to regulate. *Covell*, 127 Wn.2d at 879 (quoting *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982)). If the primary purpose of the charges is to raise revenue, then the charges are a tax. *Covell*, 127 Wn.2d at 879 (citing *Hillis Homes, Inc.*, 97 Wn.2d at 810). The second factor is whether the money collected must be allocated only to the authorized regulatory purpose. *Covell*, 127 Wn.2d at 879 (citing *Hillis Homes, Inc., v. Pub. Util. Dist. No. 1*, 105 Wn.2d 288, 300, 714 P.2d 1163 (1986); *Teter v. Clark County*, 104 Wn.2d 227, 239, 704 P.2d 1171 (1985)). The third factor is whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. *Covell*, 127 Wn.2d at 879 (citing *Teter*, 104 Wn.2d at 232). Where such a relationship exists, the charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer. *Covell*, 127 Wn.2d at 879.

The contested ordinances do not actually issue bonds; they only authorize the City to issue bonds. We recognize that at some point bonds will be issued, that interfund loans may well occur, and that charges may be increased for users of the water and stormwater systems. Until events unfold, we cannot guess as to whether such hypothetical charges would be fees or taxes. We do not have sufficient facts to properly apply the law to the situation. Because this issue is not ripe for review, we affirm the trial court on this point.

2. Bonds Exceed the Amount Necessary to Complete the Project

Next, the Alliance argues that the bonds unlawfully exceed the amount needed to complete the sewer upgrades. We disagree.

RCW 35A.34.220[7] states:

> Moneys received from the sale of bonds or warrants shall be used for no other purpose than that for which they were issued and no expenditure shall be made for that purpose until the bonds have been duly authorized. If any unexpended fund balance remains from the proceeds realized from the bonds or warrants after the accomplishment of the purpose for which they were issued, it shall be used for the redemption of such bond or warrant indebtedness. Where a budget contains an expenditure program to be financed from a bond issue to be authorized thereafter, no such expenditure shall be made or incurred until after the bonds have been duly authorized.

This statute does not limit the amount of debt that may be issued. In fact, it contemplates the existence of an unexpended fund balance, requiring that it be used to reduce the bond indebtedness. The bonds do not unlawfully exceed the amount required to complete the sewer upgrades.

[7] Chapter 35A.34 RCW applies to "all code cities which have by ordinance adopted this chapter authorizing the adoption of a fiscal biennium budget." RCW 35A.34.020. The City's budget and planning calendar is prepared on a biennial basis. BIMC § § 2.82.010, .020.

The Alliance also argues that the "only way one can get anywhere close to the $6 million[, the authorized amount of project bonds in Ordinance No. 2009-07,] is by repaying loans from the water utility of $1 million and money from sewer operations of $1,364,309." Appellant's Br. at 29. The events the Alliance is concerned about have not occurred and are not ripe for consideration.

3. Utility Advisory Committee

Next, the Alliance argues that the City was required to consult with and receive recommendations from the City's Utility Advisory Committee before authorizing the issuance of bonds. The Alliance contends that the "City's failure to take the steps mandated by BIMC [§] 2.33 renders its subsequent actions with regard to the sanitary sewer upgrades void." Appellant's Br. at 32. The City asserts that its ability to act is not conditioned on action by the Utility Advisory Committee. We agree with the City.

Under BIMC § 2.33.040, the Utility Advisory Committee, "[i]n its advisory capacity, . . . shall . . . [c]onsult with and make recommendations to the mayor and the city council, give advisory recommendations to the city council relative to the planning for, financing, operation and maintenance of water and sanitary sewer utility capital facilities." Thus, although the ordinance requires the committee to advise the mayor and council, it does not create a concomitant obligation on the mayor and council to seek or use the committee's advice.

Further, one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power. *Wash. State. Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 301, 174 P.3d 1142 (2007). "When the Legislature or state constitution has granted a power to the legislative authority of a municipality, the municipality may not limit the scope of that power,

or surrender any of it under [article XI, section 11 of the Washington Constitution], our state supremacy clause." *Taxpayers of King County*, 133 Wn.2d at 611. Chapter 35.67 RCW, which governs sewerage systems of cities and towns, grants authority to the city's "legislative body."[8] RCW 35.67.030. The Bainbridge Island City Council could not limit the scope of its power by conditioning its ability to act upon action by the Utility Advisory Committee. The City was free to approve the issuance of bonds even though it had not received a recommendation from the Utility Advisory Committee.[9]

II. Motion for Reconsideration

Finally, the Alliance argues that the trial court erred by denying the Alliance's motion for reconsideration. Again, we disagree.

We review a trial court's denial of a motion for reconsideration for abuse of discretion. *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997). Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds. *Weyerhauser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. *August v. U.S. Bancorp*, 146 Wn. App. 328, 347, 190 P.3d 86 (2008) (quoting *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997)). In

[8] RCW 35.92.100 governs revenue bonds and municipal utilities and grants authority to the "corporate authorities" of a city. RCW 39.46.150, which governs public contracts and indebtedness and revenue bonds, grants authority to the "governing body of a local government." RCW 39.50.030, which governs the issuance of short-term obligations by municipal corporations, states that the issuance of short-term obligations shall be authorized by ordinance of the "governing body."

[9] At the time the ordinances were enacted, the Utility Advisory Committee had not been formed.

general, an issue may be raised in a motion for reconsideration when the issue is closely related to an issue previously raised and no new evidence is required. *August*, 146 Wn. App. at 347. Nonethless, a plaintiff cannot propose new case theories that could have been raised before entry of an adverse decision in a motion for reconsideration. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

First, the Alliance contends that reconsideration should have been granted because there was no prior opportunity to challenge Dombroski's declaration. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. *White v. Kent Med. Ctr.*, *Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). Rebuttal documents are limited to documents that explain, disprove, or contradict the adverse party's evidence. *White*, 61 Wn. App. at 168-69. Here, the trial court found that Dombroski's declaration rebutted Adams's Declaration, which declared that it would take $4.5 million to complete the WWTP project. Dombroski's declaration set forth the sources and uses of funds for the WWTP upgrade project. Further, the declaration does not create an issue of material fact, because the exact cost of the project is not relevant to whether the City can issue $6 million in revenue bonds to fund the improvements. The trial court did not abuse its discretion in considering Dombroski's declaration.

Next, the Alliance contends that it should be allowed to conduct discovery to ascertain the truth of the statements made in Dombroski's declaration and the attached spreadsheet. The trial court may order a continuance or deny a motion for summary judgment to permit discovery if it appears from the affidavits of a party opposing the summary judgment motion "that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition." CR 56(f). The

Alliance did not request a continuance under CR 56(f) until after the motion for summary judgment had been granted. The trial court did not abuse its discretion by denying the Alliance's motion for a continuance on the basis that the request was untimely.

Finally, the Alliance argues that the trial court erred in denying its motion for reconsideration on the basis that the Alliance had raised a new legal issue. The Alliance contends that it was Dombroski's declaration that raised the new legal issue. The Alliance argues that one could read Dombroski's declaration "to state that proceeds from the proposed $6,000,000 bond will be used to (1) fund these completion costs, and (2) prepay $2,364,309 in previously incurred expenditures that were originally paid from funds in the Water Fund and Sewer Operations Fund." Appellant's Br. at 38-39. The Alliance contends that "[t]he problem . . . is that RCW 35A.34.220 provides that bonds cannot be issued to cover expenditures made prior to the time the bonds were duly authorized." Appellant's Br. at 39. An issue may be raised in a motion for reconsideration when the issue is closely related to an issue previously raised and no new evidence is required. *Anderson v. Farmers Ins. Co. of Wash.*, 83 Wn. App. 725, 734, 923 P.2d 713 (1996). The Alliance did not raise this issue at the hearing for the summary judgment motion. New evidence would be required to determine the amount of expenditures made before the issuance of Resolution No. 2009-08 and how the proceeds from the bonds were to be used. The trial court did not abuse its discretion in denying the Alliance's motion for reconsideration on this basis.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Worswick, J.

Serko, J.P.T.