No. 86552-3

FAIRHURST, J. (dissenting)—I dissent because the proposed contingent loan agreement (CLA) does not create a debt of the city of Wenatchee (City) within the meaning of our constitutional and statutory limits. The lead opinion invents an entirely new legal analysis to achieve a contrary result.

ANALYSIS

The primary issue in this case is whether the proposed CLA between the Greater Wenatchee Regional Events Center Public Facilities District (District) and the City would constitute "indebtedness" for the City within its relevant constitutional and statutory meaning. The "risk of loss" theory announced by the lead opinion is unfounded and results in a decision contrary to the law we have set forth in numerous cases addressing the identical question. The question presented is easily resolved by our well settled jurisprudence.

A. Standard of Review

We start with the proper standard of review, which the lead opinion fails to acknowledge. "Courts presume legislatures to act with integrity and with a purpose to keep within constitutional limits." *Grant v. Spellman*, 99 Wn.2d 815, 818-19, 664 P.2d 1227 (1983). Hence, a legislative enactment is presumed constitutional and the challenging party bears a heavy burden to overcome that presumption. *Wash. Fed'n of State Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995). The taxpayer representative argues such a presumption and burden of proof does not apply in this instance because the proposed CLA has not been entered into. However, the question before the court is whether the CLA would violate the constitutional debt limitation *if it were entered into*. Accordingly, the presumption of constitutionality applies and the respondents bear the heavy burden of showing otherwise.

B. The Proposed CLA Would Not Create a Debt of the City within the Meaning of Our Constitutional or Statutory Limits

Article VIII, section 6 of our state constitution provides that a city or other municipal corporation shall not "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." RCW 39.36.020(1) and (2)(a)(ii) contain identical statutory maximum debt limitations for cities. An obligation made in violation of these debt limitations is "absolutely void." RCW 39.36.040. Section 1(a) of article VIII establishes a similar limitation on the State's ability to "contract debt."

These constitutional debt limits serve "to prevent the current legislature from binding a future legislature, and to prevent legislators from making future taxpayers pay today's bills." 15 Eugene McQuillin, The Law of Municipal Corporations § 41:1, at 403 (3d rev. ed. 2005) (footnote omitted); *see also* Robert S. Amdursky & Clayton P. Gillette, Municipal Debt Finance Law § 4.1.1 (1992 & Supp. 2002). We must nevertheless recognize the limits of our role, as "courts are slow to interfere with [municipal] officers in the exercise of their judgment in dealing with the numerous difficult municipal problems which present themselves for solution." *Von Herberg v. City of Seattle*, 157 Wash. 141, 149, 288 P. 646 (1930).

1. *The City is not required to borrow money*

Under article VIII, section 1 (state debt), "debt" is "construed to mean

borrowed money represented by bonds, notes, or other evidences of indebtedness that are secured by the full faith and credit of the state or are required to be repaid, directly or indirectly, from general state revenues." Wash. Const. art. VIII, § 1(d) (emphasis added). Section 6 (municipal indebtedness) contains no definition of the term "indebted." But the definition of "debt" contained in section 1 should be equally applied to the term "indebtedness" as used in section 6.

The history of article VIII reveals that "debt" and "indebtedness" were intended to mean the same thing. *See* Theodore L. Stiles, *The Constitution of the State and Its Effects Upon Public Interests*, 4 Wash. Hist. Q. 281, 284 (1913) (by adopting article VIII, the framers were concerned about the misuse of "borrowed money" by state and local governments). Indeed, the title of article VIII—"State, County, and Municipal Indebtedness"—reveals that the drafters used debt and indebtedness interchangeably. As does the section 6 definition itself. Wash. Const. art. VIII, § 1(d) (debt requires "evidences of indebtedness"). The terms are also used interchangeably in article VIII, section 3, which permits the state to incur "special *indebtedness*" in certain circumstances, notwithstanding the limitation on "debt" set forth in article VIII, section 1. (Emphasis added.) *Black's Law Dictionary* likewise defines "indebtedness" as a synonym for debt: "indebtedness"

means "[s]omething owed; *a debt*." Black's Law Dictionary 836 (9th ed. 2009) (emphasis added). We have accordingly concluded that "when the men who drafted the constitution used the word 'debt,' they were thinking *solely in terms of borrowed money*." *State ex rel. Troy v. Yelle*, 36 Wn.2d 192, 197, 217 P.2d 337 (1950) (emphasis added).

This analysis is confirmed by *State ex rel. Wittler v. Yelle*, 65 Wn.2d 660, 668-69, 399 P.2d 319 (1965), where we explained, "This court has many times said what Article 8 means by the word 'debt.' We think that it means borrowed money; it denotes an obligation created by the loan of money, usually evidenced by bonds but possibly created by the issuance of paper bearing a different label." State debt was at issue in that case, but our analysis was founded on a "panoramic view of our cases affecting constitutional debt limitation." *Id*. at 669. In reaching the conclusion that debt means "borrowed money, debts created by the issuance of bonds," we relied in part on two cases: *Winston v. City of Spokane*, 12 Wash. 524, 41 P. 888 (1895) and *Comfort v. City of Tacoma*, 142 Wash. 249, 252 P. 929 (1927). The *Winston* and *Comfort* cases each interpreted municipal indebtedness squarely within the context of article VIII, section 6. In other words, our jurisprudence defining "debt" as borrowed money encompasses both municipal and

state debt. *See* Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 145 (2002) ("As with state obligations, debt [under article VIII, section 6] is defined as borrowed money payable from taxes.").

The borrowed money must also be "secured by the full faith and credit" of the government or required to be repaid from general revenues. Wash. Const. art. VIII, § 1(d); *Dep't of Ecology v. State Fin. Comm.*, 116 Wn.2d 246, 254, 804 P.2d 1241 (1991). This principle is reflected in our "special fund doctrine," that provides "obligations payable solely from nontax revenue deposited into special funds do not constitute a debt." Utter & Spitzer, *supra*, at 145; *see State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 661, 384 P.2d 833 (1963). Relatedly, we have established, as a "well-recognized legal principle," that debt does not include obligations paid from current-year taxes, rather than from the proceeds of borrowing. *Comfort*, 142 Wash. at 257; 15 McQuillin, *supra*, § 41:19, at 472-73 ("if when a city makes a contract . . . it has on hand funds available, that is, sufficient in amount to meet its obligations under the contract as they mature, obviously no indebtedness is created"). For example, we held in *Wittler* that the State was not incurring debt by paying teacher pension obligations from current-year tax receipts instead of bond proceeds. 65 Wn.2d at 668-71.

Applying this precedent to the proposed CLA, I would hold the municipal debt limitation is not implicated because the City is under no obligation to borrow money. The CLA only commits the City to "lend money" to the District if required to meet the District's debt service payments. Clerk's Papers (CP) at 454. The City has the "sole discretion [to] determine how it will fund each Loan, (i.e., from available City funds, from City borrowings or from any other legally available source)," CP at 455, and the CLA specifically disclaims any obligation to borrow money to fund loans to the District. As borrower, the District is required to repay to the City the principal amount of each loan with interest. And as lender, the City is provided with a variety of remedies in the event the loans are not repaid. For example, the City may take an equity interest in the regional center. It may also force the District to levy a tax, either with or without a vote of its electors, to effect fulfillment of the financing. These facts readily establish that the City would be acting solely as a lender under the proposed CLA. In no manner does the CLA require the City to borrow any amount of funds from any source.

Nor does it leave the City "holding the bag" in the event of a District default. Lead opinion at 22. The proposed CLA makes explicit that holders of the District's bonds will have no right of action or recourse against the City:

> 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.

CP at 455 (emphasis added). The City is not pledging any asset toward repayment of the District's borrowings, and the District's creditors have no recourse against the City. Indeed, it makes little sense to even reference the City's "repayment" of its loan to the District. Rather, the situation is analogous to that in *Wittler*, where the State was simply funding an obligation from current-year taxes. 65 Wn.2d at 668-71. Unless and until the City borrows money and pledges its full faith and credit toward repayment, the City is not incurring debt within its constitutional meaning.

The lead opinion's approach essentially converts the debts of the District into the debts of the City. However, in *Pierce County v. State*, 159 Wn.2d 16, 43 n.14, 148 P.3d 1002 (2006), we said the debts of one municipal corporation are not to be considered the debts of a separate municipal corporation. Our analysis there was under the plain language of article VIII, section 6. *Id*. Similarly, the State does not

incur debt by loaning money to a separate government entity where the borrower is not an agent of the State. *Dep't of Ecology*, 116 Wn.2d at 256. There is simply no authority for the proposition that a municipal lending entity incurs debt by lending money to a separate municipal borrowing entity.

In this case, the City is under no obligation to borrow money to fund the contingent loans. Unless and until the City attempts to fund loans to the District by borrowing money elsewhere, its obligations under the proposed CLA do not create a debt. *See Comfort*, 142 Wash. at 257; 15 McQuillin, *supra*, § 41:19. Accordingly, I would hold the trial court erroneously concluded the proposed CLA constitutes a debt of the City.

2. *The proposed CLA merely creates a contingent liability*

We have also recognized "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. *Kelly v. City of Sunnyside*, 168 Wash. 95, 97, 11 P.2d 230 (1932); *Comfort*, 142 Wash. at 255-56; Utter & Spitzer, *supra*, at 145; 15 McQuillin, *supra*, § 41:22. In *Comfort*, the city of Tacoma issued bonds to be redeemed from a local improvement

fund that was derived from special property assessments. 142 Wash. at 255. The city also created a guarantee fund to repay the bondholders *in the event* the property assessments were insufficient to meet its debt service obligations. *Id*. We reasoned it was "'essential to the idea of a debt that an obligation should have arisen out of a contract, express or implied, 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*.'" *Id*. at 256-57 (emphasis added) (quoting *Quill v. Indianapolis*, 124 Ind. App. 292, 23 N.E. 788, 790 (1890)). Because of the inherent contingency, we "readily" concluded the obligation was "only a contingent liability as far as the city is concerned, and in no sense a debt proper." *Id*. at 255. The lead opinion incorrectly characterizes this analysis in *Comfort* as dicta. The "main and serious question" presented in that case was whether the bonds would constitute city debt within the meaning of our constitution. *Id*. at 253. We held it would not because the obligation was contingent. That holding was directly tied and necessary to resolve the issue in *Comfort* and therefore not dicta.

The facts of this case are remarkably similar to those in *Comfort*. The proposed CLA calls upon the City to make loans to the District if, and only if, the

funds available to the District are insufficient to meet its debt service payments. There is no certainty as to whether such payments will be required upon the District's first semiannual payment, let alone several payment dates into the future. Even the amounts of future possible loans are contingent upon a calculation of the deficiency between the payment due and the funds immediately available to the District, a calculation that cannot be made with sufficient accuracy today. Further, there is nothing in the record to support the assumption that the District will be unable to repay any loans as required under the proposed CLA.

The possibility of large loan payments certainly exists. But so does the possibility that, in any given year, no loan obligation will materialize. The regional center first opened in 2008, during an extraordinarily challenging economic period. Since then, revenues have steadily improved. We are required to assume the proposed CLA will operate as anticipated by the parties, rather than making unfounded projections about the need for loans and the parties' abilities to fulfill the CLA. The District aptly points out "contingency is not a matter of degree. Either a contingency has been triggered, making the debt absolute, or it has not, meaning it is still contingent." Reply Br. of Appellant at 19.

The lead opinion and the respondents place emphasis on the "absolute and

unconditional" obligation created by the proposed CLA. *See*, *e.g.*, lead opinion at 17; Br. of City at 6, 18; Br. of Taxpayer at 34. And the trial court concluded the obligation was not contingent, but immediate, "based on . . . the District's ability, both past, current and future, to meet its needs." Verbatim Report of Proceedings at 71. Both of these contentions neglect the fact that the "absolute and unconditional" obligation to make loans, CP at 455, arises *only if*, at future semiannual intervals, "the District has insufficient amounts available from sales taxes . . . and from Regional Center Revenue, to provide for the timely payment" of its debt service obligations, CP at 454. It cannot be established that the City presently faces a definite liability that it will pay for through new borrowing. At the very most, the respondents have argued, based on the regional center's early performance, the City has "expose[d] itself to the *possibility* of having to loan the District up to" the full amount of the 2011 bonds. Br. of Resp't City at 29 (emphasis added); *see also* Resp. Br. of Taxpayer at 5 ("The City *expects* to make future payments." (emphasis added)).

The lead opinion's attempt to characterize the proposed CLA as a guarantee is similarly misplaced, as we have nevertheless referred to guarantees as contingent liabilities, not constituting debt, in *Comfort*, 142 Wash. at 254-55 and *State ex rel.*

Wash. Toll Bridge Auth. v. Yelle, 56 Wn.2d 86, 94, 351 P.2d 493 (1960) (where the amount to be placed in guarantee fund was dependent on future developments, "the guaranty is only a contingent liability"). The lead opinion relies on a distinguishable case, *State Capitol Commission v. State Board of Finance*, 74 Wash. 15, 132 P. 861 (1913), for its characterization of the CLA as a guarantee constituting debt. In contrast to the City in this case, the State in *State Capitol Commission* was afforded no options for funding, pledged its full faith and credit, and *unconditionally* guaranteed to fund bonds issued by the State Capitol Commission. *Id.* at 18. The lead opinion's characterization also ignores the security granted to the City under the proposed CLA. For example, the CLA provides that the City may require the District to raise its taxes and, under certain circumstances, transfer an ownership interest in the regional center to the City. The City is also protected against claims by the District's bondholders. These options and safeguards belie the notion that the City has unconditionally guaranteed to fund the District's debt services obligations with borrowed funds. Characterizing the proposed CLA as a guarantee is presumptive and premature.

I would hold the City's obligation is necessarily contingent on multiple considerations and therefore should not be considered debt within the meaning of

article VIII or chapter 39.36 RCW.

3. *A risk of loss analysis is inappropriate*

Under our well established case law, the proposed CLA would survive. The lead opinion, however, contrives a new "risk of loss" legal theory to strike down the proposed CLA. Under its theory, the only inquiry would be "who bears the risk of loss in the underlying obligation[?]" Lead opinion at 9. The lead opinion is forced to craft this test through inference because such an inquiry has never been stated as a rule of law.

The risk of loss approach conflicts with our precedent and threatens to confound this legal question with an imprecise and ad hoc standard. Weighing the risk of loss is a matter left to elected representatives and is not considered by the courts in reviewing the legality of transactions between government entities. *See Comfort*, 142 Wash. at 258-59; *see also Wash. State Hous. Fin. Comm'n v. O'Brien*, 100 Wn.2d 491, 498, 671 P.2d 247 (1983) (the role of courts "is not to weigh the economic risk but only to ascertain that risk to the State remains within public control"). In *Comfort*, as in this case, the city's obligation was conditioned on the possibility that insufficient funds would be available to meet debt service

obligations. 142 Wash. at 255. We said whether the city would ultimately need to borrow money to repay the bonds was "a matter that time alone can show." *Id*. at 258. We added that risk "is a matter to be left to the wisdom of the legislature, and we can not and will not assume that the purposes it had in mind will fail of attainment. Rather will we assume that the results anticipated will be realized until the contrary clearly appears." *Id*. at 258-59. In this case, the anticipated result is for the District to satisfy its debt service obligations and for the City only to lend money if necessary. Further, the loans are to be repaid by the District or the City may take advantage of various remedies provided by the proposed CLA. The record does not support a conclusion that a contrary result is clearly apparent.

The lead opinion defends its analysis by claiming it is not evaluating "the *likelihood* or the *amount* of risk," but that is exactly what it does in this case. Lead opinion at 11. If the only inquiry is on whom the risk falls, as the lead opinion states, then the proposed CLA should survive. The District's debts are the District's debts alone and not those of the City. The City has not pledged its general tax revenues or any other assets for repayment of the district bonds and the creditors have no recourse against the City. The proposed CLA affords the City with multiple safeguards and remedies and explicitly places the risk of loss solely

with the District. The lead opinion's contrary conclusion is grounded in inappropriately second-guessing the allocation of risks agreed to by the City and the District. Further, the claim that its decision "places the approval of the CLA in the hands of the voters" rings hollow. Lead opinion at 2. Voter-approved debt is limited to five percent of the total assessed value of all taxable property in the City. Wash. Const. art. VIII, § 6. The lead opinion never determines the amount of the debt or the amount of the City's debt limit. By labeling the CLA a debt, the effect of the lead opinion may very well be to take approval of the CLA *out* of the voters' hands.

The lead opinion's form of second-guessing is especially problematic given the prevalence and utility of CLAs in general. The Washington state treasurer submitted an amicus brief in this matter that offers some enlightening statistics on the use of and need for CLAs. According to the treasurer, there are approximately 20 to 30 existing CLAs between public facilities districts and cities/counties throughout the state. Those CLAs secure approximately $271 million in bonds. Other municipal entities, like public housing authorities, also utilize CLAs to secure their debts. The treasurer comments "the use of CLAs as security for debt is a valuable mechanism for public entities to cooperate and achieve lower cost

financing of projects statewide." Br. of Amicus Curiae Wash. State Treasurer at 7. The lead opinion's new standard not only calls their validity into question, but offers little predictability in the outcome of potential challenges.

As an additional note, recent legislation—passed after oral argument in this case—has afforded the parties significant assistance in their ability to generate revenue to fulfill the District's debt services obligations. Laws of 2012, ch. 4, §§ 1-6 (Substitute S.B. 5984)*; see* lead opinion at 23-25. I agree with the lead opinion that this development does not moot the case. It does, however, underscore the improvidence of making premature assumptions about the parties' capacity to fulfill their obligations. This is especially so where, as here, the City was afforded a myriad of options and remedies to consider before ever deciding to finance the District's debt services obligations through borrowed money.

I would reverse the trial court because the respondents have not satisfied their heavy burden to overcome the presumption of constitutionality and establish that the City's action to authorize the proposed CLA would be unconstitutional.[1] The effort to characterize it as debt is strained and inconsistent with the principles of our well

[1]Because I would hold the proposed CLA does not constitute a debt of the City, I would not reach the issue of whether the trial court incorrectly calculated the total amount of indebtedness. However, I concur with the lead opinion's dismissal of the District's evidentiary objections.

established jurisprudence on this issue. The CLA is a loan from one municipal entity to another. Though the City's obligations may have been greater than anticipated to date, that does not convert the proposed CLA into an unconditional commitment to borrow future funds. I decline to invent a new legal theory to reach a contrary result. I therefore dissent.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Tom Chambers, result only

Justice Susan Owens