IN THE SUPREME COURT, STATE OF WYOMING

CITY OF LARAMIE, WYOMING Appellant (Plaintiff), v. UNIVERSITY OF WYOMING and UNIVERSITY OF WYOMING BOARD OF TRUSTEES, Appellees (Defendants).	S-23-0062

APPELLEES' OPENING BRIEF

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STATEMENT OF JURISDICTION

The trial court in this matter issued two final orders that are appealable to this court. Those orders include the Order on Motion to Dismiss (R. 226-257) filed on October 29, 2021, and the Order Granting Summary Judgment as to City of Laramie's Final Claims filed on January 5, 2023. (R. 444-445). The City filed a timely Notice of Appeal on February 2, 2023. This Court has jurisdiction to decide this appeal under Article 5, § 2 of the Wyoming Constitution and WYO. R. APP. P. 1.05.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Does UW's absolute sovereign immunity possessed in 1965 prevent the City from pursuing a third-party beneficiary contract claim that it alleges arise from a 1965 quitclaim deed transferring property from the Union Pacific Railroad ("UPPR") to UW?
2. May the City argue, for the first time on appeal, that UW was engaging in a proprietary function when it obtained land in 1965 from the UPPR?
3. Is W. S. §21-17-126 constitutional?
4. May the City argue, for the first time on appeal, that W.S. § 21-17-126 violated the due process rights of the City?
5. Did the City have authority and jurisdiction and pass Laramie City Ordinance 13.040.360 ("Ordinance")?
6. Can a municipality regulate and control actions of a constitutionally created entity like the University of Wyoming?

7. Can a municipality regulate issues involving beneficial use of water which are designated by the Wyoming Constitution solely to the discretion of the State Engineer and the State Board of Control as the City has attempted to do in the Ordinance?
8. Should the Court adopt a new test to review the sovereign immunity of State institutions and dramatically alter and overrule the court's longstanding precedents regarding the limits of municipal power and jurisdiction?
9. Should this court strike down the Ordinance and declare the Ordinance to be unconstitutional?

PROCEDURAL HISTORY OF THE CASE

The City of Laramie ("City") filed a Complaint for Declaratory Judgment on June 8, 2021. On July 14, 2021, the University of Wyoming and University of Wyoming Board of Trustees ("UW") filed a Motion to Dismiss. On October 29, 2021, Judge Kricken issued an Order on Motion to Dismiss ("Dismissal Order") (R. 226-257). This Dismissal Order dismissed all claims made by the City except two claims: 1) a claim that the City had the right to enforce water well drilling restrictions contained in the 1965 UPPR-University Deed as a third-party beneficiary, and 2) a claim that UW must comply with Laramie Municipal Ordinance 13.04.360. *See,* R. 256. The section of the Dismissal Order entitled "Background Facts and Procedural Posture" accurately outlines the events of this litigation. (R. 227-232). The Wyoming Attorney General's Office entered an appearance and filed briefs to defend the constitutionality of W.S. § 21-17-126 ("UW Statute"). In the Dismissal

Order, Judge Kricken ruled that W.S. §§ 21-17-126 and 15-7-701(d) were constitutional. (R. 241-246. 256).

On December 15, 2021, UW filed an Answer to the Complaint brought by the City and asserted four counterclaims: Counter Claim One: The City of Laramie has no authority to regulate the University of Wyoming or the University of Wyoming Board of Trustees which are constitutionally and statutorily created sovereign state entities; Counter Claim Two: The City of Laramie had no statutory authority to pass Laramie City Ordinance 13.04.360; Counter Claim Three: The City failed to exhaust administrative actions before the Wyoming State Engineer and Wyoming State Board of Control regarding alleged interference between City Wells and the UW Wells; and Counter Claim Four: W.S. § 21-17-126 and W.S. § 15-7-701(d) expressly prohibit the City from any interference or regulation of UW's use of non-potable water for irrigation use on UW lands. (R. 267-290).

Prior to ruling on cross Motions for Summary Judgment three questions remained to be decided:

1. Did the City have statutory authority to pass Laramie City Ordinance 13.040.360?
2. Could the City regulate UW and the UW Board of Trustees which are constitutionally and statutorily created state sovereign entities?
3. Could the City enforce terms of a 1965 Quit Claim Deed between UW and UPPR as an alleged third party beneficiary of that contract.

The City moved for Summary Judgment on the enforceability of the City Ordinance. (R. 352-382). On October 12, 2022, UW moved for Summary Judgment on that claim as

well and additionally moved for Summary Judgment as to all counterclaims brought by UW in the lawsuit. (R. 322-348).

On November 28, 2022, the court held a hearing on the Summary Judgment motions. (R. 455). The court issued its oral decision on December 19, 2022 (R. 443) which was followed by a Summary Judgment Order filed on January 5, 2023 (R. 444-445).

Despite argument by UW to address all issues in this matter including the counter claims brought by UW, the Court issued a very narrow ruling. The court addressed only two matters: 1) Whether the City ordinance was enforceable against UW, and 2) Whether the City could enforce terms of the 1965 Quitclaim deed as a third-party beneficiary. All of UW's counterclaims were denied by the court as being moot based on the other rulings of the court. (R. 444). The court found in favor of UW on both issues and denied all of the City's claims. (R. 444-445)

STANDARD OF REVIEW

Rule 56 of the Wyoming Rules of Civil Procedure governs motions for summary judgment. Wyo.R.Civ.P. 56(c). A summary judgment is appropriate if no issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.*

A genuine issue of material fact is a disputed fact that, if proven, "would establish or refute an essential element of a cause of action or defense that the parties have asserted." *Elk Ridge Lodge, Inc. v. Sonnett*, 254 P.3d 957, 960 (Wyo. 2011). Speculation, conjecture, the suggestion of a possibility, guesses, or even probability is insufficient to establish an issue of material fact. *Jones v. Schabron*, 2005 WY 65, ¶ 11, 113 P.3d 34, 38 (Wyo. 2008).

General or conclusory allegations, likewise, lack power to establish a genuine issue of material fact. *Id*. ¶23.

"[O]n a summary judgment motion, the movant has the burden of establishing his *prima facie* case. Only then does the burden shift to the opposing party to establish through 'specific facts' that a material question remains." *Singer v. Lajaunie*, 2014 WY 159 ¶ 23, 339 P.3d 277, 284 (Wyo. 2014)(citing *Sierra Club v. Wyo. Dep't of Environmental Quality,* 2011 WY 42, ¶ 25, 251 P.3d 310, 317 (Wyo. 2011)). Once the burden has shifted, the non-movant must offer more than "a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings." *Harper v. Fid. & Guar. Life Ins. Co.*, 2010 WY 89, ¶ 30, 234 P.3d 1211, 1220 (Wyo. 2010) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986)).

In reviewing summary judgment, the Court considers the record and all evidence in a light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which may fairly be drawn from the record. *Heimber v. Antelope Valley Improvement*, 2010 WY 29, ¶ 14, 226 P.3d 860 (Wyo. 2010).

Rule 12(c) of the Wyoming Rules of Civil Procedure allows for a motion for a judgment on the pleadings. The standard of review for a 12(c) motion is:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. W.R.C.P. 12(c).

> The standard of review for application of this rule is: A defendant is entitled to judgment on the pleadings if the undisputed facts appearing in the pleadings, supplemented by any facts of which the district court may take judicial notice, establish that no relief can be granted. A judgment on the pleadings is appropriate if all material allegations of fact are admitted in the pleadings and only questions of law remain. *Box L Corp. v. Teton County ex rel. Bd. of County Comm'rs of Teton County*, 2004 WY 75, ¶ 2, 92 P.3d 811, 813 (Wyo.2004) (citations omitted).
>
> Our review is similar to consideration of a motion to dismiss under W.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted. *Id*. We consider the allegations of the complaint to be true, and view them in the light most favorable to the plaintiff. *Id*.

Newport International University v. State of Wyoming, Department of Education, ex rel, 208 WY 72 (Wyo. 2008) ¶ 11-12.

ARGUMENT ONE: THE COURT MUST AFFIRM THE TRIAL COURT'S RULING THAT UW'S SOVEREIGN IMMUNITY PREVENTS THE CITY FROM ENFORCING THIRD PARTY BENEFICIARY RIGHTS IT CLAIMS TO HAVE UNDER A 1965 QUITCLAIM DEED BETWEEN UW AND THE UPPR

UW argued in its summary judgment motion and briefing that the City could not bring a third party beneficiary contract claim against UW that the City alleged flowed from a 1965 Quit claim deed between UW and the UPPR. UW argued that in 1965, when the deed was executed, UW had absolute sovereign immunity regarding contract actions. (R. 342-344).

In response to this argument, the City claimed that the Declaratory Judgment Act trumped UW's sovereign immunity, and that a third-party beneficiary claim was not a "contract claim." (R. 415). Neither of these arguments have any support under Wyoming law and were rejected by the court.

Most importantly for purposes of this appeal, the City raises this issue for the first time on appeal. The City never raised the challenge to the court's ruling on sovereign immunity that is raised now for the first time in this court. For the first time here, the City argues that UW was somehow engaged in a "proprietary function" and has no sovereign immunity regarding the 1965 Quit Claim Deed. The City admits several times in its brief that this "proprietary function" argument is a matter raised for the first time on appeal. In fact, the City never addressed the concept of "proprietary function" as it relates to sovereign immunity in any brief filed with the court or in any argument made to the court. (R. 415-417). The City provided no affidavits or other material in its response to UW's Motion for Summary Judgment and Judgment on the Pleadings that, in any way, addressed UW's sovereign immunity in 1965.

In *Crofts v. State of Wyoming, ex rel Department of Game and Fish*, 2021 WY 61 (2016), the court addressed raising issues for the first time on appeal. The court stated:

> "This court has taken a dim view of a litigant trying a case on one theory and appealing it on another.... Parties are bound by the theories they advanced below." *Davis v. City of Cheyenne*, 2004 WY 43, ¶ 26, 88 P.3d 481, 490 (Wyo.2004)(citation omitted). There is a sound basis for our general rule "that we will not consider claims raised for the first time on appeal." *Id*. We follow this rule because "it is unfair to reverse a ruling of a trial court for reasons that were not presented to it, whether it be legal theories or issues never formally raised in the pleadings nor argued to the trial court." *Basic Energy Servs., L.P. v. Petroleum Res. Mgmt., Corp*., 2015 WY 22, ¶ 28, 343 P.3d 783, 791 (Wyo.2015)(quoting *Bredthauer v. TSP*, 864 P.2d 442, 446–47 (Wyo.1993)). *Id* at ¶ 19.

The court has further stated that:

> "We will, however, consider two types of issues raised for the first time on appeal: jurisdictional issues and "issues of such a fundamental nature that

> they must be considered." *WW Enterprises, Inc. v. City of Cheyenne*, 956 P.2d 353, 356 (Wyo.1998); *Ricci v. New Hampshire Ins. Co*., 721 P.2d 1081, 1088 (Wyo.1986); *State Tax Comm'n v. BHP Petroleum Co. Inc*., 856 P.2d 428, 437-38 (Wyo.1993).

Pohl, In re, 980 P.2d 816 (Wyo. 1999).

The City claims that issues regarding sovereign immunity are "jurisdictional" and can be considered by the court in this appeal. This blanket statement is not an accurate statement of Wyoming law and must be rejected by the court.

This court struggled with deciding whether compliance with constitutional mandates and necessary steps to perfect a claim against sovereigns was "jurisdictional" over several years. Those issues were finally decided in *Harmon v. Star Valley Medical Center*, 331 P.3d 1174, (Wyo. 2014) where the court decided:

> As the Court observed in *Brown*, § 1–39–117 of the WGCA, Article 5, §§ 1 and 10 of the Wyoming Constitution, and accepted principles relating to jurisdiction, a district court's "subject matter jurisdiction is invoked with the filing of a complaint stating a case belonging to a general class over which the authority of the court extends." *Brown*, ¶ 44, 248 P.3d at 1146. Thus, district courts have subject matter jurisdiction to hear and decide actions brought against governmental entities, whether or not the claim is defective. Presentation of a claim is a condition precedent to suing a governmental entity, but it is not necessary to invoke district court jurisdiction.

Id. at ¶ 46.

The court further explained that:

> Because the presentation of a notice of claim is a condition precedent to suing a governmental entity and is not jurisdictional, an assertion that a plaintiff did not comply with the WGCA and Wyoming Constitution is an affirmative defense subject to waiver. *See Stuart*, 21 So.3d. at 550; *see also Ponce v. Parker Fire Dist.*, 234 Ariz. 380, 322 P.3d 197, 200 (Ariz.Ct.App.2014).

Id. at ¶ 51.

It follows that if the filing of a defective notice of claim does not deprive a District Court of subject matter jurisdiction, District Courts likewise have subject matter jurisdiction to decide if sovereign immunity exists. If a court determines that sovereign immunity requires dismissal of a claim, the court may dismiss pending claims. Any claim or dispute where sovereign immunity may or may not exist falls within the "general class over which the authority of the court extends." *See, Harmon*, *supra* at ¶ 46.

The City's citation to cases from the 70's and 80's which make statements, without any legal analysis, that a court lacked subject matter jurisdiction because a governmental entity had sovereign immunity from suit, is entirely inconsistent with the rational and findings from *Harmon* which analyzed these issues at great depth. UW submits that the trial court's finding that the City could enforce a contract as a third-party beneficiary because of UW's sovereign immunity in 1965 is not a jurisdictional issue that can be raised for the first time on appeal. This court should summarily affirm the trial court's ruling with regard to the third-party beneficiary contract claim because all arguments on that issue are matters raised by the City for the first time on appeal.

To rule otherwise, and find that any case involving sovereign immunity questions is a "jurisdictional matter" would gut the Court's longstanding rule that matters cannot be raised for the first time on appeal. Any case involving sovereign immunity would be an automatic carve out from the court's prudent and thoughtful requirement that all matters should be raised before the trial court and not for the first time on appeal.

It is also important to note that this claim was resolved by the court on a Motion for Summary Judgment, or in the alternative, as a Judgment on the Pleadings, filed by UW. If the City wanted to argue that sovereign immunity did not apply because UW was acting in a "proprietary fashion" in obtaining property in 1965, the City had to present competent, admissible evidence to show there were contested issues of material fact or binding legal authority that sovereign immunity did not exist. They did neither. They presented no evidence or legal analysis that UW was acting in a proprietary fashion in obtaining property. They have waived their ability to make the arguments they are now making before this court.

Assuming the court agrees that issues regarding whether UW was acting in a proprietary or governmental fashion in obtaining the property in 1965 is a jurisdictional issue, which UW contests, this court must still affirm the ruling of the trial court.

Most importantly, the court must recognize that the City's arguments regarding **the time period** to analyze whether UW was performing a governmental or proprietary function are totally misguided and misplaced. The City argues that the court should look at UW's actions in the 2019 to 2023 time frame to determine if the actions are proprietary or governmental. (Brief of Appellant at 6-9, 19-20). That position is contrary to law, and candidly, nonsensical. All prior cases looking at proprietary/governmental action have examined facts in the time frame when the action actually took place. The trial court found that UW had sovereign immunity in 1965 when it obtained the property by quit claim deed. Facts regarding what UW actions took with the property in question in the 2019 to 2023

time frame cannot be considered to determine whether UW was performing in a proprietary or governmental function in 1965.

This issue must be analyzed by looking to the law at the time the quitclaim deed was executed. *White v. Board of Land Com'rs,* 595 P.2d 76, 81 (Wyo.1979); *Oyler v. State*, 618 P.2d 1042, 1056 (Wyo. 1980). In 1965, UW had absolute immunity from any suit based on a contract. *See*, *Biscar v. University of Wyoming Bd. of Trustees*, 605 P.2d 374, 377 (Wyo. 1980) (University of Wyoming and University of Wyoming Board of Trustees have immunity from suits based on a contract prior to enactment of Wyoming Governmental Claims Act). If this court chooses to examine whether obtaining the property in 1965 was a proprietary or governmental function, the time frame to look at is 1965 not 2019 to 2023. UW's actions in developing a water resource to irrigate lands owned and operated by the University some 55 plus years after UW first obtained the property are not relevant to establish whether UW's actions in 1965 were of a proprietary or governmental nature. This unsupported and baseless argument must be rejected by the court.

Finally, it is very doubtful that the proprietary/governmental test applies when the state itself is exercising its sovereign immunity. The court in 1975 stated that cases involving municipal sovereignty were not applicable to sovereign claims against a state institution. The court stated: "[m]unicipal corporations, unlike the State, have no sovereignty and are creatures of the state." *See, Local 187 AFL-CIO v. University of*

Wyoming, 531 P.2d 884, 887 (Wyo. 1975), n.2. There are no cases post 1975 applying the proprietary/governmental sovereign immunity test with regard to a claim against the state.

UW is an institution recognized and created by the Wyoming Constitution. *See*, Wyoming Constitution Article 7 §§ 15-17. Article 7, § 17 of the Wyoming Constitution provides that: "the board of trustees … [shall] constitute a body corporate" and "The duties and powers of the [UW] trustees shall be prescribed by law." W.S. §21-17-203 provides that the University of Wyoming Board of Trustees possess "…**all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law**, and shall have custody of the books, records, buildings and **all other property of the university**." (emphasis added). These two provisions grant the UW Trustees virtually unlimited powers to manage the University of Wyoming and to take whatever actions are "**necessary or convenient"** to manage "the buildings and all other property of the University." (emphasis added)

UW is the State of Wyoming. "The university, though declared by statute to be a body corporate by specified name, is not separate or independent from the state[.]" *Ross v. Trs. of Univ. of Wyo.*, 228 P. 642, 651 (Wyo. 1924). That legal conclusion cannot be contested. Pursuant to Art. 7 § 17, "The Legislature shall provide by law for the management of the university, its lands and property by a board of trustees . . .". No local government entity is granted authority to provide for the management of UW's lands and other property. No other entity, except the State, (via the Wyoming Legislature), has any authority to manage or regulate UW or the UW Trustees.

If the court examines whether UW's purchase of the property in 1965 was proprietary or governmental, such action was clearly governmental. Perhaps the simplest explanation is that having been given constitutional and statutory authorization of all powers "necessary or convenient" to manage the University and all property of the University, obtaining property in 1965 for the benefit of the University was most certainly a governmental function. Even if one looks to non-relevant actions in the 2019-2023 time frame as argued by the City, the irrigation of the property owned and entrusted to the UW Trustees is well within their "necessary [and] convenient" powers under state statute and the Constitution. Irrigation of UW property is, most certainly, not a proprietary action.

W.S. § 21-17-204(a)(iv) provides that the UW Trustees have the power to "[h]old, manage, lease or dispose of, according to law, any real or personal estate as is conducive to the welfare of the institution; ...". This broad grant of power to the Trustees most certainly gives UW and its Trustees the ability to create and establish an irrigation system for Jacoby Golf Course and the campus. Their actions in doing so are the exercise of a government-and not proprietary- function.

In any event, the cases cited by the City to claim that purchasing property in 1965 was a proprietary action by UW, thus depriving UW of sovereign immunity, are inapplicable because they all involve municipal sovereignty questions. In addition, cases where the court found a municipality was excessing a proprietary function all involve instances where a municipality was selling a service or a commodity to the inhabitants of the municipality.

For example, the City's reliance on *Town of Pine Bluffs v. State Board of Equalization*, 333 P.2d 700 (Wyo. 1958), is misplaced. That case addressed the question of whether property owned by municipalities for light and power service to inhabitants of the municipality could be taxed. The municipalities argued that these properties and assets could not be taxed because the municipalities were a sovereign and were performing a governmental function in providing the services. *Id*. at p. 703. The Court rejected the arguments made by the municipalities and found that where a municipality receives fees and income for activities like the operation of water systems, electricity, or gas systems, that action is proprietary. *Id*. at 711. Here, UW will not be selling water to third parties, will not provide water to third parties, and will not generate fees for the irrigation associated with the wells. Even if the court looks at UW's actions in the time frame suggested by the City, UW's actions are clearly part of a governmental function under the cases argued by the City.

While Jacoby Golf Curse is owned and operated by UW, the fees charged to play golf do not change this analysis. The fees are charged for the privilege to utilize the golf course, not to purchase irrigation water. If the City's argument that Jacoby fees make UW's actions proprietary, then virtually all actions by UW must be found to be proprietary. UW charges for tuition and assessed fees for parking, attend sporting events, etc. All of those actions are most certainly the exercise of governmental not proprietary functions.

In conclusion, this court should reject the City's attempt to raise entirely new arguments and legal theories for the first time on appeal. The City's arguments are not supported by cogent authority and focus on time periods and actions by UW that are not

relevant to the legal test they seek to have the court apply. UW had absolute sovereign immunity at the time it obtained the UPPR property in 1965. Based on that sovereign immunity, the City cannot seek to enforce terms of a contract between UW and UPPR contract as a third-party beneficiary. The trial court's decision regarding the third-party contract claim brought by the City must be affirmed.

ARGUMENT TWO: W. S § 21-17-126 IS CONSTITUTIONAL.

The City challenged the constitutionality of W.S. § 21-17-126 ("UW Statute") before the trial court. UW filed a Motion to Dismiss the City's claim of unconstitutionality. The Wyoming Attorney General's Office joined UW in defending the UW Statute. The trial court, in a well-reasoned and thoughtful decision, carefully addressed each argument presented by the City and found that W. S. § 21-17-126 was constitutional and did not violate Article 3, § 27 (" § 27") or Article 3, § 31 ("§ 31") of the Wyoming Constitution. (R. 226-257).

STANDARD OF REVIEW FOR ARGUMENT 2:

The party challenging the constitutionality of a statute bears the burden of proving the statute is unconstitutional. *Pfeil v. Amax Coal West, Inc.,* 908 P.2d 956, 961 (Wyo.1995). That burden is a heavy one "in that the appellant must 'clearly and exactly show the unconstitutionality beyond any reasonable doubt.'" *Cathcart v. Meyer*, 2004 WY 49, ¶ 7, 88 P.3d 1050, 1056 (Wyo.2004), quoting *Reiter v. State*, 2001 WY 116, ¶ 7, 36 P.3d 586, 589 (Wyo.2001). Courts presume "the statute to be constitutional.... Any doubt in the matter must be resolved in favor of the statute's constitutionality." *Thomson v.*

Wyoming In-Stream Flow Committee, 651 P.2d 778, 789-90 (Wyo.1982); *Powers v. State,* 2014 WY 15, p.7, 318 P.3d 300, 303 (Wyo.2014).

The Court has further noted that:" [o]ne who assails the classification of a law must carry the burden that it does not rest in any reasonable basis and is essentially arbitrary." *Mountain Fuel Supply v. Emerson*, 578 P. 1351, 1355 (Wyo. 1978); *See also, State v. Carter*, 215 P. 477, 483 (Wyo. 1923) (courts will not interfere with the Legislature's determination that a special law is necessary until it is clear that a general law could not be adopted.) The City cannot carry the burden that W.S. § 21-17-126 is unconstitutional.

To summarize, the City passed Ordinance 13.40.360 on August 5, 2020. That Ordinance far exceeds any powers granted to municipalities in Wyoming and is both unconstitutional and illegal. The Ordinance additionally attempts to nullify and confiscate powers granted exclusively to the State Engineer and Board of Control to regulate and control the appropriation of water in Wyoming. The Ordinance attempts to nullify and confiscate powers granted exclusively to the University of Wyoming Board of Trustees to control and regulate the lands and resources of the UW. The Legislature, via the passage of W.S. §21-27-126 and modification of W.S. §15-7-701, nullified the operation of City Ordinance 13.40.360 as it may apply to UW.

The UW Statute provides:

> **§21-17-126. University water system**
>
> (a) Subject to Title 41 of the Wyoming statutes and notwithstanding any municipal or county ordinance, the University of Wyoming may:
>
> (i) Develop, drill, construct, operate, maintain and use any water line system, well or works on property owned by the university

for the purposes of distributing, providing and using nonpotable water on property owned or leased by the university for miscellaneous use where water is to be used for landscape watering, lawns, athletic fields, trees, shrubs and flowers;

(ii) Connect a building, facility, landscape, lot, premises or structure owned by the university to any water line, system, well, or works operated, maintained or used by the university.

(b) No city or county shall restrict or prohibit the university from developing, drilling, constructing, operating, maintaining or using any water system independent of the city's or county's water system.

In the same Legislation, the Legislature also modified W.S § 15-7-101 to provide:

"Nothing in this article shall be construed to restrict, prohibit or otherwise affect the rights of the University of Wyoming under W.S. § 21-17-126."

These legislative enactments were passed in response to the City adopting Ordinance 13.04.360 to thwart UW's efforts to develop a non-potable water source for the Jacoby Golf Course and campus.

The Ordinance passed by the Laramie City council provides:

13.04.360 – Nonmunicipal water – Franchise or permit required.

It is unlawful to do the following unless a franchise or permit is granted by the city council upon a determination that such franchise or permit is in the best interest of the city:

A. To develop, drill, construct, operate, maintain, or use any waterline, system, well, or works within the corporate limits of the city in order to sell, distribute, provide, or use nonmunicipal water (potable and/or non-potable) within the city;
B. To interconnect any building, facility, landscape, lot, premises, or structure of any kind within the corporate limits of the city to any water line, system, well, or works other than to the city's water utility; or

C. To use any portion of the city's streets, alleys, easements, or rights-of-way, or other property owned or managed by the city, for such purposes.

A water well within the corporate limits of the city that was constantly (year to year) and legally producing water on or before June 1, 2020 may continue to operate for the same purpose and capacity, except when such use is prohibited or restricted by order of the city manager, if the landowner notifies the city of the well on or before May 31, 2021, allows the city to obtain a GPS reading of its location, and submits a water production report to the city manager each year. The report shall be submitted to the city manager by February 15th of each year for the prior January 1 to December 31 period. For wells permitted by the State Engineer's Office (SEO) for twenty-five gallons per minute (25 GPM) or less, the annual report shall simply state whether the well was active at any time during the previous calendar year. For wells permitted by the SEO for more than twenty-five GPM, the annual report shall state the following: the well name, SEO permit number, and volume of water produced by the well foreach calendar month period and the dates of the meter readings. The landowner of a well permitted for more than twenty-five GPM shall, at the landowner's expense, install an automatic-read flow meter approved by the city manager, maintain the meter in good working condition, and grant access to city staff to read the meter.

All potable and non-potable water shall be supplied by the city's water utility following annexation unless a franchise or permit is granted by the city council as provided in this section.

Any person violating the provision of this section shall, upon conviction, be punished as provided in Chapter 1.28. The city attorney may also commence an action in the name and on behalf of the city for legal and equitable relief. In addition, any violation involving changes to the use or an increase in the capacity of a well that was in continuous and legal use on or before June 1, 2021 (as described above), without a permit granted by the city council, or any violation of the notification and reporting requirements in this section, shall be cause for immediate loss of the privilege to use such well.

(Ord. No. 1778, §1, 8-5-2020)

UW filed counterclaims to the City Complaint and argued in the Motion to Dismiss that: Counter Claim One: The City of Laramie had no authority to regulate the University

of Wyoming or the University of Wyoming Board of Trustees which are constitutionally and statutorily created sovereign state entities; Counter Claim Two: The City of Laramie had no statutory authority to pass Laramie City Ordinance 13.04.360; Counter Claim Three: The City failed to exhaust administrative actions before the Wyoming State Engineer and Wyoming State Board of Control regarding alleged interference between City Wells and the UW Wells; and Counter Claim Four: W.S. § 21-17-126 and W.S. § 15-7-701(d) expressly prohibit the City from any interference or regulation of UW's use of non-potable water for irrigation use on UW lands. (R. 267-290).

With regard to the City's claims that the UW Statute was unconstitutional, the Trial Court rejected all arguments made by the City and found that:

1. The standard of review on a constitutional challenge to a statute is exceedingly deferential. "Every statute is presumed to be constitutional, and not to be held in conflict with the constitution unless such conclusion is clear, palpable, unavoidable, and beyond a reasonable doubt." (R. 242);
2. UW is not a "special commissioner, private corporation, or association" for purposes of § 37. UW is a constitutionally created entity which engages in its constitutional functions as prescribed by laws passed by the Legislature. (R. 245)
3. The UW Statute does not interfere with municipal functions. Nothing in the UW Statute delegates any power for UW to interfere with the City's water utilities. The court explicitly rejected the City's unsupported and nonsensical argument that the potential negative fiscal impact of UW reducing its purchases of water from the City

after development of its own non potable water system involved the delegation of a municipal function to UW. (R. 246-247)

4. The UW Statute does not fall within any of the specifically enumerated cases prohibited as "Special Legislation" under § 27. The Trial Court rejected the City's claim that the UW Statute regulated "township affairs" finding that the UW statute addressed only the University's affairs. The statute precluded actions by the City if UW's wells and water system were independent of the City water system. The statute did not in any way affect the City's water utility. (R. 249-250)
5. UW had not been granted a special or exclusive privilege in violation of § 27. All of UW's actions were subject to Tile 41 (Statutes regulating beneficial use of state-owned water) and UW was therefore subject to all the same laws and regulations that pertain to all Wyoming water users (R. 250)
6. The UW Ordnance is not a "Special Law" under § 27 because it applies only to UW. The constitution requires the Legislature to pass laws to manage the University and its property. The UW Ordinance cannot be a "special law" because it applies only to the University when the law's sole intent is to comply with Wyoming Constitution Article 7, § 17. (R. 250-251)

The City continues to argue before this court that the UW Statute is unconstitutional under both § 27 and § 31. Their arguments are unavailing and must be rejected by the Court.

Article 3, § 37 of the Wyoming Constitution provides:

§ 37. **Delegation of power to perform municipal functions prohibited**

> The legislature shall not delegate to any special commissioner, private corporation or association, any power to make, supervise or interfere with any municipal improvements, moneys, property or effects, whether held in trust or otherwise, to levy taxes, or to perform any municipal functions whatever.

While this court has never explicitly defined what the words "special commissioner" in Title 37 might involve, UW and the UW Board of Trustees are not special commissioners as used in Title 37.

W.S. § 21-17-126 does not make any delegation to "… any special Commissioner, private corporation or association…". The statute does not create some new entity and transfer power to that entity. The statute does not transfer power to UW to supervise or interfere with any city improvements. The statute simply, and legally, states that UW can develop a non-potable water system and that the City cannot interfere with the exercise of that discretion.

Further, the statute does not grant "…power to make, supervise, or interfere … with any municipal functions". Rather, the statute formally recognizes powers that UW has possessed since statehood and makes it clear that municipalities and counties cannot interfere with the constitutional and statutory power that UW has been granted. Thus, there is no "delegation" necessary to run afoul of the constitutional provision. There is no grant of authority to any entity of any power to change any municipal duties or powers.

Even if there was a delegation, as noted *supra,* UW is a constitutionally created state entity. The constitutional and statutory provisions grant the UW Trustees virtually

unlimited powers to manage the University of Wyoming and to take whatever actions are "**necessary or convenient"** to manage "the buildings and all other property of the University." W.S. §21-17-203.

Municipal corporations, like the City of Laramie, have only such powers as granted to them by the Wyoming Legislature. The Wyoming Supreme Court has, on numerous occasions, noted that municipalities are "creatures" of the Wyoming Legislature. *See*, *State ex rel. Fire Fighters Local 279 v. Kingham,* 420 P.2d 254, 257 (Wyo. 1966) (a city, as a creature of the legislature, has only such powers as have been granted to it by the state.); *State ex rel. Fire Fighters Local No. 946 v. City of Laramie*, 437 P.2d 295, 300 (Wyo. 1968); *See also, Board of Trustees of Laramie County Fair Board v. Board of County Commissioners of Laramie County*, 2020 WY 41, 460 P.3d 251 (Wyo. 2020). (County Commission has only direct and implied powers authorized by Legislature).

This so called "Dillon's Rule," has long been followed in Wyoming. Dillon's Rule provides that one of the tenants of the "Creature Rule" is that a municipal corporation possesses and can exercise only the powers granted to it by the legislature in express words, those powers necessarily and fairly implied and incident to those powers expressly granted, and those powers essential to the operation of the municipal corporation-not simply convenient powers but necessary and indispensable powers. Further, pursuant to Dillon's Rule, any fair, reasonable, or substantial doubt concerning the granting of that municipal power is resolved by the courts against the municipal corporation. *See*, *Rudolph, Wyoming Local Government Law*, § 2.5, P. 71-76 and cases cited therein.

It is clear under Wyoming law that a municipality cannot regulate the State. Further, the City cannot pass ordinances that limit the discretion of the UW Trustees. *Id.* UW is a state institution that has sovereign and governmental immunity protecting it from all forms of regulation by a legislatively created local entity. The City identifies no state statute in its briefing which explicitly provides the City jurisdiction to pass Ordinance 13.04.360. In fact, none exists. The City's claims of "Home Rule" and interference with municipal functions must all fall.

The City's reliance and citation to *Holt v. City of Cheyenne*, 137 P.876, 881 (Wyo.1914) is both misplaced and misleading. *See, Appellant's Brief* at p.38. In *Holt*, a water user challenged the legality of a district court water adjudication and claimed that he had obtained a city water right by prescriptive use and adverse possession. *Id.* at 881. The arguments from *Holt*, which the City includes on page 38 of its Brief, all involve the court's discussion and analysis of Holt's adverse possession claim. *Id.*

It is misleading to argue that a 1914 decision on whether a private individual can obtain a municipal water right by adverse possession has bearing and should be controlling of issues in this matter. Citation to *Holt* and reliance on that case as authority that the City can ignore the Wyoming Constitution, Wyoming water statutes, all contract law, real property law, Dillon's Rule, and a multitude of cases addressing the limited power of municipalities to regulate or control constitutionally created state entities, is wrong and must be rejected.

If *Holt* has any precedential value, that precedential value is that as of 1914, the Wyoming Supreme Court found that a private party could not obtain a water right held by

a municipality by adverse possession. The arguments from *Holt* made here are pure dicta and should be ignored by the court as having no relevance as to issues in this matter.

The City's citation to *Stewart v. City of Cheyenne,* 154 P.2d 355, 356 (Wyo.1944) and *Town of Pine Bluffs,* 333 P. 2d 355 (Wyo.1958) for the proposition that UW is a "special commissioner" as that phrase is used in Tile 37 are also legally erroneous.

Stewart involves an analysis of whether the Legislature's creation of a Board of Public Utilities which could operate in some instances without the supervision of the elected municipal authorities was constitutional. *Stewart,* 154 P.2d at 356. The court found that the Legislature's creation of the Board of Public Utilities, which could issue bonds and condemn property without the consent and approval of the Cheyenne elected officials violated, Article 3, § 37. *Id.* at 366. The facts of *Stewart* are not similar in any way to the case at hand and *Stewart* most certainly does not stand for the proposition that a statute which reaffirms powers held by a constitutionally created state entity violates Article 3, §37.

Again, the UW Statute did not establish some new type of entity like the Public Service Commission established by the Legislature in *Stewart.* The UW Statute did not give a new Commission power to issue bonds and the power to condemn property. The UW Statute simply recognized the limited power of municipalities under longstanding precedent and recognized the constitutional power of the State and the Legislature's constitutional duty to pass statutes governing the University of Wyoming. *Stewart* shows that the UW Statute is constitutional under Title 37.

Town of Pine Bluffs also supports the constitutionality of the UW Statute. That case involved the taxation of municipally owned electrical plants. The municipalities claimed that action by the State Board of Equalization violated § 37. The court rejected that claim and stated:

> "The State Board of Equalization is neither a special commissioner nor a private corporation nor an association within the meaning of the above provision. It is a board recognized by the constitution of this state in Art. 15, §§ 9 and 10. We construed the above constitutional provision in *Stewart v. City of Cheyenne*, 60 Wyo. 497, 154 P.2d 355. A perusal of that opinion will show, we think, that it cannot apply in a case such as before us."

Town of Pine Bluffs v. State Bd. of Equalization, 333 P.2d 700, 705-706 (Wyo. 1958).

Town of Pine Bluffs stands for the proposition that constitutionally created entities, like UW and the state Board of Equalization, are not "special commissioners" within the meaning of Title 37. This court should affirm that ruling.

The UW statute also does not delegate any municipal functions to UW in violation of Title 37. The City argues that the UW Statute interferes with the City's water supply, impacts the City's drainage system, affects the City's fiscal integrity by allowing UW to forego purchasing irrigation water from the City, and claims that a totally separate non-potable water system operated by UW is an interference with the "waterworks" of a municipality. All of these arguments are wrong as a matter of law, and not supported by any facts in the record.[1]

[1] The City argues that it has broad powers pursuant to Title 15 of Wyoming Statutes to regulate and control virtually all issues concerning water use within municipal boundaries.

A serious misperception and illogical belief has plagued the City for several years. The City has long claimed that it has the authority to control ground water aquifers in and around Laramie, Wyoming. This civil action is entirely centered and driven around that untenable legal position.

This farcical legal belief caused the City to pass an unconstitutional Ordinance prohibiting UW and private citizens from drilling a private well within city limits unless that citizen obtains a franchise or permit from the City, caused the City's attempt to drill a well in a City intersection where the City owned no subsurface rights, *See*, Supreme Court Number S-21-0239, and forms the basis of virtually every argument the City presents here. For instance, the City argues that the UW Ordinance is unconstitutional because the City has the power to regulate any aquifer from which it draws water. (Brief of Appellant p. 41). The City argues the Ordinance is justified because the City has an unfettered duty to protect its water sources and investment in the municipal water system. *Id.* The City argues that UW cannot develop its own non-potable water system because that will allow UW to reduce purchases of water from the City. *Id.* at 42. Without producing a single fact supporting this argument, the City argues that the City's revenue stream will be harmed by UW's development of a non-potable water source for irrigation and that the City can thwart, via an Ordinance far beyond any power or jurisdiction possessed by any

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That issue is easily resolved by the amendment to W.S. §15-7-101 which provides: "Nothing in this article [Title 15] shall be construed to restrict, prohibit, or otherwise effect the rights of the University, under W.S. § 21-17-123. (Bracketed material added).

municipality in Wyoming, those efforts by UW. *Id.* at 43. These made-up justifications and legal fallacies must be rejected once and for all by this court.

The City's belief that it can regulate who may produce and beneficially use water in Wyoming is totally inconsistent with the Wyoming Constitution, Title 41 of the Wyoming Statutes, and volumes of legal decisions from Wyoming courts. All water is owned by the State. Wyoming Constitution Art. 8 §1. The Wyoming State Engineer and the State Board of Control are constitutionally charged with the permitting and beneficial use of that water. *Id.* at §§ 2,5. A municipality has the right to appropriate and beneficially use water, but the municipality must seek the authority and approval from the State Engineer and Board of Control to do so.

It is important that the court recognize that the City's arguments in this appeal raise issues that would have been decided by the trial court if the court had ruled on UW's Counterclaims in this matter.

The Trial Court granted UW's Summary Judgment Motions and Motion for Judgment on the Pleadings finding that sovereign immunity precluded the City from enforcing alleged third-party beneficiary contract rights in the 1965 deed, and found that W.S. § 21-17-126 and W.S 15-7-701(d) precluded the Ordinance from having any effect with regard to UW's water development plans. The Trial Court did not rule on UW's Counter Claims one and two, both of which legally challenge the City's ability to regulate UW in any fashion and show that the City had no jurisdiction to pass the Ordinance and the Ordinance should be struck down. The court reasoned that these counter claims and issues were moot based on the court's other rulings. (R. 444).

In this appeal, the City continues to argue that the City had authority to pass the unconstitutional and illegal Ordinance and that the City has the authority to regulate UW. *See, Brief of Appellant* at p. 47. These arguments are inconsistent with the procedural history and rulings of this case. UW submits that the trial court's decision on the City claim regarding third party beneficiary claims and the court's ruling that W.S. §§ 21-17-126 and 15-7-701(d) preclude operation of the Ordinance against UW should be affirmed by this court.

In addition, because the City now raises arguments that were not decided by the Trial Court, UW will provide briefing on the two claims not resolved by the trial court. UW submits that in addition to affirming the trial court's rulings, this Court should also strike down the Ordinance and find that the City has no jurisdiction or power to regulate UW as it has attempted to do over the past years.

ARGUMENT 3: THE CITY OF LARAMIE HAD NO STATUTORY AUTHORITY TO ENACT CITY ORDINANCE 13.04.360

UW's Counter Claim Two (City has no authority to regulate UW and no authority to pass Ordinance) is a pure legal issue. This counterclaim can be decided based on the Wyoming Constitution, Wyoming statutes, and decisions of the Wyoming Supreme Court. This court, under the standard of review applicable to Motions for Summary Judgment and Motions for Judgment on the pleadings, and the arguments of the City made before this court, must decide the question of the validity of the Ordinance. Because there are no

contested issues of material fact regarding Counter Claim Two, the court should rule in favor of UW on this counterclaim.[2]

Again, UW is a constitutionally created state entity. UW is an institution recognized and created by the Wyoming Constitution. *See*, Wyoming Constitution Article 7 §§ 15-17.

UW is the State of Wyoming. "The university, though declared by statute to be a body corporate by specified name, is not separate or independent from the state[.]" *Ross v. Trs. of Univ. of Wyo.*, 228 P. 642, 651 (Wyo. 1924). This legal conclusion cannot be contested. No other entity, except the State, (via the Wyoming Legislature) has any authority to manage or regulate UW or the UW Trustees, as they are part of the sovereign, the State.

All water in the State of Wyoming is owned and controlled by the State of Wyoming. *See,* Wyoming Constitution Article 8, § 1. The Board of Control has been vested with the "… supervision of the waters of the state and of their appropriation, distribution and diversion …" *Id*. § 2. The Constitution also vests the State Engineer with

[2] The City claimed in its pleadings before the trial court that there was no dispute with regard to any material fact with regard to the City's authority to enact the Ordinance and UW's obligation to comply with Ordinance. (R. 402). The city argued these matters could be decided as a matter of law. *Id.* The City's arguments on appeal, specifically that the court should remand for trial on whether UW must comply with the Ordinance (Appellant's Brief at 53), are directly contrary to arguments made by the City to the trial court.

"… general supervision of the waters of the state and of the officers connected with its distribution." *Id*, § 5. The duties of the Board of Control and the State Engineer are more precisely set out in Title 41 of Wyoming Statutes and rules adopted thereto. *See*, W.S. § 41-1-101, *et seq.*

It is apparent from reading the Wyoming Constitution and Title 41 of Wyoming Statutes that the sovereign State of Wyoming has vested all control and regulation of water appropriation and distribution solely within the discretion of the Board of Control and the State Engineer. *McTiernan v. Scott*, 2001 WY 87, 31 P.3d 749 (Wyo. 2001) ¶ 23; *See Also, John Meier & Son v. Horse Creek Conservation District*, 603 P.2d 1283, 1288 (Wyo.1979).

These same provisions show that municipalities, like the City of Laramie, have no authority or power to regulate who may drill wells, who may appropriate water, who may use non-municipal water, who may transfer water from a well located outside of municipal boundaries into municipal boundaries, who may make beneficial use of water, or who may selectively deny permission to use streets, alleys, easements or right of ways to prevent use of non-municipal water within city boundaries.

The Constitution provides authority and limitations for municipal corporations in Article 13. Article 13, § 3 provides that municipal corporations cannot levy or collect taxes or incur debts except as directed by the Legislature. Article 13, § 5 allows municipal corporations to acquire water rights. Article 13, § 4, entitled "Franchises," provides that "[n]o street passenger railway, telegraph, telephone, or electric light line shall be constructed within the limits of any municipal organization without the consent of its local authorities." In short, if the drafters of the Constitution wanted municipal corporations to

have jurisdiction over water appropriation and beneficial use, they would have provided so in Article 13, § 4. They would have provided that no water line or well could be constructed within the limits of a municipal authority without the consent of local authorities. They did not do so.

There is no power granted to municipal corporations in Title 13 of the Constitution, nor anything in Wyoming Statutes, Titles 15 or 41, that would give a municipal corporation power to control or regulate the appropriation and beneficial use of water. All that power is vested in the Board of Control and the State Engineer.

Municipal corporations, like the City of Laramie, have only such powers as granted to them by the Wyoming Constitution and Wyoming Legislature. The Wyoming Supreme Court has, on numerous occasions, noted that municipalities are "creatures" of the Wyoming Legislature. *See*, *State ex rel. Fire Fighters Local 279 v. Kingham,* 420 P.2d 254, 257 (Wyo. 1966) (a city, as a creature of the legislature, has only such powers as have been granted to it by the state.); *State ex rel Fire Fighters Local No. 946 v. City of Laramie*, 437 P.2d 295, 300 (Wyo. 1968). *See*, Argument and cases provided on page 22 of this brief.

Laramie Ordinance 13.040.360 criminalizes conduct involving any importation of water into City limits, the drilling of a well within City limits, the use of any water line or infrastructure within City limits, the connection of any building, facility, landscape, lot, premise or building to any water source other than the City water utility, failure to install meters on wells and report water usage to the City, and use of any city streets or property for non-municipal water use. Any person or entity with an existing well who changes use, or increases the capacity of a well, or who fails in any notification or reporting requirement

under the Ordinance, will be subject to "immediate loss of the privilege to use such well." The only possible way to avoid either civil or criminal penalties, or the taking of a real property interest in an existing well, is to apply for a "franchise or permit" from the City Council. The City Council can only grant the franchise or permit if it determines that the franchise or permit "is in the best interest of the city."

The breadth of this Ordinance is flabbergasting. The City has, with the passage of this Ordinance, assumed control over private property rights of Laramie citizens and entities like US, and all without due process for any violation of the Ordinance and forced anyone seeking to use any source of water in the City of Laramie that is not sold by the City to apply for a franchise or a permit. Further, the Ordinance contains no definition or guideline as to when the issuance of the required permit or franchise might be "in the best interest of the city."[3]

The case of *KN Energy, Inc. v. City of Casper*, 755 P. 2d 207 (Wyo. 1988), is factually similar to this matter, and directly on point. *KN Energy* clearly shows that the City had no authority to pass the Ordinance in question.

In *KN Energy*, the City of Casper passed an ordinance requiring public utilities to be "licensed" by the City to provide gas service to Casper residents. This ordinance was

[3] This standard as to when the City Council can grant a franchise or permit is vague and ambiguous and therefore unconstitutional and void. *See, Travelocity.com LP v. Wyo. Dep't of Revenue*, 2014 Wyo. 43 (2014), ¶ 97-98 (laws must be reasonably explicit to prevent arbitrary and discriminatory enforcement due to lack of explicit standards.)

passed by Casper after KN and Casper could not come to an agreement on an expired franchise agreement that authorized KN to supply gas to Casper residents. *Id*. at pp.209-210. The Casper Ordinance criminalized actions by a public utility operating in Casper without a license or a franchise agreement. *Id*. at 209. Likewise, Laramie Ordinance 13.040.360 also criminalizes conduct involving any actions covered by the Ordinance without a license or franchise agreement.

In finding that Casper had no statutory authority to pass the licensing ordinance, the court reemphasized what had long been the law in Wyoming when it stated:

> Our rule in Wyoming is unequivocal. Municipalities, being creatures of the state, have no inherent powers but possess only the authority conferred by the legislature. " * * * [M]unicipalities can exercise only those powers of government which are expressly or impliedly conferred." *City of Buffalo v. Joslyn*, Wyo., 527 P.2d 1106, 1107 (1974), citing *May v. City of Laramie*, 58 Wyo. 240, 131 P.2d 300, 312 (1942).
>
> A court must analyze any pertinent constitutional proviso or appropriate statute for the purpose of determining whether express or implied authority has been conferred upon a municipality. *Haddenham v. City of Laramie, Wyo.*, 648 P.2d 551 (1982); *City of Buffalo v. Joslyn, supra*. In deciding whether authority has been granted to a municipality to pursue a claimed governmental purpose, we apply a rule of strict construction, resolving any doubt against the existence of the municipal power. *Whipps v. Town of Greybull*, 56 Wyo. 355, 109 P.2d 805, 146 A.L.R. 596 (1941). If we find that appropriate authority has been conferred upon a municipality by the legislature, we then liberally construe the method invoked to exercise the conferred power, asking only if it is reasonable. *Whipps v. Town of Greybull, supra*. *See also* 2 E. *McQuillin, Municipal Corporations* §§ 10.18(a) through 10.21 at 789-800 (rev. 3rd ed. 1979).

KN Energy, 775 P.2d at 210-211.

The *KN Energy* court found that all power to regulate utilities in the state of Wyoming had been delegated by the Wyoming Legislature to the Wyoming Public Service

Commission ("PSC"). *Id.* at 213, 216. Because the power to regulate utilities was vested in the PSC, the court found that Casper had no authority to impose license or franchise fees on public utilities. *Id*.

In reaching its decision, the *KN Energy* Court examined and rejected several theories argued by the City of Casper to support their authority to enact the contested ordinance. *Id*. Two theories advanced by Casper as authority for the ordinance rejected in *KN Energy* are advanced by the City of Laramie here to support the enactment of Laramie Ordinance 13.040.360. The theories discussed in *KN Energy* involve alleged statutory or inherent police power possessed by municipalities and the concept of "Home Rule" under the Wyoming Constitution at Article 13, § 1(b). Neither of those theories can sustain the Ordinance here under the controlling precedent and analysis of *KN Energy*.

Any argument that municipalities possess some inherent or residual police power was quickly disposed of in *KN Energy*. The court stated:

> The law is settled that, other than the United States of America, only the state, as sovereign, is possessed of inherent police powers. 6 E. *McQuillin, Municipal Corporations* § 24.35 at 107 (rev. 3d ed. 1988). This court has explained the police power vested in municipal governments in this way: " * * * [T]he only powers possessed by municipalities are those delegated to them. *Stewart et al. v. City of Cheyenne*, 60 Wyo. 497, 154 P.2d 355. The police power is no exception. It is not inherent in municipalities. It is said in 37 Am.Jur. 905: 'In the absence of direct constitutional authorization, the generally accepted view is that any police power which a municipal corporation attempts to exercise must come from the source of the state police power, the state legislature.' And on page 902 it is said: 'The prevailing view in this country is that the police power of municipalities exists solely by virtue of legislative or constitutional grant.' * * *" *Blumenthal v. City of Cheyenne*, 64 Wyo. 75, 186 P.2d 556, 563 (1947).

Id. at 212.

The court also found that there was no residual or general police power provided by W.S. §15-1-103 (a)(xli). This statute generally gives municipalities the power to adopt ordinances and regulations necessary for the health, safety, and welfare of cities or towns. Express power to enact any ordinance must be found in W.S. §§ 15-1-101 to 15-10-117 of the Wyoming Statutes. *Id*. Since W.S. §§ 15-1-101 to 15-10-117 provided no authority for Casper to enact the ordinance, the general grant of authority under W.S. § 15-1-103(a)(x1i) provided no general or residual police power to enact the questioned ordinance. The Court found that "[t]here is no residual police power that is contemplated by the statutory scheme". *Id.* at 212.

The concept of "Home Rule" is based on Wyoming Constitution Article 13, § 1(b) which provides:

> "All cities and towns are hereby empowered to determine their local affairs and government as established by ordinance passed by the governing body, subject to referendum when prescribed by the legislature, Page 213 and further subject only to statutes uniformly applicable to all cities and towns, and to statutes prescribing limits of indebtedness. The levying of taxes, excises, fees, or any other charges shall be prescribed by the legislature."

The court noted that:

> " * * * Plainly and without ambiguity it makes such legislation [municipal ordinances] 'subject to' statutes uniformly applicable to all cities and towns and to those prescribing limits of indebtedness. " ' * * * The term "subject to" means "subordinate to" or "subservient to." * * *' *Kelly v. Smythe*, 61 Wyo. 209, 226, 157 P.2d 289, 296 (1945). *See*, *Chandler v. Hjelle, N.D.*, 126 N.W.2d 141, 147 (1964).
>
> "Legislation by cities and towns must not conflict with statutes uniformly applicable to cities and towns, and it must be subordinate and subservient to such statutes. Each enactment must be measured in its own right to determine if it pertains to a 'local affair' and if it is 'subject to' statutes uniformly applicable."

> Even though the language of this constitutional provision is quite broad, the power of the legislature to control even the local activities of the municipality cannot be debated. "
>
> * * * It is, accordingly, noted that it has been recognized from the very beginning of Wyoming that the legislature has the right to prescribe the powers and duties of municipalities and these include not only governmental affairs but strictly local affairs as well." *Stewart v. City of Cheyenne*, 60 Wyo. 497, 514, 154 P.2d 355, 360 (1944).
>
> **To the extent that a statute of the state in some way conflicts with a claimed power of the municipality, the municipal provision must yield, even with respect to any police power**. The application of that principle results in a conclusion that the power to adopt the licensing ordinance in this instance could not be sustained under the general power granted by Art. 13, § 3 of the Wyoming Constitution.

Id. at 213. (citing *Laramie Citizens for Good Government v. City of Laramie*, 67 P.2d 474, 483 (Wyo. 1980)(emphasis added).

There is no statutory or constitutional authority in Wyoming which would authorize any subservient entity like the City of Laramie to enact the Ordinance. This conclusion is supported by the fact that all issues regarding water ownership, control, beneficial use, and production of surface or ground water is vested solely in Wyoming State Board of Control and Wyoming State Engineer by the Wyoming Constitution and Wyoming statutes. In addition, all management and control of the University of Wyoming is vested solely in the University of Wyoming Board of Trustees by the Wyoming Constitution and Wyoming statutes. Pursuant to the binding precedent of *KN Energy*, the Ordinance must be struck down. The City of Laramie had no authority to pass this Ordinance. *KN Energy*, 755 P.2d at 213.

Further, the Ordinance is inapplicable to UW based upon legislation enacted in 2021. The Ordinance conflicts with the 2021 legislation, and therefore, the ordinance must yield in accordance with *KN Energy*.

Even assuming, for the moment, that the City had the authority to enact Ordinance 13.040.360, which UW contests, W.S. § 21-17-126 and the amendment of W.S. §15-7-126 clearly nullify the operation of the Ordinance as it might apply to UW.

Further, and again assuming that prior to the 2021 enactment of W.S. §21-17-126 the Legislature had delegated some authority to the City to pass the Ordinance, the Legislature has the power to reassume any delegated powers it may have given to a municipality. *See, Western Auto Transports, Inc. v. City of Cheyenne,* 57 Wyo. 351, 377, 118 P.2d 761 (Wyo. 1941) (State "may re-assume the power delegated."). If any delegation had occurred, which UW contests, the Legislature's actions in passing W. S. § 21-17-126 and amending W.S. § 15-7-701 in 2021 most certainly reassumed any power the Legislature had given to the City to regulate water appropriation or the management of the University of Wyoming.

Several other points bear mentioning. First, all of the City's arguments regarding burden on the drainage system, the fiscal integrity of the City, and the potential effect on the City's wells, are not supported by the record in this matter. With respect, these arguments are just made up, stab in the dark justifications, for the passage of a patently unconstitutional Ordinance. The City's brief does not cite to any portion of the record for these arguments because they never provided anything other than conclusory arguments

on these points in all of the briefing and arguments before the trial court. The argument that UW's operation of a non-potable irrigation water system will somehow burden the City's drainage system is a great example of this. That argument assumes that UW expended millions of dollars to develop an irrigation system and then will haphazardly pump costly irrigation water not on grass but rather down the City stormwater system. That just would not happen. It also ignores that the City's storm water drainage system was not designed to handle the violent weather than can occur in southeast Wyoming where a single thunderstorm can dump inches of water in a matter of minutes. The argument is not factually supported in the record, is not logical, and ignores all common sense.

In addition, all of the equal protection arguments raised by the City in the Briefing before this court under Title 27, are matters again raised for the first time on appeal. The City did not raise these arguments before the trial court. A review of the briefing on Title 27 and argument before the trial court discloses that the City made no Equal Protection argument before the trial court. Pursuant to the longstanding rule of this court that arguments cannot be raised for the first time on appeal, those arguments must be rejected by the court. *See* discussion regarding the same *supra.*

Lastly, the City argues that this court should adopt, for the first time, some type of "balancing of interest" test where the State's sovereign immunity may conflict with the exercise of some regulation by a municipality. The court must reject this suggestion. The adoption of a balancing of interest test would run squarely contrary to the constitutional and statutory delegation of powers to both UW and the State Engineer and Board of Control. The adoption of this new rule of law would be entirely inconsistent with the

limited power granted to municipalities under the Wyoming Constitution and cases interpreting those provisions. The adoption of this new rule of law would necessarily require the court to overrule a large number of prior decisions by this court. Adoption of this new test would conflict with numerous existing statutes and likely require changes to the Wyoming Constitution.

In addition, if the court imprudently decided to adopt the new test, such adoption should apply prospectively and not retroactively. *See, Mills v. State*, 2020 WY 14 ¶15, (Wyo. 2020). ("For a decision to warrant only prospective application, the decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.") (citations omitted). Here adoption of the "balancing of interest" test would overrule numerous cases that UW had correctly relied on both statutorily and constitutionally in developing the non potable water system. If the court entertains this watershed change of law for Wyoming, the Court must apply the rule prospectively and affirm the orders of the trial court.

CONCLUSION

UW respectfully requests that the Court affirm the Order on Motion to Dismiss and the Order Granting Summary Judgment as the City of Laramie's Final Claims. The Court must ignore and not consider arguments raised for the first time on appeal by the City. The Court should find that the Ordinance passed by the City is illegal and unconstitutional, exceeds the limited powers granted to municipalities under Wyoming law, and strike the Ordinance down. The court should find that the UW Statute nullifies the Ordinance as

having any effect as to the actions of UW in developing a non-potable irrigation watering system as shown in this matter. The Court should reject the City's request to adopt some type of balancing of interest test to analyze sovereign immunity claims.

Dated this 15th day of June, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPELLEES' BRIEF was filed and served electronically through the C-Track electronic filing system the 15th day of June, 2023 on the following:

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I hereby certify that no privacy redactions were required or made, and the document submitted in digital form or scanned pdf is an exact copy of the written document filed with the Clerk. The electronic document has been scanned for viruses and is free of viruses.

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