

Response To Whitefish MT Politicians

Exposing Potential Corruption And \$Millions In Overcharges

In an OP-ED published in the Whitefish Pilot on Nov 1st, 2023, four Whitefish politicians including the Mayor wrote a disparaging letter questioning my integrity, competence, credentials and motivation. This stems from numerous letters that I've written exposing wrongdoing by Whitefish officials, particularly my last OP-ED that described the Class Action order by a Federal Judge in Missoula. The Whitefish politicians made numerous false claims and accusations which I am responding to here.

We plan to continue to expose Whitefish illegal impact fees through letters and OP-EDs. We are also proceeding through the Federal courts and the Montana legislative process and regulatory system to expose and fight these problems. The City faces \$millions in liabilities if it loses the current Class Action lawsuit. With the City's recent passage of similarly flawed, inflated impact fees, it may be opening itself up to even more litigation and liability.

One falsehood put forth by these politicians begs to be corrected. They claim that since I am not a lawyer, any of my legal analysis should be discarded. HOWEVER, I am a consultant for the Plaintiff attorneys and as such, all of the press releases and Op-Eds were meticulously reviewed by these attorneys for factual and legal mistakes. This includes this very RESPONSE! Therefore, there is no basis for the City to state that legal claims made in these documents were false.

Here are just a few of the misinformed statements by the Whitefish politicians:

Origin of Fixture Unit Problem

Since 2019, the Whitefish officials effectively double charged all builders and homeowners the impact fees for stand-alone showers. The claim that the **City found the fixture unit problem** in 2021 is typical disinformation coming from a Whitefish public official. Why would City politicians promote this lie when it is so easily refuted? In the end, this only diminishes the City politicians' own credibility.

I discovered the fixture unit problem after applying for a building permit in May 2021 and I presented this to the Public Works Dept in writing. This included what the problem was, where it was in the City's impact fee calculation program, and how much I was being overcharged due to this error. The City Public Works Director eventually offered me a "discount" in the exact amount I calculated. He never admitted to an error on the City's part, however. I asked the City about all of the other property owners who were overcharged by the City in the past. I sent a letter to the City Manager, Attorney and Mayor of Whitefish. The City Attorney stated that she was "looking into it" with no further response or follow-up action from anyone else. There appeared to be no motivation on the part of Whitefish to fix this problem. Neither the City nor its impact fee consultant FCS discovered this error. This is all thoroughly documented.

When the City did NOT respond to my communications, I contacted the Montana Department of Labor & Industry who pressured Whitefish into correcting the fixture problem in July 2021. It was only then that the City admitted the exact problem I reported and agreed to issue refunds. **NBC MT** reported that we found the fixture problem and produced a report on this. Even the **Whitefish Pilot**, while defending the City and calling the error an "accident", printed a story stating we uncovered the problem. The City's claim that they discovered the problem is an attempt by certain public officials to revise history and paint themselves in a more favorable light. The fact is, they apparently had covered this up for months after it was first reported. It is a patently false statement that the City found the problem. The City is now required to refund approximately \$200K to Whitefish property owners. If this problem had not been reported by us, the City today would STILL be overcharging Whitefish residents.

Class Action Issues

The City Manager and now other City officials continuously put out the false narrative that the fixture unit problem was the basis for the Class Action lawsuit filed against the City in 2022. They use this claim in an attempt to diminish the real issues that drove property owners in Whitefish to file the Class Action. The City keeps claiming they had already corrected the problem(s) and were in the midst of issuing refunds when the suit was filed. The City Manager and her supporters repeated this false claim in Jan, 2023 at a Senate hearing when they opposed SB 142. They hoped no one would read the actual Class Action filing outlining the numerous City abuses that are far more extensive than the single shower fixture unit problem. **The City politicians' narrative is far from the complete truth.**

Whitefish property owners and their attorneys initiated the Class Action because the City refused to address the more serious problems we presented to the City Manager and Mayor in the summer of 2021 and to the City Council in Sept, 2021. We presented these problems in a written report, acting in good faith as whistleblowers who were exposing a City official's errors or worse, possible corruption. This report was summarily dismissed. The City Manager at this meeting downplayed the overcharges we exposed and her responsibility for them. She only admitted the fixture unit problem, but stated at this meeting that this was just a minor error that would require only a small refund (if any) to property owners. She falsely claimed that she implemented the fees in the 2018 FCS report and adopted the 2007 HDR method of collecting impact fees. Both statements are false. She also claimed that the Whitefish impact fees could be audited by the state. **This was patently false as the state admits it does not audit impact fees.**

We had exhausted all means to fix these problems through the City, so we contacted property owners who were overcharged. Through their legal representation, the Class Action was filed in Feb 2022. At the time of this filing, the City Manager admitted that the "minor" overcharges for the fixture unit problem would cost the City \$196K in refunds.

After numerous hearings and motions, the Federal Judge certified the Class Action and ruled that if the accusations in this case are proven, the City of Whitefish would be liable for violating the Constitutional and legal rights of hundreds of property owners through illegal impact fee assessments. The City denied most of the claims outlined in the lawsuit. In early 2023, the City Mayor published an online statement that the lawsuit was frivolous and without merit. He defended the actions of City employees and claimed the City did nothing wrong.

Despite all this rhetoric from the City, a **\$1.4 Million** settlement agreement was reached in the Class Action against the City and its consultant, resulting in refunds to nearly 450 owners and 750 properties in Whitefish.

Our Motives

The City questioned my motives in their OP-ED and suggested that I disclose them to the public. Our motivation has been crystal clear since day one and that is to expose wrongdoings of certain City officials and to recover the significant amount of overcharges imposed by the City on hundreds of Whitefish property owners. In the process, we are seeking a more honest and fair government which was outlined in our OP-ED published in the Daily Interlake in the fall of 2021 entitled "Seeking Honest Governance". Perhaps these Whitefish politicians should ask for a copy. We are not members of the Class Action. We don't stand to gain anything financially. City officials know EXACTLY what our motives are. They simply don't understand why we would spend so many hours researching and exposing the City's wrongdoings without monetary gain.

NBC MT interviewed both myself and my neighbor, Bill Burg, in 2021 and asked us the same question and our response has never changed.

Rose Elliott Letter and Report

In Nov, 2022, in the middle of the Class Action lawsuit, a letter was sent to several hundred Whitefish homeowners who the City has identified as potentially eligible for refunds due to the fixture unit problem we identified in 2021.

NBC MT did a program on the Rose Elliott letter and interviewed one of our neighbors who received this letter. Rose Elliott is the only City official whose name is on this letter, yet the Mayor and others claims she was just a simple employee doing her job. But these politicians have never publicly identified who else was involved with this letter, even in their response to my OP-ED. This is unusual considering the legal authority it claims to have in the letter and the specific demands placed on homeowners. Elliott is listed as a Public Works Supervisor with the responsibility of counting fixtures and assessing impact fees during the building permit process. The fixture unit error, resulting in \$200K in overcharges happened under her watch. She was then tasked by the City Manager to conduct a review of the fixture unit overcharges that we identified. The amounts of the individual refunds came from her. The addresses of the recipients came from her. City officials refused to be interviewed by NBC regarding this letter.

The City politicians falsely claimed it was not the City's policy to collect impact fees on additional fixtures added to a home after it is built, but **City Ordinance 10-2-2 states that very policy**. Again, anyone can look this up and read for themselves the City's policy. Why these politicians would make a false statement such as this is incredible.

The gist of the Elliott letter, as it pertains to the Class Action lawsuit, was rejected by the Missoula Court in the Judge's recent order. It is online for anyone to read. City politicians didn't mention this in their OP-ED. The Judge ruled that class members are not required to have a home inspection to determine refunds, which was the purpose of Elliott letter. This was a major point I raised with my OP-ED. The politicians apparently did not want the Whitefish public to know the Judge dismissed the City's demands in her ruling. Instead, the City officials were gaslighting their OP-ED audience, claiming I was being too critical of a city employee. A written declaration by Elliott was submitted to the Judge in the Class Action. The Elliott declaration summarizes the results of the City's inspections that were performed as a direct result of the Elliott letter. Rose Elliott is not a simple Whitefish employee but an active participant in the Class Action and her activities as such go to the heart of the Class Action lawsuit. These Whitefish politicians chose not to put their names on this letter, yet they sanctimoniously criticize US for stating the obvious about the letter and the role of Rose Elliott.

The letter was a blatant attempt to intimidate Whitefish homeowners who were apparently members of the Class Action. The author claimed in the letter, **with no legal authority**, that any homeowner who didn't agree to an inspection would be ineligible for a refund from the City and could be ineligible for a refund under the Class Action. If that's not intimidation, what is? The letter was unsigned and contained only one City official's name, Rose Elliott.

The description and intent of this letter as portrayed by the Whitefish politicians is inconsistent with the letter's content. The City had no apparent intention of refunding the amounts stated in the letter because the conditions and recipients of these refunds were subject to the current litigation. The Court ruled against the City's position in this matter. The letter was simply a ruse to collect data on Whitefish property owners whose properties are a subject of the Class action. One simply needs to ask a few questions. How many homes did the City inspect? Yet how many refunds have the City issued? NONE.

Water Meter Size and UPC (Uniform Plumbing Code)

The City made false claims about my OP-ED comments on the UPC and the City's attempt to bypass the State regulatory authority when sizing water meters in commercial and residential units. I accurately stated that the **"The City claims it is exempt from state law"**, referring to MCA 50-60-301 (municipalities must adopt state mandated building standards), which I mentioned in my OP-ED. The City claims as a public utility it cannot be regulated by the Dept. of Labor & Industry and is not required to adopt the UPC as its plumbing standard for utility related matters, including sizing water meters. **NO other City in Montana makes this claim and all use the UPC for determining water meter sizes.**

The city claims that sizing a water meter is a utility issue, not a building issue. However, the city uses the building's fixtures and 2018 UPC chart on page 147 to count fixture units to size water meters. The city ignores the chart on the next page in the UPC manual that is used by plumbers (and all other cities) to size water meters. Instead,

Whitefish uses its own chart that significantly **overstates** the size of the required water meter. In practice, Whitefish uses NO STANDARD (other than its own arbitrary one) to size water meters.

I referenced **SB 406** and stated that the City was violating this new law, which went into effect on Oct 1 2023. (SB 406 states that no government entity can impose stricter laws or standards on property owners than state adopted laws or standards). It is irrefutable that Whitefish imposes stricter standards on property owners when dictating water meter sizes for new and existing homeowners. My own building permit application back in 2021 demonstrates this more restrictive policy. My research on City wrongdoing also showed the City Manager fudging the fixture counts used by the City to impose impact fees, costing property owners hundreds of \$\$.

I spoke with State Senator Jeremy Trebas who sponsored SB 406 and he backed my assessment that the City was in violation of his statute. Sen Trebas went further and put me in contact with several experts who helped write this bill including Bureau Chief Eric Copeland from Labor and Industry, and SB 406 consultant and real estate expert John Sinrud. Both agreed with Senator Trebas. Mr. Copeland agreed to obtain a legal opinion from his attorneys.

My motivation for exposing the City's failure to adopt state mandated standards is absolutely clear. Whitefish is the ONLY city in Montana that does not use the UPC to size water meters. And water meter sizes are used by Whitefish to collect impact fees. Whitefish is one of the very few cities that does not allow the homeowner and a licensed plumber to perform this task. The City is acting outside the norms and standards adopted by the state and the rest of the cities in Montana.

So why is Whitefish so reluctant to use the same standards as adopted by the rest of Montana? There is no scientific basis for Whitefish not to use the UPC. But there are apparently several political and financial reasons not to use it. **At the Oct 16th City Council meeting, City Manager Smith and Rose Elliot said they didn't trust builders and licensed plumbers to size water meters and did not want to relinquish control of this function.**

But apparently it is the City officials who lack trustworthiness. It was Whitefish employee Rose Elliott whose department was tasked with counting fixture units. She double counted certain units to the benefit of the City, violating the UPC standard. It was City Manager Dana Smith who created impact fee collection charts inconsistent with the UPC. This is a major issue in the Class Action litigation. It was Dana Smith who was caught fudging the fixture unit counts in these same collection charts that increased impact fees. All to the benefit of Whitefish and its officials and politicians. The City uses its claimed exemption from state law to overcharge Whitefish residents and builders.

By using its own standard, the City forces homeowners to install water meters larger than necessary to collect larger fees. The City also uses this power to unnecessarily force owners of older homes, at the owner's expense, to relocate water meters out to the street. This is done strictly to accommodate the City and provides no benefit to the homeowner.

From discovery documents provided by Whitefish in the current Class Action litigation, we found that approximately 45 homes were forced to install larger 1" meters, when a ¾" meter was likely sufficient based on the UPC. For example, the UPC max number of fixture units for a ¾" meter is 39. Whitefish uses max fixture units of only 33 or 34 for the same meter. Besides paying higher impact fees, these homeowners were also charged higher base water fees because Whitefish charges higher rates for larger meters. **There is a clear financial motivation for Whitefish to keep its own method of meter sizing.**

The City lacks transparency and needs to adopt the UPC to allow homeowners and builders to see how meters are being sized. City residents are entitled to equal treatment as other Montana residents. City employees keep the water meter sizing in the dark, allowing them to make changes without any public scrutiny.

My Background

The City claims I have no background or experience in impact fees, so my claims against the City have no credibility. When I first applied for a building permit back in May, 2021, I would agree 100% that I had no knowledge of or experience with Whitefish impact fees. But my work experience taught me how to research new applications and systems very quickly and how to rely on experts to fill in the gaps. Since Whitefish politicians have challenged my credentials, I feel it necessary to promote my background.

I have extensive experience in data analysis and complex data related problem solving. I graduated from the Air Force Academy with a degree in computer science. I have 2 master's degrees, one in business and the other in computer science. At age 26 while in the Air Force, I was an expert Systems Analyst in charge of the computer operating systems that controlled the air defense systems of the entire U.S mainland. After my tour in the AF, I worked for a tech company and was immediately assigned to the Los Alamos Laboratories in New Mexico developing network links between diverse computer systems. I've developed database tools and applications for all levels of private and government organizations in the U.S. and Canada. My company that I've co-owned now for 45 years has received numerous awards for innovation. Our products and services are provided to cities and counties throughout the country. Our customers include virtually all of the who's who list of public companies and universities in the U.S. and worldwide. **We have identified and solved far more complex problems than anything I've encountered with Whitefish impact fees.** Because many of the impact fee problems we exposed involved mathematical and accounting calculations, I am fully qualified based on 5 decades of experience.

Because of my experience, I was able to quickly identify the problem with Whitefish fixture units in a matter of hours (**Origin of Fixture Unit Problem**). Neither Whitefish nor its consultant had found this problem in years. Even Whitefish Public Works Director Craig Workman complained that his staff spent countless hours just verifying the problem I discovered and reported to him. After several years and thousands of hours researching impact fees, I feel my credentials are established, particularly for the water and sewer impact fees in Whitefish, MT. I've helped research and write new impact fee legislation that was signed into law by the Governor of Montana in 2023. I've studied numerous impact fee reports beyond just the ones developed for Whitefish. I've researched impact fee problems from other states including litigation filed by several law firms in these states. I've studied and referenced numerous impact fee standards including the APA, NHBA and NHA.

I've produced numerous studies and reports of my own on Whitefish and Montana impact fees while accumulating statistics on all of the major cities in Montana that impose impact fees. Several of these studies have been reviewed by experts including Dr. Bryce Ward, PHD in economics from Harvard Univ. who also taught economics at Harvard. Most importantly, I've communicated with impact fee experts and public works departments throughout the state of Montana. I was a consultant for the Plaintiff attorneys in the most recent Class Action lawsuit against the City of Whitefish and developed the primary report that was the basis for this lawsuit. This suit resulted in a settlement agreement with the City that achieved significant refunds to nearly 450 property owners in the City. Despite the false claims by certain Whitefish politicians, **I feel far more qualified to point out the extensive impact fee problems in Whitefish than any of these political critics and City officials.**

It is ironic that the Whitefish politicians would question my credentials yet allowed their own employee, the acting City Manager, who had no impact fee training, to modify the City's 2018 Impact Fee Update. These modifications were the basis of the Class Action litigation against Whitefish. She admitted altering the fees recommended by the City's consultant, raising water impact fees nearly fourfold, and she alone built the charts used to collect these fees. She had no credentials that qualified her for this task. When we met with her in August, 2021, the City Manager demonstrated virtually no knowledge of how the collection charts were built in the past. **Apparently credentials are only important for those who challenge City fees, not for those who create them.**

A 10 minute video has been produced that outlines the impact fee problems faced by Whitefish property owners. It can be viewed [here](#).

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Author of the following studies and reports relating to Whitefish MT impact fees:

1. *Whitefish Public Works Department Problems - Fixture Unit Count Program Errors*
2. *Whitefish Water and Sewer Impact Fee Problems – Updated April 2023*
3. *Whitefish Water and Sewer Impact Fee Issues - Collection Chart Problem (Detailed)*
4. *Whitefish Wastewater (Sewer) Impact Fee Issue - Phantom Solar Array Project*
5. *Whitefish Water Impact Fee Issue - Expanded Water Treatment Plant Costs*
6. *Response To FCS March, 2022 Memorandum - Updated April 20, 2023*
7. *Whitefish Water Impact Fee Issue - South Water Reservoir Project - Updated 29 June, 2023*
8. *Whitefish Mt Uses Conflicting Water Reports - Impact Fees Vs Montana DEQ Reports*
9. *Whitefish vs MT Adopted Building Codes - Updated November, 2023*
10. *Analysis of 2024 Whitefish Impact Fees - Updated December, 2023*