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TO: Dick Warbrouck
President of the Retired Firefighters of Washington

Jerry Taylor
President of Retired Seattle Police Officers' Association

FROM: Phil Talmadge

RE: HB 2350/SB 6563 – Proposed LEOFF Plan I and II Merger

Dick and Jerry:

I previously gave you my thoughts on possible legal issues associated with House Bill 2097, a bill introduced late in the 2011 legislative session, that proposed the merger of LEOFF Plan I and II. HB 2097 died in committee.[1] However, a study group was created after the 2011 session to consider merger. In theory, the group involved all "stakeholders" associated with the merger. In practice, the group was bent on *promoting* merger and was not receptive to providing information to LEOFF Plan I advocates.

At the behest of LEOFF Plan II Board ("Board") chair Kelly Fox and its director Steve Nelsen, attorney Robert Klausner and the Ice Miller law firm were retained to provide legal opinions to the Board on tax implications and other legal questions associated with merger. Despite *repeated* requests to the Board and PRA requests, only a letter from Ice Miller and nothing from Klausner was made public. It is not clear if the Ice Miller letter is the full scope of its opinion on merger issues, nor is it clear any legal opinions have been provided to all Board members or legislators, depriving them of all necessary information, paid for by the taxpayers, on the merger issue.[2]

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[1] It is noteworthy that on page 5 of the Actuary's fiscal note for HB 2097 that he opined that LEOFF Plan I would have a surplus that would be used to lower contribution rates for LEOFF Plan II members. He also assumed (p. 6) that the new board would not recommend any further improvements in LEOFF Plan I benefits.

[2] I offer no opinion here on the viability of an action under the PRA to compel the Board to turn over the Klausner and Ice Miller opinions. But it is bad policy for the Board or legislators to consider merger without full appreciation of any legal risks or tax consequences from the IRS attendant upon any merger.

Without authorization from the Board, Fox and Nelsen have advocated for merger. As president of the Washington State Council of Firefighters, Fox's membership, who are principally LEOFF Plan II members, will benefit from a merger bill.[3]

For the 2012 legislative session, Representative Sullivan introduced HB 2350. SB 6365 has been introduced in the Senate. It is essentially the same bill as HB 2097, except that the bill could allow the Legislature to avoid making some $80 million in LEOFF Plan II contributions instead of the $15 million allowed by HB 2097.

The LEOFF Plan II Board recently voted 5-4 not to endorse HB 2350, but has since reversed itself.

You have received an excellent opinion on the workings of HB 2350 from attorney Joseph Fishnaller that I will not replicate. This legal analysis follows:

(1) Background to the Governance of LEOFF Plan I and II

As you know, there were several statutory pension systems in Washington for uniformed personnel prior to creation of the Law Enforcement Officers and Firefighters pension system ("LEOFF"). For example, for firefighters, a 1947 (RCW 41.16) and a 1955 pension system (RCW 41.18) governed the pension and disability entitlement of firefighters. Similarly, RCW 41.20 governed police officers in first class cities. Generally under those systems, decisions with respect to pension eligibility and disability were handled by local boards in the jurisdictions employing the firefighters and police officers. The 1969 Legislature established LEOFF. LEOFF contained components of both a retirement and

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[3] Mr. Fox's participation in the crafting of HB 2350/SB 6563 and his advocacy for the merger of LEOFF Plan I and II funds, particularly without Board authorization, may violate RCW 42.52.020 which states:

> No officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the sate officer's or state employee's official duties.

Mr. Fox, as board chair, is a "state officer." RCW 42.52.010(19). His position with the State Council is a professional activity that may be in conflict with his duties as Board chair. He cannot use his position as Board chair to advance the interests of the people he represents outside of his service to the State. If HB 2350 or SB 6563 were enacted, the people Mr. Fox represents as president of the State Council would enjoy the benefit of diminished pension contributions.

disability system. Although under RCW 41.26.030(4), any then-existing firefighters or police officers became LEOFF members, new firefighters and police officers had to meet medical standards to be eligible for LEOFF membership. Under RCW 41.26.040(2), LEOFF firefighters and police officers were essentially entitled to any benefits that had been afforded such firefighters and police officers under the predecessor retirement systems. RCW 41.26.110 provided that the existing local disability boards would administer the new LEOFF I system, subject to rules established by the Department of Retirement Systems. RCW 41.26.115. If a firefighter or police officer was aggrieved by any decision of the local board on disability or retirement, he/she had a right of appeal to the director of the Department of Retirement Systems. RCW 41.26.200. Most critically, RCW 41.26.150 provided that LEOFF Plan I firefighters and police officers, both retirees and actives, had a right to certain medical benefits set forth in RCW 41.26.030(22). *Knudson v. City of Ellensburg*, 832 F.2d 1142 (9th Cir. 1997) (medical benefits are not contingent upon employment; retirees had the right to receive medical benefits under this statutory provision). But RCW 41.26.150 also provided that a local disability board had the discretionary authority to provide additional medical benefits beyond those set forth in RCW 41.26.030(22). *See Stegmeier v. City of Everett*, 21 Wn. App. 290, 584 P.2d 488 (1978) (court upholds board decision to allow retired police officer prescription eye glasses); *Snohomish Cy. Fire Dist. No. 1 v. Snohomish Cy.,* 128 Wn. App. 418, 425-26, 115 P.3d 1057 (2005) (court upholds authority of local board to reimburse certain dental expenses).

In 1977, the Legislature created LEOFF Plan II. It is generally acknowledged that LEOFF Plan II is not as generous in its benefits as is LEOFF Plan I. LEOFF Plan II does not afford its members the medical benefits allowed in LEOFF Plan I, for example. Issues relating to disability on the job are not addressed by LEOFF Plan II but rather under Washington's Industrial Insurance Act, Title 51 RCW. Police and firefighter groups proposed Initiative 790 to the voters in November, 2002 to address governance of LEOFF Plan II. The voters approved that measure which created a board of trustees for LEOFF Plan II that was separate and distinct from any legislative committees that had governed pension system previously. *See* RCW 41.26.700, et. seq. That board ostensibly has the authority to set contribution rates for employers, employees, and the State of Washington. RCW 41.26.705(5). *Retired Public Employees Council of Washington v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003) (upholding the authority of the Legislature to set pension system contribution rates in a budget bill).

HB 2350/SB 6563 proposes to merge the LEOFF Plan I and II funds. The bill also subjects the merged fund to the management of what was formerly the LEOFF Plan II Board created by RCW 41.26.700 et. seq. (§ 4). The new merged

board would set contribution rates for both LEOFF Plan I and II members and employers (§§ 3, 16). The bill, however, does not specify whether the new combined board would have any responsibility in connection with supervision of the local disability boards' decisionmaking generally, or with respect to medical benefits under RCW 41.26.150 specifically (§ 5). The Board's membership, now consisting of a majority of LEOFF Plan II members and retirees, is unaltered, except that the retiree member could be LEOFF Plan I or II (§ 7). The bill retains the existing provisions of RCW 41.26.715 which provided for 3 firefighters and 3 police officers. *Id.* But in actual practice, with the diminishing number of LEOFF Plan I actives, members are likely to be Plan II. Finally, the bill provides that the new board is authorized to pay "legal expenses that are primarily incurred for the purpose of protecting the trust fund or incurred in compliance with statutes governing the fund" out of "interest earnings" of LEOFF (§ 20).

(2) Legal Issues

In considering the possible merger of LEOFF Plan I and II, a number of legal issues are present. This memorandum by no means considers all of the potential legal issues. However, four legal issues are readily apparent from any proposed merger, including:

(a) Under the decision of the Washington Supreme Court in *Bakenhus v. City of Seattle,* 48 Wn.2d 695, 296 P.2d 536 (1956), are the independent LEOFF I and II funds a contractual benefit of LEOFF members that may not be disturbed under that decision?

(b) Is the local board process of LEOFF Plan I in which local boards make disability and retirement decision and can authorize added medical benefits under RCW 41.26.150, a contractual right of LEOFF Plan I members that cannot be disturbed under *Bakenhus*?

(c) Where the Legislature is excluded from any role in the setting of contribution rates for Plan I and II members, notwithstanding the provisions of Initiative 790 as set forth in RCW 41.26.700 et. seq., do such contribution rates require legislative approval under Initiative 1053 or Article VII, § 5 of the Washington Constitution?

(d) Does the makeup of a combined LEOFF board with its disproportionate (or even an exclusive) number of LEOFF II members violate the rights of LEOFF I members whose pension rights are decided by such a board?

(e) Is the new board's authority to retain independent legal counsel consistent with the constitutional authority of the Attorney General?

(3) *Bakenhus*-Related Questions

In order to answer questions (a) and (b) above, it is important to understand the rule articulated in *Bakenhus*. In numerous appellate court decisions and AGOs,[4] our Supreme Court addressed the question of legitimacy of changes to laws governing a pension system both for current members or retirees. In general terms, the right to a public pension commences upon the first day of employee's employment and continues to vest with each day of service thereafter. *Tembruell v. City of Seattle*, 64 Wn.2d 503, 506, 392 P.2d 453 (1964). That employee's pension entitlement, based on contract, is in accord with the statutes as they existed when the employee began his/her service. *Mulholland v. City of Tacoma,* 83 Wn.2d 782, 785-86, 522 P.2d 1157 (1974); *Noah v. State*, 112 Wn.2d 841, 845 n.1, 774 P.2d 516 (1989).

Bakenhus, a retired Seattle police officer, sued Seattle, challenging a policy which set a maximum of $125 per month on police pensions. When he commenced his employment with Seattle in 1925, he was entitled to receive one-half of the salary he had received during the last year before his retirement. Bakenhus obtained a judgment directing that he be paid a pension of one-half of his last month's salary and a judgment for the difference between the pension he had been paid from the date of his retirement and the amount he should have received. Our Supreme Court started from the premise that a pension granted to a public employee is not a gratuity but is deferred compensation for services rendered on a contractual basis. *Id.* at 700. Thus, when an employee accepts a job to which a pension plan is applicable, that employee contracts for the pension and is entitled that pension when he/she has fulfilled all of the conditions associated with it. The Court indicated that pension rights may be modified prior to the employee's retirement, but only for the purpose of keeping the pension system flexible and maintaining its integrity. 48 Wn.2d at 701. More specifically, citing California authority, our Supreme Court stated that any such modifications to the pension system "must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." *Id.* at 701-02.[5] The Court sustained Bakenhus' rights under the pension system that applied when he began working for Seattle.

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[4] I have generally chosen not to cite the numerous AGOs on pension issues generally and LEOFF issues specifically unless they bear directly on the legal issue discussed herein.

[5] The Supreme Court in *Dailey v. City of Seattle,* 54 Wn.2d 733, 344 P.2d 718 (1959) summarized its holding in *Bakenhus* as follows: "1. That employees who accept employment

In cases subsequent to *Bakenhus*, our Supreme Court rooted its analysis in Article I, § 23 of the Washington Constitution which precludes legislation impairing the obligations of contract. In a recent case addressing the *Bakenhus* rule, our Supreme Court in *McAllister v. City of Bellevue Firemen's Pension Board,* 166 Wn.2d 623, 628, 210 P.3d 1002 (2009) reaffirmed the *Bakenhus* rule that any changes to a pension system could not result in disadvantage to the employee over the employee's former pension plan.

RCW 41.26.040(2) codifies *Bakenhus*, guaranteeing that a firefighter retiring or police officer under LEOFF must not suffer any diminution in benefits that would have available if LEOFF had not been enacted. *McAllister*, 166 Wn.2d at 629.

Washington courts have broadly construed the scope of these contractual rights; they are not confined to pensions alone. For example, service-connected disability rights of a police officer fall within *Bakenhus. State ex rel. Johnson v. Funkhouser*, 52 Wn.2d 370, 325 P.2d 297 (1958). *See also, Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 333 P.2d 642 (1958) (*Bakenhus* not confined to retirement for service pension rights in case of firefighter where pension system covered service/nonservice disability and retirement). *Bakenhus* principles also apply to pension-related benefits negotiated in a collective bargaining agreement between a private employer and employees, *Dorward v. ILWU-PMA Pension Plan*, 75 Wn.2d 478, 452 P.2d 258 (1969), or a public employer and employees, *Internat'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186 (2002) (airport fire service employees voluntarily agreed to pay Social Security and Medicare, matched by employer contributions; when union opted out of Social Security/Medicare, employer refused to return the employer match for both systems to the employees; Social Security/Medicare contributions fall within *Bakenhus).*

Washington courts have held that a variety of rights, including rights that indirectly affect a pension, are contractual in nature and are not subject to change by Legislature to the disadvantage of the employee or retiree. *See, e.g.,*

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to which pension plans are applicable contract thereby for a substantial pension, and are entitled to receive the same when they have fulfilled the prescribed conditions. 2. That employees (perspective pensioners) will be presumed to have acquiesced in legislative modifications that do not unreasonably reduce or impair existing pension rights; or, stated positively, if the modifications are reasonable and equitable. 3. That an act of the Legislature, making a change in pension rights, will be weighed against pre-existing rights in each individual case to determine whether it is reasonable and equitable. If the over-all result is reasonable and equitable, the employees (prospective pensioners) will be presumed to have acquiesced in the modification; if the over-all result is not reasonable and equitable, there will be no such presumption." *Id.* at 738-39.

Bakenhus, *supra* (size of a pension); *Weaver v. Evans,* 80 Wn.2d 461, 495 P.2d 639 (1972) (systemic funding of pension system); *Washington Association of County Officials v. Washington Public Employees Retirement System Board*, 89 Wn.2d 729, 733, 575 P.2d 230 (1978) (right to a practice of including certain lump sum payments in the calculation of retirement benefits); *Eagan v. Spellman*, 90 Wn.2d 248, 258, 581 P.2d 1038 (1978) (right to a statutory retirement age at the time of employment); *Horowitz v. Dep't of Retirement Systems,* 96 Wn.2d 468, 635 P.2d 1078 (1981) (rights to refund of pension contributions); *Washington Federation of State Employees v. State*, 98 Wn.2d 677, 679, 658 P.2d 634 (1983) (the right to add to a pension by using accrued vacation pay).

By contrast, the mortality tables for calculating annuity benefits, *King County Employees' Ass'n v. State Employees Retirement Board*, 54 Wn.2d 1, 336 P.2d 387 (1959), or contribution rates, *Charles, supra* are not contractual benefits.

With respect to the first of the two legal questions above, it appears that an aspect of that question has been answered by decisional law. In *Charles*, *supra*, the Supreme Court held that the right to the systematic funding of a retirement system to maintain its actuarial soundness is a contractual benefit that may not be altered by legislation. 148 Wn.2d at 625. Thus, LEOFF Plan I members are entitled to an actuarially sound and appropriately funded pension system. That argument might extend to maintenance of a separate LEOFF Plan I fund over which LEOFF Plan I members have authority. But clearly to the extent that merger of Plan I and Plan II funds would undercut the actuarial soundness of LEOFF Plan I or impact the appropriate funding of LEOFF Plan I, a merger would violate the *Bakenhus.*

With respect to the second of the two questions, as to medical benefits, the question of whether medical benefits are a contractual right under LEOFF Plan I has not been specifically tested in court. However, in *Navlet v. Port of Seattle,* 164 Wn.2d 818, 194 P.3d 212 (2008), the Supreme Court held that certain lifetime retirement health care and welfare benefits provided pursuant to a collective bargaining agreement between the port and a union which guaranteed the employees who reached retirement the same level of medical and welfare coverage they had received during active employment constituted a vested right under *Bakenhus* that could not be altered.

In AGLO 1975 No. 2, 1975 WL 165841 (1975), the Attorney General specifically concluded that the provisions of RCW 41.26.150 are contractual rights subject to *Bakenhus.* The Attorney General there rejected the contention that benefits under RCW 41.26.150 were not a contractual right of LEOFF Plan I

members, noting that such benefits were plainly a part of LEOFF pension system and they were governed by *Bakenhus.*

Thus, in my opinion, the medical benefits of RCW 41.26.150, including the discretionary ability of local disability boards to authorize additional medical benefits for retirees subject to their jurisdiction, constitute vested contractual rights that may not be altered under *Bakenhus.*[6]

(4) Authority of Merged Board to Set Contribution Rates

While RCW 41.26.705(5) purports to confer exclusive authority upon the Board to set contribution rates for LEOFF Plan II members, and the new board would have been given the authority to set contribution rates for LEOFF Plan I members under HB 2350, that authority is circumscribed by the provisions of RCW 43.135.055.[7]

Over the course of the last decade, super majority requirements for the enactment of fees and taxes have been imposed by initiative. Initiative 1053 was adopted by the voters in November 2010. It establishes a 2/3 super majority requirement for the enactment of taxes in RCW 43.135.034. Moreover, RCW 43.135.055 addresses fees and states:

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[6] The board may contend that § 5 of HB 2350 guarantees LEOFF Plan I members their benefits. That section states:

> After the merger of law enforcement officers' and firefighters' retirement system plan 1 into the law enforcement officers' and firefighters' retirement system plan 2, each participant in the law enforcement officers' and firefighters' retirement system plan 1 or the law enforcement officers' and firefighters' retirement system plan 2 is entitled to the same benefits immediately after the merger as immediately prior to the merger including, but not limited to, any benefits provided to active or retired members of the law enforcement officers' and firefighters' retirement system plan 1 by city or county disability boards pursuant to RCW 41.26.150. This protection is in addition to any other protections provided by law.

§ 5 guarantees the benefits that existed pre-merger. It does not specifically address the local disability board process nor does it assure LEOFF Plan I members of the rights they possessed under that process to receive enhanced medical benefits, for example.

[7] Article VII, § 5 of the Washington Constitution also provides that taxes may only be imposed "in pursuance of law." Under this constitutional provision, a tax must be expressly imposed by statute or local ordinance. *Okeson v. City of Seattle,* 150 Wn.2d 540, 556, 78 P.3d 1279 (2003). But to the extent that the pension contribution rates do not constitute a tax, but rather are a fee, Article VII, § 5 of the Washington Constitution does not apply. *State v. Sheppard,* 79 Wash. 328, 140 Pac. 332 (1914).

> A fee may only be imposed or increased in any fiscal year if approved with majority legislative approval in both the House of Representatives and the Senate and must be subject to the accountability procedures required by RCW 43.135.031.

RCW 43.135.055(1). RCW 43.135.005, the initiative's intent section, makes clear that there must be legislative approval for any fee increase. Section 9 of Initiative 1053 specifically provides that the initiative is to "be liberally construed to effectuate the intent, policies, and purposes of this act."

No definition is set forth in RCW 43.135 for a "fee."[8] *Merriam-Webster's Collegiate Dictionary* (11th ed.) defines a fee as "a fixed charge" or "a sum paid or charged for a service." In addition to RCW 43.135.055, other statutes narrow the fee-setting authority of the Legislature. For example, RCW 82.02.020 limits the authority of local jurisdictions to land use-related impose fees. That statute offers an analogous definition of a "fee" and our courts have broadly construed a "fee" under that statute. For example, in cases arising under RCW 82.02.020, fees, charges, even indirect assessments fall within the scope of the statutory provision. *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 757-58, 39 P.3d 867 (2002); *Citizens for Rational Shoreline Planning*, 155 Wn. App. 937, 942-43, 230 P.3d 1074, *review granted*, 170 Wn.2d 1001 (2010).

The most often litigated question is whether a particular assessment is a fee or a tax. For example, *Covell v. City of Seattle,* 127 Wn.2d 874, 879, 905 P.2d 324 (1995) distinguishes between a tax and a fee. If an assessment is a tax, it may be subject to constitutional limitations. Beginning in *Covell*, the Supreme Court articulated a three-part test to distinguish a fee from a tax; that test looks (1) to whether the purpose of revenue enhancer is to regulate or raise revenue; (2) whether the funds generated are dedicated to a regulatory purpose; and (3) if there is a direct relationship between the assessment and the service received burden created by the payor. There, the Court held that Seattle's residential street utility charge was a tax not a fee. Our Supreme Court and the Court of Appeals have adhered to the three-part test in many subsequent decisions.

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[8] The legality of a decision by the Legislature to lower the statutorily-set contribution rates for pension systems was tested in *Charles*. There, the Supreme Court determined that pension system members had standing to challenge the rate issue and in so doing determined that a pension system is not a trust. Rather, a pension system is a creature of statute. The Court further concluded that the contribution rates were not a contractual right under *Bakenhus* in the absence of specific proof that the lower contribution rates would prevent the effective operation of the pension system, rendering it actuarially unsound. 148 Wn.2d at 625-28.

In my opinion, under that test, the contribution rates do not constitute taxes, but rather are fees. Assessments for purposes that do not involve public revenue have generally been seen by our courts not to be taxes. *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 156, 203, 117 Pac. 1101 (1911) (worker compensation premiums); *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guaranty Ass'n*, 83 Wn.2d 523, 538, 520 P.2d 162 (1974) (insurance guaranty assessments for fund to pay claims for liquidated insurers). Further, given the broad judicial interpretation of fees in statutes like RCW 82.02.020, it is likely a Court would deem LEOFF contribution rates to be fees. As such, they do not fall within the purview of article VII, § 5 of our Constitution.

Finally, if the contributions are fees, can the Board impose them without legislative involvement? I do not believe so. The general principle for interpreting statutes adopted by Washington courts is that the most recent and more specific enactment covering a particular issue governs. *Muije v. Dep't of Social & Health Servs.*, 97 Wn.2d 451, 453, 645 P.2d 1086 (1982) (provisions of a specific statute passed subsequent to a general statute will prevail); *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 37, 785 P.2d 447 (1990). Here, I-1053 is the more recent and specific statute on the issue of legislative approval of fees. Thus, in my opinion, the authority of a combined LEOFF board to impose contribution rates is subject to RCW 43.135.055. The Legislature, not such a board, must establish the contribution rates for LEOFF retirees insofar as contribution rates constitute a fee.

(5) Due Process Issues Associated with Management of Merged LEOFF Fund

LEOFF Plan I is presently managed by the Department of Retirement Systems. RCW 41.50.055. Contributions to that fund are governed by statute. RCW 41.26.080. The liabilities of the LEOFF Plan I system must be funded in accordance with the provisions of RCW 41.45. By contrast, the Board manages LEOFF Plan II fund, RCW 41.26.720(1), although it must work cooperatively with the State Investment Board in doing so. RCW 41.26.732. The Board is made up of eleven members, six of whom are active or retired LEOFF II members.

Under the provisions of HB 2350/SB 6563, the merged board would still very likely have a majority of LEOFF Plan II members, with little representation for LEOFF Plan I members, even though that board would set LEOFF Plan I contribution rates, if such authority is upheld (*see supra*), and it would manage

the retirement funds of the LEOFF Plan I members.[9] If, as was contemplated in HB 2097, any LEOFF Plan I "surplus" is designated as a funding source to diminish LEOFF Plan II members' contributions, the new board will have very limited incentives to increase existing LEOFF Plan I member benefits and thereby restricting the funding source for lower Plan II members' contributions. The new board will be inherently conflicted, to the detriment of the former Plan I members.

Washington courts have historically expressed the view that "taxation without representation" violates fundamental constitutional principles relating to voting or due process. Here, of course, no "taxation" is at issue, but the setting of contribution rates and management of the LEOFF Plan I funds substantially impact LEOFF Plan I members, entitling them to fair representation on the unelected board making such decisions, particularly were a court to disagree with my opinion that the contribution rates must be set by the Legislature under RCW 43.135.055.

In *Malim v. Bethiem,* 114 Wash. 533, 196 Pac. 7 (1921), our Supreme Court held that a statute purporting to allow a diking district to assess lands outside the district's boundaries where those landowners had no right to vote in district elections was unconstitutional as it deprived the landowners of the right to free and fair elections under article I, § 19 of the Washington Constitution. *See also, Foster v. Sunnyside Valley Irr. Distr.*, 102 Wn.2d 395, 687 P.2d 841 (1984) (invalidating irrigation district voting statute limiting vote to agricultural land owners).[10] Similarly, in *State ex rel. Tax Commission v. Redd*, 166 Wash. 132, 6 P.2d 619 (1932), the Court overturned an effort by the State Tax Commission to reassess certain property in Franklin County for local tax purposes. The Court held that the Legislature could not take from the people of that county the right to locally assess their property, an action the Court deemed central to their "right of local-self-government secured to them by our Constitution." *Id.* at 139.

In recent cases, however, our Supreme Court has indicated that there is no need for direct representation for affected constituencies on a governmental board if the board is made up of elected officials. In *Granite Falls Library Capital*

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[9] The merged board members are recommended to the Governor by the Washington State Council of Firefighters and WACOPS, organizations whose focus is on their LEOFF Plan II members.

[10] Where the governmental body has general governmental powers, equal protection principles dictate that "one-person, one-vote" must govern. *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885 (W. D. Wash. 1990) (invalidating make-up of Metro Council made up of mixture of elected and appointed officials on one-person, one-vote grounds). The LEOFF's Board's authority is arguably more narrow than "general government" purposes.

Facilities Area v. Taxpayers of Granite Falls Library Capital Facilities Area, 134 Wn.2d 825, 953 P.2d 1150 (1998), the library capital facilities area was a distinct quasi-municipal corporation that could levy taxes; its governing body was made up solely of three elected county council members. The Court rejected a challenge to the board's makeup on article I, § 19, due process, and equal protection grounds where the voters of the facilities area expressly approved the sale of bonds by the area and the power of the board to levy taxes to pay for the bonds. The Court did not offer a detailed analysis for its conclusion, but it appears that the delegation of taxing power to this board was proper so long as procedural safeguards like the right to vote on the taxing authority constrained the board's actions. *Id.* at 842, 844. *See also, Municipality of Metro Seattle v. City of Seattle,* 57 Wn.2d 446, 454, 357 P.2d 863 (1960) (Metro Council could levy taxes because the Council, though appointed, consisted of elected officials in the region); *Larson v. Seattle Popular Monorail Authority*, 156 Wn.2d 752, 131 P.3d 892 (2006) (Court upholds authority of Monorail board to levy taxes where board was created by voters and consisted of both elected and appointed members); Mathew Senechal, *Revisiting Granite Falls: Why the Seattle Monorail Project Requires Re-Examination of Washington Prohibition on Taxation Without Representation*, 29 Seattle U. L. Rev. 63 (2005).

In sum, in my opinion, no Washington case has authorized the delegation of a significant fiscal power such as the power to tax or impose fees, or to manage hundreds of millions of dollars in pension funds to an unelected board whose make-up is largely devoid of persons selected by, or representative of, the persons affected by the board's decision. A board that has power over vital financial interests of LEOFF Plan I members, that entirely, or even largely, consists of LEOFF Plan II members, whose interests may diverge from those of the LEOFF Plan I members, violates constitutional principles.

(6) The New Board's Authority to Reimburse Legal Expenses

§ 20 of HB 2350/SB 6563 authorizes the board to use the merged LEOFF fund interest earnings to pay legal counsel. Insofar as LEOFF is no longer a trust after *Charles*, but a creature of statute, it is likely this is within the power of the Legislature to do unless it infringes on the authority of the Attorney General. That authority was recently examined by our Supreme Court in *City of Seattle v. McKenna*, 172 Wn.2d 551, 259 P.3d 1087 (2011) and *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011).

From those decisions, it is clear that the Attorney General will be legal counsel to the new board, RCW 43.10.040, and the board had no authority to employ counsel "to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performances of any of the duties specified by

law to be performed by the attorney general . . ." RCW 43.10.067. Because the Attorney General not only will represent the board in court, but advises it under RCW 43.10.040, "in all matters involving legal or quasi legal questions . . .", I do not believe § 20 can be read to authorize the board to retain outside counsel, except insofar as the Attorney General determines that the assistance of special assistant attorney general is required. This section cannot be construed to limit or circumvent the normal payment for legal services to the Attorney General pursuant to the legal services revolving fund process or legal expenses beyond those that are reasonable. RPC 1.5(a).

(7) Conclusion

To summarize,

- The LEOFF Plan I and II merger contemplated by HB 2350/SB 6563 violates the constitutional prohibition on impairment of contract as discussed in *Bakenhus* and its progeny if the fund merger undercuts the actuarial soundness of LEOFF Plan I. It may be unconstitutional per se in the elimination of a separate LEOFF Plan I fund. It is unconstitutional as to the possible elimination of local disability boards.

- Under RCW 43.135.055, only the Legislature may set contribution rates as they are fees.

- The management of merged funds by a new board created by HB 2350/SB 6563 with limited LEOFF Plan I member representation violates the due process rights of LEOFF Plan I members.

- The proposed reimbursement of legal expenses in HB 2350/SB 6563 from fund interest earnings is constrained by the constitutional and statutory authority of the Attorney General.