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SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF LONGVIEW, a Washington municipal corporation,

Respondent,

v.

MIKE WALLIN, an individual,

Appellant,

and

BANCAMS.COM, an unknown entity; WA CAMPAIGN FOR  
LIBERTY, a Washington non-profit corporation; VOTERSWANT  
MORECHOICES.COM, an unknown entity; COWLITZ COUNTY, a  
municipal corporation; and KRISTINA SWANSON, Cowlitz County  
Auditor,

Additional Respondents.

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BRIEF OF RESPONDENT – CROSS-APPELLANT  
CITY OF LONGVIEW

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## 1. INTRODUCTION

RCW 46.63.170 specifically authorizes local legislative bodies, such as the Longview City Council, to adopt ordinances for automated traffic safety cameras (“safety cameras”). The City Council of the City of Longview (“City”) did so. For over 75 years, this Court has held that such a grant of power is exclusive to the City Council and precludes local initiatives on the same subject. Further, the City’s ordinances pursue a plan adopted by the Legislature, and are therefore administrative in nature and beyond the scope of the local initiative power.

Nevertheless, a group of initiative sponsors including appellant Mike Wallin (“Wallin”) sponsored Longview Initiative No. 1.<sup>1</sup> The initiative would have repealed the City’s safety camera ordinances; required supermajority Council votes and a public vote to validate any future safety camera ordinance; and required an “advisory vote” at special elections for any future safety camera ordinance. The City sought declaratory judgment regarding the validity of the initiative. Wallin also brought a series of “special motions” to strike under RCW 4.24.525.

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<sup>1</sup> Wallin is the only party who appeared in response to City service of process. See Clerk’s Papers 13 (“CP13”), CP14, CP22, CP45.

The trial court correctly denied Wallin's special motions to strike, and correctly determined that the fundamental provisions of the initiative were beyond the local initiative power. The trial court erred in allowing the provision for future advisory votes to proceed to the ballot. Just as in the case of specific delegation of safety camera legislation to the City Council, the Legislature delegated authority to call special elections (including advisory votes) only to the City Council. RCW 29.04.330(2). Moreover, in creating a series of future advisory votes, Initiative No. 1 essentially creates future initiatives by initiative, which is not authorized by law.

**2. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**2.1 Respondent's Assignments of Error.**

2.1.1 The trial court committed error in holding that §3 of the Initiative is within the scope of the local initiative power.

2.1.2 The trial court committed error when it denied the City's motion for reconsideration regarding §3 of Initiative No. 1.

2.1.3 The trial court committed error when it denied the City's voluntary motion to dismiss under CR 41(a)(1)(B).

2.1.4 The trial court committed error when it determined that the City's Complaint was a claim based on an action involving public participation.

**2.2 Issues Pertaining to Respondent's Assignments of Error.**

2.2.1 The fundamental legislative purposes of Initiative No. 1 were not furthered by §3. Did the trial court err in holding that §3 was severable from the main body of the Initiative. The answer is Yes.

2.2.2 A future advisory vote for safety camera ordinances is a special election, and calling for special elections is delegated to the "governing body of a city" in RCW 29A.04.330(2). Is §3 of Initiative No. 1, which requires a special advisory election for any present or future safety camera ordinance, beyond the scope of the local initiative power. The answer is Yes.

2.2.3 CR 41(a)(1)(B) requires the trial court to grant voluntary dismissal when no counterclaim has been filed, and Wallin did not file an answer or any counterclaim. Did the trial court err in applying CR 41(a)(1)(B) when it denied the City's motion to voluntarily dismiss? The answer is Yes.

2.2.4 The City's Complaint sought a declaration that Initiative No. 1 was outside the scope of the local initiative power, and did not seek

to prevent Wallin's actions involving public participation or petition in any manner or seek relief against Wallin. Did the trial court err when it determined that the City's claim was "based on an action involving public participation." The answer is Yes.

2.2.5 The City brought its declaratory judgment claim in order to enforce its municipal code and protect the public from the expense of holding an election regarding an illegal subject. Is the City's action exempt under RCW 4.24.525(3) from a special motion to strike? The answer is Yes.

2.2.6 In the alternative, does RCW 4.24.525 violate the Washington Constitution by amending the Uniform Declaratory Judgment Act without reference; and, interfering with the right of the City to seek access to State courts of general jurisdiction to declare its rights and remove legal uncertainty with respect to the initiative and referendum process. The answer is Yes.

### **2.3 Response to Petitioner's Assignments of Error and Issues Pertaining to Petitioner's Assignments of Error.**

2.3.1 This Court has held that a city is financially harmed by having to bear the expense of an election for an initiative that is beyond the scope of the local initiative power. Initiative No. 1 would also have required the City to breach a valid contract. In accordance with over 75

years of Washington law allowing such actions by cities, does the City have standing to bring a declaratory judgment action to determine whether Initiative No. 1 is within the scope of the local initiative power? The answer is Yes. (Petitioner's Issue 1.)

2.3.2 The City and Wallin had a clear dispute and/or the mature seeds of a dispute regarding the scope of the local initiative power; the City would be specifically and financially harmed by having to hold an election for an illegal initiative; the County Auditor had certified on July 11, 2011, that the sponsors of Initiative No. 1 had obtained sufficient valid signatures to place that initiative on the ballot, which was well prior to any of the orders entered by the trial court; and Wallin admits the issues presented here are of public importance. Is the City's declaratory claim ripe and justiciable? The answer is Yes. (Petitioner's Issue 1.)

2.3.3 The Washington Legislature specifically delegates the subject of safety cameras to the "local legislative authority" and every Washington appellate decision to address such language has held that those subjects are outside the scope of the local initiative power. Did the trial court correctly decide that the City was likely to prevail and correctly grant the City's declaratory judgment claim? The answer is Yes. (Petitioner's Issues 2 and 3.)

2.3.4 The Washington Legislature specified a detailed framework on how the City may authorize and use traffic safety cameras. Is the City's ordinance authorizing safety cameras administrative (as found by the trial court in its oral ruling) and therefore beyond the local initiative power? The answer is Yes. (Petitioner's Issues 2 and 3.)

2.3.5 The **local** initiative power is not constitutionally protected, and the City's lawsuit did not seek to restrict Wallin from speaking or petitioning the government regarding safety cameras. Did the City's lawsuit violate Wallin's right to free speech? The answer is No. (Petitioner's Issue 4.)

### **3. STATEMENT OF THE CASE**

The facts are not disputed in this case, and the matters for decision are purely legal in nature.

#### **3.1 The Washington Legislature Delegated to the Longview City Council the Authority to Enact Ordinances Governing Safety Cameras.**

The Washington Legislature at Chapter 46.63 RCW established a uniform statewide framework for certain traffic offenses, including the use of safety cameras:

(1) The use of automated traffic safety cameras for issuance of notices of infraction is subject to the following requirements:

(a) **The appropriate local legislative authority** must first enact an ordinance allowing for their use to detect one or more of the following: Stoplight, railroad crossing, or school speed zone violations. At a minimum, **the local ordinance must contain the restrictions described in this section** and provisions for public notice and signage.

RCW 46.63.170(1) (emphasis added). That statute goes on to specify in detail how safety cameras must be implemented. RCW 46.63.170.

Pursuant to that legislative grant of authority to the Longview City Council, the Council adopted a new chapter to the City Code, Chapter 11.04 Longview Municipal Code (“LMC”), which authorized safety cameras and followed the detailed requirements of RCW 46.63.170.<sup>2</sup> In October 2010, the City Council extended that authorization through May 2012.<sup>3</sup>

In August 2010, the City entered into a contract with American Traffic Solutions, Inc. (“ATS”) for installation of the safety camera equipment and for ATS to service and manage that equipment.<sup>4</sup>

### **3.2 City of Longview Code Authorizes Initiative and Referendum in Limited Circumstances.**

Under the authority granted to it by the State Legislature at RCW 35A.11.080 - .100, the City provides for the exercise of the powers of

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<sup>2</sup> CP7 (6/9/11 Davis Dec. at ¶2 and Ex. A).

<sup>3</sup> CP7 (6/9/11 Davis Dec. at ¶3 and Ex. B).

<sup>4</sup> CP7 (6/9/11 Davis Dec. at ¶4 and Ex. C).

initiative and referendum. Chapter 1.35 LMC. And, consistent with the Legislature's grant to the City, the powers of initiative and referendum are limited. A local initiative in the City may not extend, for example to:

(9) Ordinances which are not general ordinances shall not be the subject of initiative or referendum. For purposes of this section only, general ordinances are defined as those ordinances having general application throughout the city;

**(10) Ordinances, where the power of the city to legislate on the subject matter is derived from a grant of power by the state legislature directly to the city council or other corporate authorities as opposed to a grant of such power to the city as a corporate entity, shall not be subject to initiative or referendum;**

(11) Ordinances, the subject matter of which is exempted now or hereafter by state law or judicial decision of the superior court of Cowlitz County or any appellate court of the state, shall not be subject to initiative or referendum.

LMC 1.35.020 (emphasis supplied).

### **3.3 Longview Initiative No. 1 Proposed Repeal of the City's Safety Camera Ordinances and New Adoption Procedures.**

In January 2011 a number of initiative sponsors, including Wallin and a group led by Tim Eyman, initiated a signature campaign for Initiative No. 1. That initiative proposed to:

- prohibit any safety cameras unless approved by a super-majority of the City Council and approved by the electors in an election (§1);
- limit the amount of fines from violations assessed through safety cameras (§1);

- repeal Chapter 11.04 LMC (authorizing safety cameras as the Legislature allowed the City Council to do) in its entirety (§2); and
- require an advisory vote for any existing or future ordinance authorizing City ordinance authorizing safety cameras (§3).<sup>5</sup>

In May 2011, the sponsors submitted signed petitions with almost double the number of signatures (if valid) required in order to qualify Initiative No. 1 for the ballot pursuant to RCW 35A.11.100.<sup>6</sup> The City ordinances limit the initiative power, however, and that power does not include matters delegated to the City Council by the Legislature. LMC 1.35.020.<sup>7</sup>

The City and initiative sponsors disagreed about whether Initiative No. 1 was the proper subject for a local initiative. As a result, on June 7, 2011, the City filed a Complaint for declaratory judgment asking the court to determine whether Initiative No. 1 was within the scope of the local initiative power.<sup>8</sup> The City also filed a motion for declaratory judgment.<sup>9</sup>

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<sup>5</sup> CP7 (6/9/11 Davis Dec. at Ex.D).

<sup>6</sup> The City is a non-charter Code city operating under Chapter 35A RCW. LMC 1.12.010.

<sup>7</sup> See CP7 (6/9/11 Davis Dec. at Ex. F).

<sup>8</sup> CP1 (City's Complaint for Declaratory Judgment and Injunctive Relief). The City's Complaint seeks a declaration that Initiative No. 1 is outside the scope of the local initiative power, and also seeks injunctive relief to prevent Initiative No. 1 being placed on the ballot. The injunctive relief was not sought against Wallin because only defendant Cowlitz County Auditor had the authority to place matters on the ballot. RCW 29A.04.025; RCW 29A.04.216.

All initiative sponsors were served as being appropriate parties.<sup>10</sup>

Only Wallin appeared and contested the City's Complaint.

### **3.4 The Initiative Sponsors Failed Initial Signature-Gathering; Wallin's Special Motion to Strike.**

Wallin appeared and filed a special motion to strike under RCW 4.24.525 – the Strategic Lawsuits Against Public Participation (“SLAPP”) statute. Wallin did not file an answer or counterclaim.<sup>11</sup>

Shortly thereafter, on June 23, 2011, the County Auditor informed the parties that, even though Wallin had submitted 3,675 signatures, only 1,940 of those signatures were valid – well short of the 2,830 valid signatures required. The City had brought its Complaint to enforce its municipal code and safeguard the City taxpayers from paying for an election for an invalid initiative.<sup>12</sup> Since it appeared Initiative No. 1 did not have sufficient signatures to qualify for the ballot, the City moved to

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<sup>9</sup> CP2. Although denominated a motion for declaratory judgment and injunctive relief, the City's motion was treated as a motion for summary judgment because facts were not in dispute.

<sup>10</sup> CP13, CP14, CP22, CP45; *see City of Sequim v. Malkasian*, 157 W.2d 251, 138 P.3d 943 (2006). Wallin complains in his Opening Brief about being “dragooned” into court. Yet Wallin argued below that all initiative sponsors were indispensable parties that required joinder. CP26 (Wallin Opposition at 14–15).

<sup>11</sup> Pursuant to CR 13 a “counterclaim must be in a “pleading,” and pleadings are limited to the forms of complaints and answers in CR 7(a).

<sup>12</sup> CP28 (City's Motion to Voluntarily Dismiss at 1–2).

voluntarily dismiss under CR 41(a)(1)(B). The hearing on both motions was set for July 11, 2011.

At the July 11 hearing, the trial court treated Wallin's special motion as a "counterclaim" and denied the City's motion to voluntarily dismiss. The trial court also found the City's action was a claim against public participation, even though no relief was sought against Wallin. The trial court denied Wallin's special motion to strike because the City had shown (the City's Complaint was on file) that Initiative No. 1 was outside the scope of the local initiative power.<sup>13</sup> The trial court's order on those matters was entered August 8, 2011.<sup>14</sup>

During the pendency of the motion, initiative sponsors had gathered additional signatures. On the same date as the hearing, July 11, 2011, the County Auditor certified that sufficient valid signatures *had* finally been received to qualify Initiative No. 1 under RCW 35A.11.100.<sup>15</sup>

**3.5 After Initiative No. 1 Obtained Sufficient Signatures, the City Renewed its Motion for Declaratory Judgment.**

After Initiative No. 1 obtained sufficient signatures, the City renewed its motion for declaratory judgment. The hearing was set for

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<sup>13</sup> CP39.

<sup>14</sup> CP39.

<sup>15</sup> Attachment A to Brief of Respondent. The Court may take judicial notice of this letter from the County Auditor.

August 15, 2011. At the hearing the trial court denied Wallin's motion to reconsider his special motion to strike. The trial court also granted the City's motion on all fundamental elements of its motion for declaratory judgment – holding that the Legislature delegated the subject of safety cameras to the City Council in RCW 46.63.170 and, therefore, the authorization and management of safety cameras was not within the scope of the local initiative power. The trial court, however, allowed §3 of Initiative No. 1 to go to the ballot. That section required an advisory vote on any existing or future ordinance authorizing safety cameras. The trial court issued an order to that effect on August 15, 2011.<sup>16</sup>

The City moved for reconsideration of the trial court's decision that §3 of Initiative No. 1 could go to the ballot. Wallin brought a second special motion to strike. The trial court denied both motions.<sup>17</sup> These appeals followed.

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<sup>16</sup> CP39. In its oral ruling, the trial court also held that the City's authorization and management of safety cameras was an administrative action, because it merely furthered a detailed plan required by the Legislature. Initiative No. 1 is also beyond the scope of the local initiative power for that reason. Verbatim Report of Proceedings ("VRP") at 21–22.

<sup>17</sup> CP55.

## 4. ARGUMENT

### 4.1 Standard of Review.

The matter before the Court involves purely legal issues – the application of RCW 46.63.170, RCW 4.24.525, and City ordinances to uncontested facts. The standard of review is *de novo*. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994). In its Opening Brief, Wallin frequently mischaracterizes the City’s motives for bringing its Complaint. The City’s legislation and pleadings speak for themselves. But those pleadings clearly demonstrate the City’s enforcement of LMC 1.35.020 and its efforts to save taxpayers the cost of holding an election (or elections) on a subject not within the initiative power. Wallin’s mischaracterizations are not relevant to the Court’s decision.

RCW 4.24.525 is modeled after an almost identical California anti-SLAPP statute. *See* Cal. C.C.P. 425.16 *et seq.* California cases are persuasive in interpreting RCW 4.24.525. *E.g.*, *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1109 (W.D. Wash. 2010). The California courts apply the de novo standard to review special motions to strike. *Flatley v. Mauro*, 139 P.3d 2, 19 (Cal. 2006).

#### **4.2 Initiative No. 1 Is Beyond the Scope of the Local Initiative Power Because the Legislature Delegated the Subject of Safety Cameras to the Local Legislative Body.**

For over 75 years, the Washington Courts have recognized that a city may seek pre-election review of a proposed initiative to determine if the initiative is within the scope of the local initiative power. *City of Port Angeles v. Our Water-Our Choice*, 170 Wn.2d 1, 7 – 8, 239 P.3d 589 (2010); *Neils v City of Seattle*, 185 Wash. 269, 276, 53 P.2d 848 (1936). Pre-election review is appropriate to determine whether the Legislature delegated the subject matter of the initiative to the City Council. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006); *Whatcom County v. Brisbane*, 125 Wn.2d 345, 884 P.2d 1326 (1994).

When the Legislature grants a power specifically to a local legislative body, that power is not subject to direct legislation by initiative. “An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself.” *Malkasian*, 157 Wn.2d at 261-262. The test is whether a proposed initiative would “interfere with the exercise of a power delegated by state law to the governing body of the city.” *Priorities First v. City of Spokane*, 93 Wn. App. 406, 411, 968 P.2d 431 (1998). Just four months ago, Division One held that a measure nearly identical to

Initiative No. 1 was outside the initiative power because the Legislature delegated the subject of traffic safety cameras to the “local legislative authority” in RCW 46.63.170. *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011) (petition for review pending in this Court under Case No. 865949).

The *American Traffic Solutions* decision is correct. The Legislature granted the power over the use and operation of safety cameras to the “appropriate *local legislative authority*.” RCW 46.63.170(1)(a) (emphasis added). Likewise, RCW 46.63.170(1)(c) provides that “[d]uring the 2009-2011 fiscal biennium, automated traffic safety cameras may be used to detect speed violations for the purposes of section 201(2), chapter 470, Laws of 2009 if the *local legislative authority* first enacts an ordinance authorizing the use of cameras to detect speed violations.” (Emphasis added.) Accordingly, this Court must find that Initiative No. 1 is outside the scope of the local initiative power.

Defendant Wallin’s assertion that the *McFarland* case requires the Court to review the statutory scheme to determine legislative intent is unsupported by that very decision. *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2007). In *McFarland*, the Supreme Court held that the Legislature intended land use development

regulations under the Growth Management Act (“GMA”) are delegated to the local legislative authority, and therefore not subject to initiative and referendum. Unlike RCW 46.63.170, the GMA contains no statement directly delegating to the local “legislative authority” or the local “legislative body.” Nevertheless, the *McFarland* Court determined the Legislature vested those powers in the local legislature in order to further the consistent state policy of the GMA. *McFarland*, 156 Wn.2d at 174. Here, there is no need for such statutory construction as the Legislature has made it clear that the “**local legislative authority**” has the authority to govern safety cameras. RCW 46.63.170. There is **no** Washington case holding that a subject is within the local initiative power when the Legislature specifically uses the language “**local legislative authority**” in the legislative delegation as the Legislature did here.

Even if the Court looks at the Legislature’s overall statutory scheme, the statement of policy in Chapter 46.63 RCW shows the Legislature’s intent was to create a uniform, statewide system to decriminalize certain traffic offenses and promote public safety. *See* RCW 46.63.010 (the “legislative intent in the adoption of this chapter in decriminalizing certain traffic offenses to promote the public safety and welfare on public highways and to facilitate the implementation of a

uniform and expeditious system for the disposition of traffic infractions.”). When the Legislature wants a uniform statewide policy, that delegation is vested in the local legislative body, not the municipality as a “corporate” entity. *McFarland*, 159 Wn.2d at 174. Here, the trial court correctly so ruled.

**4.3 Initiative No. 1 Is Beyond the Scope of the Local Initiative Power Because It Affects Administrative Subjects, Rather than Legislative Subjects.**

The local initiative power is also limited to legislative actions. Administrative actions are outside the initiative power, and determining whether an action is administrative or legislative is appropriate in pre-election review. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1981). A local government action is administrative if: (1) it is pursuing a plan that the local government itself has adopted; **or** (2) the local government action is in pursuit of a plan adopted by some power superior to it. *City of Port Angeles v. Our Water – Our Choice*, 170 Wn.2d 1, 239 P.3d 589 (2010) (city’s fluoridation of its water supply was administrative action because it was done pursuant to a comprehensive program set out by the State Department of Health and Board of Health); *see Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984) (street naming);

*Leonard v. City of Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976)

(rezoning).

Here, the Washington State Legislature has required a detailed plan with explicit limitations under which cities and counties may use automated traffic safety cameras in RCW 46.63.170. That statute:

- Limits automated safety camera use to stoplights at two-arterial crossings, school speed zones, and railroad crossings;
- Allows safety cameras to take pictures only of the vehicle and license plate, and only while the infraction is occurring;
- Specifies exactly how the notice of infraction must be mailed;
- Specifies that any images must be available for inspection in a proceeding the adjudicate liability;
- Specifies how a registered owner may respond to a notice of infraction;
- Requires that all images are solely for use of law enforcement, are not open to the public, and may be used in court only in a proceeding under the automated traffic camera statute;
- Requires that all automated traffic safety camera areas must be clearly marked;
- Specifies that a manufacturer or vendor of cameras may be paid only based on the value of the equipment and services involved, and not based on a portion of fines collected;
- Specifies that infractions are not part of a registered owners driving record;
- Provides a method for a registered owner to show that he or she was not using the vehicle at the time of infraction; and

- Has a detailed definition of automated traffic safety camera.

RCW 46.63.170.

Wallin's only response is to argue that there is no state policy "mandating" the use of safety cameras. That is not the test of whether an initiative is administrative or legislative in nature. The test is whether the City is pursuing a plan adopted by the Legislature. There was also not a state policy in *City of Port Angeles*, for example, mandating drinking water fluoridation. *City of Port Angeles*, 170 Wn.2d at 10 – 12.

The City's safety camera ordinances follow the Legislature's statute almost verbatim. LMC 11.04.020 *et seq.* Because the Longview ordinances enact a plan adopted and controlled by the Legislature, those ordinances are administrative in nature, and are not subject to the local initiative power.

The administrative nature of the City's actions is highlighted by the fact that the City entered into contracts with ATS, and cameras have already been installed in several locations throughout the City.<sup>18</sup> In

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<sup>18</sup> CP7 (6/9/11 Davis Dec at ¶¶ 4–5 and Ex. C). Initiative No.1 would also be an illegal impairment of contract, in violation of Wash. Constitution Art. I, §23. But the Court need not consider that issue because the initiative is beyond the scope of the local initiative power both because traffic safety camera systems have been expressly delegated to the City Council and because the initiative is directed to administrative subjects, rather than legislative subjects.

*Ruano*, the Washington Supreme Court held that where the county had declared its intention to build a domed stadium and then entered into contracts for that work, an initiative attempting to overturn those contracts was directed at administrative matters, and therefore beyond the scope of the initiative power. *Ruano v. Spellman*, 81 Wn.2d 820, 505 P.2d 447 (1973). In this case, not only is the City pursuing a plan adopted by the Legislature, but Initiative No. 1 would also overturn contracts that the City is currently administering. The initiative cannot overturn those administrative actions.

In addition to holding that the fundamental provisions of Initiative No. 1 were delegated to the City Council,<sup>19</sup> the trial court also correctly held in its oral ruling that those provisions of Initiative No. 1 were administrative in nature and beyond the initiative power or that independent reason.<sup>20</sup> This Court should affirm the trial court on both grounds.

#### **4.4 The Trial Court Improperly Severed §3 of Initiative No. 1.**

Although the trial court found that the subject of safety cameras was specifically delegated to the City Council and that the authorization

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<sup>19</sup> CP44 (Order Granting Declaratory Judgment and Injunctive Relief, Denying Reconsideration dated August 15, 2011).

<sup>20</sup> VRP at 21–22.

and management of safety cameras was an administrative subject, the trial court severed §3 of Initiative No. 1. The trial court erred in holding that §3 was within the scope of the local initiative power. Section 3 would require future special elections for an advisory vote on any existing or future safety camera ordinance, no matter how far into the future that might extend. The trial court committed error for several, independent reasons.

**4.4.1 Section 3 Is Outside the Local Initiative Power Because Authorizing Special Elections Is Specifically Delegated to the Longview City Council.**

As the law discussed above clearly holds, when the Legislature grants a power specifically to a local legislative body, that power is not subject to direct legislation by initiative or referendum. “An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself.” *Malkasian*, 157 Wn.2d at 261–262.

In this case, §3 sets up a series of special elections for future advisory votes. Those advisory votes are totally apart from the vote on Initiative No. 1 itself (including the vote on severed §3). Local initiatives are authorized by RCW 35A.11.080 *et seq.* But the other votes called for by §3 are special elections under Washington law. Calling for special

elections is specifically delegated to the Longview City Council.

Therefore, the subject of Section 3 is outside the local initiative power.

Under Washington law, a general election is one that is required to be held on a fixed date at regular intervals. RCW 29A.04.073. A special election is any election that is not a general election, but may be held in conjunction with a general election. RCW 29A.04.175. Section 3 of Initiative No. 1 would require a series of future advisory votes. Those votes would be special elections because they are not required to be held at regular intervals. RCW 29A.04.175; RCW 29A.04.073.

In order for the county auditor to hold a special election, the Washington Legislature requires a resolution from the “**governing body of a city**” requesting that special election. RCW 29A.04.330(2) (emphasis supplied).

The county auditor, as ex officio supervisor of elections, **upon request in the form of a resolution of the governing body of a city**, town, or district, presented to the auditor prior to the proposed election date, may call a special election in such city, town, or district, and for the purpose of such special election he or she may combine, unite, or divide precincts.

RCW 29A.04.330(2) (emphasis supplied). Such a resolution from the governing body of the City “**must be presented to the county auditor**” at

least 45 days prior to the election date. RCW 29A.04.330(3) (emphasis supplied).

The Legislature has granted local initiative power to Washington cities in RCW 35A.11.080 and RCW 35.17.260. But the subject matter of an initiative must be within the scope of that power. The subject matter of §3 is setting up a series of future special elections. Section 3 is, in effect, an initiative to create future special election advisory votes (future initiatives) without the requirement for those elections to be authorized by RCW 35A.11.080 *et seq.* But the authority to call for a special election is specifically delegated to **the governing body** of the City. Because, §3 is outside the scope of the local initiative power, the trial court erred in holding otherwise.

#### **4.4.2 Section 3 Is Not Severable From the Main Body of Initiative No. 3.**

Even if §3 of Initiative No. 1 were within the scope of the local initiative power, it could not be severed from the other portions of Initiative No. 1. Washington appellate decisions emphasize that a valid portion of an initiative may not be severed if it would not accomplish the fundamental legislative purpose of the initiative. *Priorities First v. City of Spokane*, 93 Wn. App. 406, 413, 968 P.2d 431 (1998), *review denied*, 137 Wn.2d 1035 (1999) (severance not allowed because the balance of the

initiative was “useless to accomplish the legislative purpose”); *City of Seattle v. Yes For Seattle*, 122 Wn. App. 382, 393, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005).

The initiative may not be severed, however, if the valid and invalid portions are so connected that the valid portions would be ‘useless to accomplish the legislative purpose.’

*Yes For Seattle*, 122 Wn. App. at 393 (quoting *Priorities First*). In *Yes For Seattle*, the court invalidated Seattle Initiative 80 (“I-80”), which concerned urban creeks.<sup>21</sup> Many of I-80’s provisions controlled development over or adjacent to creeks, and the court held that those provisions were “development regulations” as defined in the Washington Growth Management Act (“GMA”) and were beyond the scope of the local initiative power because the Legislature had delegated GMA compliance to the local legislative body. Other provisions of I-80, however, were not “development regulations.” These other provisions required such things as city action to develop a creek restoration plan, city coordination of creek restoration efforts, city restoration of creeks if they were not restored by a developer, city removal of fish barriers, and a city-

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<sup>21</sup> CP48 (City’s Motion for Reconsideration at Tab A). A copy of I-80 is available at <http://clerk.ci.seattle.wa.us/~public/initref/init80.htm>.

sponsored education program regarding the values of urban creeks. The I-80 initiative contained a severance clause (as does the Initiative No. 1 in this case) stating that should any portion of I-80 be held invalid, that portion would be severed and the remainder of I-80 would remain valid and enforceable. *Yes For Seattle*, 122 Wn.2d at 394. The *Yes For Seattle* court held that the presence of a severability clause was not dispositive. Because the development control aspects of I-80 were predominant, with most sections of the initiative dealing with development, the Court held that “[t]he nondevelopment sections on their own would not accomplish the goals of the initiative, as development and land use controls play the central role in the initiative.” *Id.* at 394. For those reasons, the Court held that the valid portions of the initiative were not severable from the invalid portions. *Id.* at 395.

This case is practically identical to *Yes For Seattle*, and the Court should reach the same result as in that case. Here, the Initiative’s goals are stated in bold at the top of the petition for Initiative No. 1:

- Repeals government-imposed automatic ticking cameras in Longview;
- Requires Longview’s city government to get voter approval if they try again;

- Removes the profit-motive by limiting fines; and
- Protects democracy and due process.<sup>22</sup>

The advisory votes in §3 are not even mentioned. The issues related to the repeal of the City's existing safety camera ordinance, the reduction of safety camera fines, and the restrictions on future safety camera ordinances predominate. These same goals of Initiative No. 1 are repeated in the January 26 letter to the City Council,<sup>23</sup> which was used as the solicitation for signatures by the Initiative's sponsor.<sup>24</sup> Just as in the *Yes For Seattle* case, the proposed ballot title for Initiative No. 1 concerns new limits on the adoption of Safety Camera ordinances, limiting fines, and repealing the existing City Safety Camera ordinance.<sup>25</sup> And just as in the *Yes For Seattle* case, the issues regarding actual regulation and passage of safety camera ordinances (which are clearly outside the initiative power) predominate in Initiative No. 1. Because these purposes of the initiative predominate, and the advisory vote provisions would not accomplish those purposes, §3 of Initiative No. 1 is not severable from the primary portions of Initiative No. 1.

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<sup>22</sup> CP7 (6/9/11 Davis Dec. at Ex. C).

<sup>23</sup> CP7 (6/9/11 Davis Dec at Ex. E); CP48 (City's Motion for Reconsideration at Tab B).

<sup>24</sup> CP48 (City's Motion for Reconsideration at Tab C).

<sup>25</sup> CP48 (City's Motion for Reconsideration at Tab A); CP7 (6/9/11 Davis Dec. at Ex. D).

Under controlling Supreme Court case law, severance clauses are not dispositive. *E.g.*, *McGowan v. State*, 148 Wn.2d 278, 60 P.2d 67 (2002) (holding that a severance clause “is not necessarily dispositive” on whether the legislative body would have enacted a constitutional provision without the unconstitutional parts of an initiative); *see Yes For Seattle*, 122 Wn. App. at 393 (citing *McGowan* for the same proposition). The test is set forth in the *McGowan* and *Yes For Seattle* cases – whether the severed portion of the initiative would accomplish the “fundamental legislative purpose” of the initiative.<sup>26</sup>

Wallin contends that an advisory vote fulfilled Initiative No. 1’s purpose to “protect democracy.” But democracy is the actual exercise of political authority by the public or by the public’s elected representatives. In this case, the trial court had already held that all substantive decisions regarding the subject of safety cameras were outside the scope of the local initiative power. The non-binding votes envisioned by §3 do not further the initiative’s stated fundamental legislative purposes and, just as in *Yes*

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<sup>26</sup> Wallin cites to the *Gerberding* case for the proposition that a severance clause *always* provides the Court with the necessary assurance that the legislative body would have enacted the other, lawful provisions of an initiative, without the unlawful provisions. *Gerberding v. Munro*, 434 Wn.2d 188, 1977, 949 P.2d 1366 (1998). Washington Supreme Court decisions after *Gerberding* show clearly that Wallin reads *Gerberding* incorrectly. *E.g.*, *McGowan v. State*, 148 Wn.2d 278, 60 P.2d 67 (2002).

*for Seattle and Leonard*, issues related to safety camera authorization and management predominate.

In addition, an advisory vote cannot possibly further a **legislative** purpose, because advisory votes are not legislative in nature. *Ruano v. Spellman*, 81 Wn.2d 820, 823-24, 505 P.2d 447 (1973) (action is legislative only if it prescribes a new law, policy or plan). The trial court should have determined that §3 was not severable from the primary portions of Initiative No. 1 for that reason alone.

#### **4.4.3 An Advisory Vote Is Not a Contemplated Exercise of the Local Initiative Power.**

The statutes governing the exercise of the local initiative power do not make any provision for a nonbinding, advisory vote. *Local* initiatives are not constitutionally guaranteed. *City of Port Angeles*, 170 Wn.2d at 7 – 8. And the local initiative power may only be exercised as set forth in RCW 35.17.240 through .320. RCW 35A.11.100 (and the adopted City code). Those statutes allow initiatives to be placed on the ballot for a **binding** vote of the local electors. RCW 35.17.260. If approved, the measure takes effect immediately by operation of law. RCW 35.17.330. These statutes do not authorize an initiative to create a **nonbinding** initiative/advisory vote, and no case states otherwise. Simply stated, the

electorate cannot compel a series of future advisory votes through the initiative process.

Moreover, the local initiative power only extends to the authority of voters to directly initiate and enact **legislation**. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973). To be legislation, an action must create new a law, policy or plan. *Ruano*, 81 Wn.2d at 823-24; *see Phoenix Development v. City of Woodinville*, 171 Wn.2d 820, 836, 266 P.3d 1150 (2011); *see also* Black's Law Dictionary (9<sup>th</sup> Ed. 2009) (legislation is "the process of making or enacting a positive law in written form"). Advisory votes do not create a new law, policy or plan. Therefore, they are not legislation, and are not a proper subject of an initiative. Section 3 of Initiative No. 1 is even further removed from creating legislation, because §3 does not itself constitute a vote on anything substantive. Instead, §3 sets in motion an unlimited string of advisory votes about any future City ordinance regarding safety cameras.

Case law in every jurisdiction to consider the matter agrees that advisory votes are not a permissible subject of the initiative power. The Nebraska Supreme Court addressed this issue directly:

Generally, a measure seeking an advisory vote of the electorate or a nonbinding expression of public opinion on a question is not a proper subject of the initiative. . . . Government should be spared the burdensome cost of

election machinery as a straw vote on the electorate's opinions, sentiments, or attitudes on public issues.

*State ex re. Brant v. Beermann*, 350 N.W.2d 18, 21 – 23 (Neb. 1984).

Other jurisdictions considering this issue have reached the same conclusion. *E.g.*, *City of Eugene v. Roberts*, 756 P.2d 643 (Or. Ct. App. 1988, *affirmed*, 756 P.2d 630 (1988) (advisory ballot question was inappropriate because it was nothing more than a proposition or question and, therefore, something other than a “measure”); *City of Litchfield v. Hart*, 29 N.E.2d 678, 679 (Ill. 1940) (statutory power to register an expression of opinion on questions of public policy is not analogous to the “initiative” or “referendum” which relates to power of the people to propose bills and laws and to enact or reject them); *Paisner v Attorney Gen.*, 458 N.E.2d 734 (Mass. 1983) (authorizing refusal to certify proposed initiative where the measure did not propose binding “law”). Wallin cites no authority to the contrary.

The same result holds under Washington law. Advisory votes, and provisions scheduling future advisory votes, are not legislation and are outside the scope of the local initiative power. The Legislature, and the City, have provided a lawful means to test legislation in an appropriate case. It is called a referendum. RCW 35A.11.080; LMC 1.35.010. The Legislature may authorize such measures; an initiative may not.

Important public policy considerations support this view. Requiring advisory votes on subjects that are not valid subjects for initiatives in the first place involves an unnecessary, wasteful, and costly circumvention of the well-developed body of Washington law defining the appropriate subject for direct legislation. If the trial court were upheld, initiative sponsors could propose initiatives requiring advisory votes on every single action taken by local legislatures or local administrators. The record in this case shows that this is not a hypothetical or academic concern because §3 of Initiative No. 1 will require an advisory vote on any present or future action, stretching indefinitely into the future, in the City of Longview authorizing traffic safety cameras. Any action of a city council, even actions outside of local initiative and referendum authority, could be subject to an advisory initiative. No statute so provides.

Cities have discretion to hold advisory votes, and such elections can be useful tools to gauge public opinion. In fact, the City of Longview did so in connection with its safety camera legislation.<sup>27</sup> But absent that city council authorization of a special election, the initiative powers cannot be exercised in such a way to compel future, advisory votes; and

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<sup>27</sup> CP38 (8/1/11 Davis Dec. at ¶2 and Exs. A and B).

this Court should protect the taxpayers from such an endless string of expensive advisory votes.

**4.5 The Trial Court Erred In Not Granting the City's Motion to Voluntarily Dismiss.**

A plaintiff may voluntarily dismiss upon motion at any time before the conclusion of plaintiff's opening case. CR 41(a)(1)(B). Upon motion, the action "shall be dismissed" unless one of the narrow exceptions in CR 41(a) apply. The exceptions are class actions pursuant to CR 23, derivative suits pursuant to CR 23.1, and actions in which counterclaims have been pleaded. CR 41(a)(1) and CR 41 (a)(3). Dismissal by the court is mandatory. CR 41(a)(1)(B).

On June 23, 2011, the City learned from the County Auditor that almost half of the petition signatures submitted by Wallin were invalid.<sup>28</sup> Not wishing to spend public money challenging an initiative that might not obtain sufficient signatures, the City moved to voluntarily dismiss its Complaint.<sup>29</sup> Wallin opposed the City's motion. The trial court denied the City's motion because the court believed Wallin's pending special

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<sup>28</sup> CP29 (7/7/11 Davis Dec. and Ex. A).

<sup>29</sup> CP28 (City's Motion to Voluntarily Dismiss Pursuant to CR 41(a)(1)(B)).

motion to strike under RCW 4.24.525 was “in the nature of” a counterclaim.<sup>30</sup>

The trial court committed clear error because a motion to strike is not a counterclaim. Under the Civil Rules, a counterclaim must be in a pleading. CR 13. And a “pleading” is one of the allowed answers or complaints enumerated in CR 7(a). Here, Wallin did not submit an answer, much less plead a counterclaim, and the trial court committed clear error in failing to grant the City’s motion to dismiss.<sup>31</sup>

In doing so, the trial court ignored a decision from the Western District of Washington directly on point. *Arata v. City of Seattle*, 2011 WL 248200 (W.D. Wash., Jan. 25, 2011). In *Arata*, the petitioner moved to amend his complaint to dismiss claims against nine individual defendants while a special motion to strike under RCW 4.24.525 was pending. The defendants objected to the amendment, and argued that they

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<sup>30</sup> Wallin may argue that RCW 4.24.525(5)(c) stayed all motions pending his special motion to strike. He is incorrect because the City’s motion to voluntarily dismiss was not pending and, more important, the Supreme Court’s adopted Court Rules allow such a motion to dismiss, and those rules prevail over any legislative enactment.

<sup>31</sup> The Court should note that Wallin opposed the City’s motion to dismiss after learning that Wallin had produced insufficient signatures for Initiative No. 1. CP31. But in his Opening Brief, Wallin now attacks the City for allegedly filing its Complaint before it was certain that Initiative No. 1 had sufficient signatures.

should be awarded attorneys fees under their special motion to strike. The District Court allowed the amendment, noting that failure to do so would be antithetical to the Civil Rules and would also be antithetical to the purposes of RCW 4.24.525, which seeks to resolve claims arguably based on public participation activities expeditiously and without discovery. The trial court should have granted the City's motion and not considered Wallin's first special motion to strike.

**4.6 Wallin's Special Motions to Strike Had No Merit and Were Properly Denied.**

**4.6.1 The City's Claims Were Not Against an Action in Public Participation.**

Although the trial court denied both of Wallin's special motions to strike, the court committed error when it determined that Wallin had made the initial required showing that the City's claim was "based on an action involving public participation." RCW 4.24.525(4)(a). Wallin argued that its circulation of proposed initiative petitions was "public participation," but the City's Complaint did not purport to, and did not, interfere in any way with Mr. Wallin's initiative activities or his petitions to the government. The Complaint sought a declaration that Initiative No. 1 is outside the scope of the local initiative power, and also sought injunctive relief to prevent Initiative No. 1 being placed on the ballot. The injunctive relief

was not sought against Wallin, because only defendant Cowlitz County Auditor has the authority to place matters on the ballot. RCW 29A.04.025; RCW 29A.04.216.

The legislative purpose of RCW 4.24.525 is to curb “lawsuits brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for the redress of grievances.” 2010 Wash. Laws Chapter 118. The City’s claim sought a declaration that Initiative No. 1 is beyond the scope of the local initiative power. That claim did not seek to chill Wallin’s speech or right to petition in any way. Interpreting a substantially identical provision in the California anti-SLAPP statute, the California courts have unequivocally held that a city’s declaratory judgment action to determine the validity of an initiative is *not* within the scope of the anti-SLAPP statute. *City of Riverside v. Stansbury*, 155 Cal. App. 4<sup>th</sup> 1582, 1590–91 (2007) (declaratory judgment action to determine initiative validity did not limit speech rights and was therefore not subject to special motion to strike); *see City of Cotati v. Cashman*, 29 Cal. 4<sup>th</sup> 69 (2002) (rejecting Anti-SLAPP liability where city filed declaratory action to determine validity of ordinance). The trial committed error when it held that Wallin had made the required initial showing that the City’s claim was based on an action involving public participation. This Court

should overturn that holding and make it clear that local jurisdictions may seek declarations regarding the validity of initiatives and referendums without being subjected to the penalties in RCW 4.24.525.

**4.6.2 The City's Claim Is Exempt Under RCW 4.24.525(3).**

Actions brought by a prosecuting attorney or city attorney to enforce laws aimed at public protection are exempt from the Washington anti-SLAPP statute. RCW 4.24.525(3). The Longview City Attorney brought the City's Complaint to enforce LMC 1.35.020(10), which prohibits the following types of ordinances from being passed by local initiative:

(10) Ordinances, where the power of the city to legislate on the subject matter is derived from a grant of power by the state legislature directly to the city council or other corporate authorities as opposed to a grant of such power to the city as a corporate entity, shall not be subject to initiative or referendum;

The City's lawsuit was to protect the public from having to fund an election that violated a pre-existing City ordinance (limiting the Longview local initiative power to legislative matter not delegated directly to the City Council), and the common law rule that initiatives must address legislative and not administrative subjects.

Although there is no Washington law on this point, the California courts have construed the nearly identical provision in that state's anti-

SLAPP statute to permit a city attorney to initiate legal actions.<sup>32</sup> *City of Los Angeles v. Animal Def. League*, 135 Cal. App. 4<sup>th</sup>, 606 618, 37 Cal. Rptr. 362, 641-42 (2006) (exemption applies to any action initiated by a city attorney to protect the public); *City of Long Beach v. Calif. Citizens for Neighborhood Empowerment*, 11 Cal. App. 4<sup>th</sup> 302, 3 Cal. Rptr. 3d 473, 478-79 (2003) (anti-SLAPP did not apply to city’s action to enforce campaign expenditure laws). This Court should interpret RCW 4.24.525(3) similarly to encompass this type of lawsuit brought by the Longview City Attorney to enforce its municipal code and protect the taxpayers from having to pay for unauthorized elections.

**4.6.3 The City Demonstrated It Would Prevail On the Merits of Its Claim.**

Under the special motion to strike provisions of RCW 4.24.525, Wallin first had to prove that the City’s **claim** was “based on an action involving public participation and petition.” RCW 4.24.525(4)(b). As shown above, Wallin could not do so, and the trial court should have denied (but incorrectly did not deny) Wallin’s motion on that ground.

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<sup>32</sup> Cal C.C.P. §425.16(d) provides “[t]his section shall not apply to any enforcement action brought in the name of the people of California by the Attorney General, district attorney, or city attorney, acting as public prosecutor.”

If a claim is based on an action in public participation, the burden then shifts to the nonmoving party to show by clear and convincing evidence that it will prevail on the merits of the claim. *Id.* As discussed above in §§4.2, 4.3 and 4.4 of this brief, the City did so because:

- The Legislature delegated the subject of safety cameras to the City Council in RCW 46.63.170, and therefore Initiative No. 1 is outside the scope of the local initiative power – including §3 of Initiative No. 1
- The authorization and management of safety cameras by the City implements a plan set forth by the Legislature, and is therefore administrative action. Initiative No. 1 addresses that administrative subject and is outside the scope of the local initiative power for that independent reason – including §3.
- Section 3 of Initiative No. 1 attempts to authorize future special elections for advisory votes. The Legislature delegated calling special elections to the City Council in RCW 29A.04.330(2), and §3 is outside the scope of the local initiative power for that independent reason.
- Section 3 of Initiative No. 1 does not accomplish the fundamental *legislative* purposes of the proposed initiative, which are to repeal the City's safety camera ordinances, require supermajorities and voter approval for safety camera ordinances, and enact other limits on the operation and fines imposed by safety cameras. Because those issues predominate, §3 is not severable from the main provisions of Initiative No. 1.
- A requirement for future advisory votes is not a proper subject for initiatives.

For all those reasons, the City met its burden to show it would prevail on the merits of its claim.

Wallin claims that the City conceded his first special motion to strike (heard July 11, 2011) because the City did not file a written opposition and moved to voluntarily dismiss. Wallin is incorrect. The City did not need to respond in writing because the City's Complaint and motion for declaratory judgment were already on file and contained sufficient foundation on which the trial court could rely. The Complaint cited controlling legal authority and RCW 46.63.170. As explained above, the City filed its motion to voluntarily dismiss in order to save the taxpayers the cost of litigation regarding an initiative that had not obtained, and might not have obtained, sufficient signatures to qualify for the ballot. The City could have renewed its declaratory action had sufficient signatures been obtained.

Wallin also claims that he prevailed "in part" on his July 11 special motion to strike because the trial court ultimately (though wrongly) determined, on August 15, that §3 of Initiative No. 1 could be severed from the main body of the initiative and be placed on the ballot. As discussed above and in §4.4 of this brief, that decision by the trial court regarding §3 of Initiative No. 1 was clear legal error. But even if the trial court had been correct, and §3 were a valid subject for a local initiative, Wallin would not be prevailing because "nominal success" on a special

motion to strike does not make a party “prevailing” for an award of attorney fees and penalties. *Moran v. Endres*, 135 Cal. App. 4<sup>th</sup> 953, 37 Cal. Rptr. 3d 786 (2006) (attorneys’ fees not available where defendant was successful at striking only one of numerous causes of actions asserted by plaintiff); *see also Mann v. Quality Old Time Serv., Inc.*, 120 Cal App. 4<sup>th</sup> 90, 100, 15 Cal Rptr 3d 215 (2004), *affirmed*, 139 Cal App. 4<sup>th</sup> 328, 42 Cal. Rptr. 3d 607 (2006) (in resisting special motion to strike, plaintiff need only show a probability of prevailing “on any part of its claim”). The City prevailed at the trial on all principal elements of its Complaint; and the trial court properly denied relief under RCW 4.24.525.

In response to the City’s motion for reconsideration, asking the trial court to reconsider its August 15, 2011, decision regarding §3 of Initiative No. 1, Wallin filed a *second* special motion to strike. Wallin claimed that the City had asserted a new theory, but the City had not amended its Complaint to assert any new claims and the City’s theory was the same as the Complaint – that all of Initiative No. 1, including §3, were matters that the Legislature had specifically delegated to the City Council and were outside the local initiative power. The trial court correctly denied Wallin’s second special motion to strike. In addition to the reasons set forth above, that second special motion to strike was an unauthorized

motion for reconsideration in violation of CR 59. RCW 4.24.525 authorizes a (one) special motion to strike claims based on public participation and petition. The statute does not authorize a *second* special motion, unless the plaintiff's pleadings are amended to assert new claims.

In sum, Wallin did not meet his burden under the Washington anti-SLAPP statute to show that the City's claims, which did not seek to inhibit Wallin's public participation and petition, were based on actions in public participation. And the City more than met its burden to show a likelihood of prevailing on the merits of its declaratory judgment claim.

**4.7 RCW 4.24.525 Amends the Uniform Declaratory Judgment Act Without Reference, in Violation of the Washington Constitution.**

Under the Washington Constitution, no act may be revised or amended without reference to that act in the amendment. Wash. Constitution, Art. II, §37; *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996) (when reading a new statute, citizens and legislators must not be required to search out other statutes which are amended, but the statute must be complete in itself or show explicitly how it relates to statutes it amends). While courts need not reach constitutional issues when legislation may be interpreted to avoid those issues, the anti-SLAPP statute in RCW 4.24.525, as Wallin would have the Court interpret and

apply it, unlawfully amends the Uniform Declaratory Judgment Act (the “DJA”). Chapter 7.24 RCW.

Under the DJA, municipalities have the right to have questions of the validity of a proposed initiative or referendum determined by the Superior Court. RCW 7.24.020. The DJA is a remedial statute, and its purpose is to afford relief from uncertainty with respect to legal relations. RCW 7.24.120. It is to be liberally construed and administered. *Id.* Proceedings under the DJA are to be the same as any other civil action. RCW 7.24.090. With respect to costs, under the DJA the court “may make such award of costs as may seem equitable and just.” RCW 7.24.100.

For over 75 years, under the common law and more recently under the DJA, cities and counties have been authorized to determine the validity of proposed initiatives and referendums affecting their rights. RCW 7.24.525 has changed the DJA process without reference to that statute. As interpreted by Wallin, the City would no longer have any right to a declaratory judgment as it would have no standing until after an election were held. The proceedings under the DJA have been radically altered by RCW 4.24.525 to include stays of all discovery and special motions to strike – all of which change the Civil Rules – and which amends the

specific provisions of RCW 7.24.090 without the constitutionally required notice. The costs awardable under the DJA have also been amended by RCW 4.24.525, without notice. This Court should either hold that RCW 4.24.525 does not apply to declaratory actions to determine the validity of local initiatives brought by city attorneys or county prosecuting attorneys; or, that the statute as applied violates Washington Constitution, Art. II, §37.

#### **4.8 The City Has Standing to Bring Its Declaratory Action.**

This Court has recognized for over 75 years the right of local governments to seek a judicial determination of whether a proposed initiative or referendum is within the scope of the local initiative power. *E.g., Malkasian, 157 Wn.2d 251; Whatcom County v Brisbane, 125 Wn.2d 345, 884 P.2d 1326 (1994); Chelan County v Andersen, 123 Wn.2d 151, 868 P.2d 116 (1994).* Here, the City's Complaint was brought pursuant to the DJA, Chapter 7.24.RCW, and to enforce the City Municipal Code. The DJA's purpose is to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" and is "to be liberally construed and administered. RCW 7.24.120. The DJA affords relief to persons whose legal relations are affected, including municipalities. RCW 7.24.020; RCW 7.24.130.

A financial interest is sufficient for standing under the DJA. *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 493-94, 585 P.2d 71 (2002) (school district had standing because it would be financially affected). Washington courts recognize that local jurisdictions and taxpayers are financially burdened by having to place an initiative with unlawful subject matter on the ballot. *Save Our State Park v. Hordyk*, 71 Wn. App 84, 92, 856 P.2d 734 (1993).

This Court also recognizes that a city has standing under the DJA to challenge statutes or other law that would affect the city. Where there are issues of public importance, standing is liberally granted. *City of Seattle v. State*, 103 Wn.2d 663, 667–669, 694 P.2d 641 (1985). In the context of a DJA action regarding an initiative, a party has standing if the *result* of the initiative, if passed, would impair that party’s contract. *American Traffic Solutions*, 163 Wn. App. at 432–433.

In this case, the City has standing. Having to fund an election for an initiative whose subject matter is beyond the scope of the initiative power is a clear “injury in fact.” Initiative No. 1 would also have required the City to breach its contract with ATS and is a sufficient interest to confer standing. The City also has an interest in the enforcement of its own municipal code. Under the Longview Municipal Code, the local

initiative power is limited, and ordinances on subjects delegated to the City Council are not subject to initiative. LMC 1.35.020(10). The City alleged that its interest would be affected because Initiative No. 1 would “improperly interfere with the exercise of a power delegated by state law to a local legislative authority.”<sup>33</sup> That is a concrete and specific injury sufficient to confer standing, and Wallin’s claims otherwise have no merit.

#### **4.9 The City’s Claims Are Ripe for Adjudication.**

In order for a matter to be ripe for adjudication under the DJA, there must be a “present and existing dispute, or the mature seeds of one,” between parties with substantial and opposing interests, and a judicial determination would be final. *First United Meth. Church v. Hearing Examiner*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996) (dispute between city and church whose property was nominated for designation as historic landmark was ripe, even though designation process not complete). Even if a dispute is not yet ripe, the courts will grant relief under the DJA when the merits are unsettled and there is a continuing question of great public importance. *Ackerly Communications v. City of Seattle*, 92 Wn.2d 905, 912, 602 P.2d 1177 (1979). This Court should also recognize that ripeness is a prudential doctrine concerning whether the Court will exercise its

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<sup>33</sup> CP1 (City’s Complaint at ¶27).

jurisdiction; it does not affect the Court's actual subject matter jurisdiction. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 75–76, 768 P.2d 462 (1989).

In this case there was clearly an existing dispute between the City and the initiative sponsors, including Wallin. On May 25, 2011, after receiving signature petitions from the sponsors, the City Council passed Resolution 1991.<sup>34</sup> That resolution determined the Initiative No. 1 was invalid because it violated LMC 1.35.020 and directed the City to take no action to place Initiative No. 1 on any ballot in 2011. Wallin and the other initiative sponsors obviously thought there was an existing dispute with the City regarding Initiative No. 1 because Wallin *sued* the City to place the allegedly valid initiative on the ballot.<sup>35</sup> That same week, the City brought its declaratory action for a judicial determination of the validity of Initiative No. 1; and moved to consolidate the two lawsuits.<sup>36</sup>

At that date, there was obviously a dispute between the City and Wallin about the validity of Initiative No. 1. The parties were opposing on that issue, and the Court could reach a determination of the issue. Even if the issue had not been ripe for adjudication, the City's lawsuit (as admitted

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<sup>34</sup> CP7 (6/9/11 Davis Dec. at Ex. F).

<sup>35</sup> Cowlitz County Case No. 11-2-00607-8. CP6; CP12.

<sup>36</sup> CP6.

to by Wallin) addressed unresolved issues of public importance about the scope of the local initiative power with respect to safety cameras as allowed by RCW 46.63.170.

The out of context snippets of quotes from the cases cited by Wallin in his Opening Brief are both irrelevant and misleading. *First*, Wallin cites the Ninth Circuit for the supposed premise that ripeness is jurisdictional and must be measured at the time of the filing of the complaint. *Wilbur v. Locke*, 423 F.3d 1101 (2005), *overruled by, Levin v. Commerce Energy*, 130 S. Ct 2323 (2010).<sup>37</sup> But the *Wilbur* case did not involve a ripeness challenge, did not interpret Washington law, and only addressed whether a plaintiff had standing in federal court for purposes of Article III of the United States Constitution.

*Second*, Wallin cites a string of cases that are claimed to stand for the proposition that courts determine initiative matters only after sufficient signatures are gathered to qualify for the ballot.<sup>38</sup> All of those cases merely recite in their statement of the facts that sufficient signatures were gathered at some point. In the *City of Port Angeles* case, for example, the auditor found sufficient signatures **after the city's declaratory judgment**

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<sup>37</sup> Wallin's Opening Brief at 14–15.

<sup>38</sup> Wallin's Opening Brief at 15–16.

**case was filed** and the parties stipulated to forward the petitions to the auditor. *City of Port Angeles*, 170 Wn.2d at 7 (“The parties agreed to allow the auditor to count the signatures”). These cases do not establish any legal doctrine regarding ripeness.

*Third*, Wallin cites to *dicta* in the *Hordyk* and asserts a court cannot determine initiative validity prior to validation of sufficient signatures. *Hordyk*, 71 Wn. App. at 92. The issue in *Hordyk* was when the county auditor should determine whether a proposed initiative would violate the county code and had nothing to do with either the issue of ripeness or when the trial court should consider an issue.

Even if the *dicta* in *Hordyk* were applicable – that a court should not rule on initiative validity until sufficient, valid signatures are gathered to potentially place the initiative on the ballot – that is in fact what occurred in this case. Wallin had initially submitted over 800 more signatures than required, but over 47% of them proved to be invalid.<sup>39</sup> The sponsors were given more time by the auditor and submitted additional signatures. On July 11, 2011 (the same day initial motions were heard) the auditor determined there were sufficient signatures for Initiative No. 1. The hearing on the merits of the City’s motion for declaratory

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<sup>39</sup> CP29(7/7/11 Davis Dec. at Ex. A).

judgment was over five weeks later on August 15, 2011 – well after the auditor’s determination.

In sum, there was clearly an actual, existing controversy between the City and Wallin sufficient for the trial court to determine to exercise its jurisdiction. Moreover, as stated by Wallin himself, this case involves ongoing issues of public importance. Wallin’s argument that the City’s claims are not ripe has no merit.

**4.10 The City Has Not Violated Wallin’s Rights to Freedom of Speech and to Petition the Government.**

The **local** initiative power is not constitutionally guaranteed or protected, but is allowed by the Legislature. *City of Port Angeles*, 170 Wn.2d at 7–8; RCW 35A.11.080. Because there is no constitutional right to place a local initiative on the ballot, there are no constitutional implications when a city seeks judicial review of a local initiative’s validity.

In this case, the City’s Complaint did not seek to limit Wallin’s speech in any way. The case did not seek to stop Wallin from gathering signatures. The City did not seek to stop Wallin from submitting petitions. Because the City did not interfere with Wallin’s speech, and because Wallin has no constitutional right to put a local initiative on the ballot,

Wallin's allegations that the City violated his constitutional right to freedom of speech has no merit.

Wallin cites the *Coppernoll* case for the proposition that “substantive preelection review may also unduly infringe on free speech values.” *Coppernoll v Reed*, 155 Wn.2d 290, 298, 119 P.3d 318 (2005). That quotation from *Coppernoll*, taken out of context by Wallin, is irrelevant to this case for two independent reasons. *First*, the *Coppernoll* case involved a state-wide initiative, not a local initiative. State-wide initiatives are constitutionally protected. Wash. Constitution Art. II §1 (“the people reserve to themselves to power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature”). *Second*, the *Coppernoll* court was talking about pre-election “substantive” challenges to state-wide initiatives – i.e., challenges to the constitutionality or legality of the subject of the initiative itself. The *Coppernoll* court recognized that pre-election challenges to whether the initiative was within the initiative power were perfectly appropriate when the question is whether the initiative is legislative or administrative, or (for local initiatives) whether the Legislature delegated the subject matter to the legislative body of a city. *Coppernoll*, 155 Wn.2d at 297. *Coppernoll* validates the City's action in seeking a declaratory judgment on the

validity of a local initiative. Wallin's claims of constitutional violations have no merit.

## 5. CONCLUSION

The City of Longview respectfully requests the Court to affirm the trial court decision that Longview Initiative No. 1 is outside the scope of the local initiative power; to affirm the trial court rejection of Wallin's special motions to strike; to overturn the trial court decision that §3 of Initiative No. 1 is within the scope of the local initiative power; and, to overturn the trial court's decision denying the City's motions to voluntarily dismiss and for reconsideration.

RESPECTFULLY SUBMITTED this 25th day of January, 2012.

CITY OF LONGVIEW



Stephen C. Shuman, WSBA No. 13266  
Interim Longview City Attorney, and

FOSTER PEPPER PLLC

P. Stephen DiJulio, WSBA No. 7139

Roger A. Pearce, WSBA No. 21113

Associated Counsel for City of Longview

**ATTACHMENT A**  
**(July 11, 2011 letter from the Cowlitz County Auditor)**



KRISTINA K. SWANSON  
AUDITOR

County Administration Building  
207 Fourth Avenue North  
Kelso, WA 98626  
TEL (360) 577-3002  
FAX (360) 414-5552  
[www.co.cowlitz.wa.us/auditor](http://www.co.cowlitz.wa.us/auditor)

July 11, 2011

Hand delivered

City of Longview  
Ann Davis, Deputy City Clerk  
1525 Broadway  
Longview, WA 98632

Re: Certification of petition signatures, Longview Initiative Measure No. 1

Dear Ms. Davis,

The Cowlitz County Auditor's Office has reviewed the City of Longview petition, originally received June 16, 2011, resubmitted with additional pages on July 6, 2011, and has verified the accuracy and eligibility of the signatures submitted.

You asked us to certify the sufficiency of the petition based on "fifteen percent of the total number of names of persons listed as registered voters within the city on the day of the last preceding city general election." We find that 18,854 voters were registered in the City of Longview on the day of the November 3, 2009 General Election. As a result, the petition required 2,830 valid signatures to be sufficient.

**Having received over the required 2,830 valid signatures, the petition is found to be sufficient.**

The original petition is attached along with the summary report of our findings.

Please, feel free to contact me if you have any questions.

Sincerely,

KRISTINA K. SWANSON  
Cowlitz County Auditor

By: Amy Hair, Chief Deputy Auditor



Enclosures

Accounting  
(360) 577-3004

Auto Licensing  
(360) 577-3007

Elections  
(360) 577-3005

Marriage Licensing  
(360) 577-3003

Recording  
(360) 577-3006

**City of Longview Petition, Initiative Measure No. 1 – Received June 16, 2011**

**Petition Summary**

Total pages submitted: 847  
Total signatures submitted: 5,484  
Total signatures required: 2,830

Date submitted: June 16, 2011; July 6, 2011  
Date initial signature review completed: June 23, 2011  
Date second signature review completed: July 8, 2011

**Breakdown of signature review**

Signatures accepted as valid: **3,235**

Signatures challenged because the signer was <b>not registered to vote</b> :	<b>1,103</b>
Signatures challenged because the voter was <b>not registered to vote within the district</b> :	<b>788</b>
Signatures challenged because voter <b>signed more than once</b> :	<b>348</b>
Signatures challenged because <b>no signature</b> was on the petition:	<b>4</b>
Signatures challenged because the <b>signature did not match</b> :	<b>6</b>

Accounting  
(360) 577-3004

Auto Licensing  
(360) 577-3007

Elections  
(360) 577-3005

Marriage Licensing  
(360) 577-3003

Recording  
(360) 577-3006

**ATTACHMENT B**  
**(Chapter 11.04 Longview Municipal Code)**

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**Chapter 11.04  
AUTOMATED TRAFFIC SAFETY CAMERAS**

Sections:

- 11.04.020 Authority.
- 11.04.040 Definition.
- 11.04.060 Notice of infraction
- 11.04.080 Request for hearing.
- 11.04.100 Presumption of committed infraction – Presumption overcome.
- 11.04.120 Infractions processed.
- 11.04.140 Penalty for violation of infraction noted by automated traffic safety cameras
- 11.04.145 Authorization for use of electronic signatures.
- 11.04.150 Contracting for automated traffic safety camera equipment and operation and issuance and processing of infractions.
- 11.04.160 Nonexclusive enforcement.
- 11.04.180 Termination of authorization for use of automated traffic safety cameras.

**11.04.020 Authority.**

(1) Law enforcement officers of the city and persons commissioned by the chief of police for the city are authorized to use automated traffic cameras and related automated systems to detect one or more of the following: (a) stoplight violations, and (b) school speed zone violations.

(2) The use of automated traffic safety cameras is subject to the following restrictions:

(a) Use of traffic safety cameras is restricted to two arterial intersections and school speed zones only;

(b) Automated traffic safety cameras may only take pictures of the vehicle and vehicle license plate and only while an infraction is occurring. Pictures taken by automated traffic safety cameras may not reveal the face of the driver or of the passengers in the vehicle.

(3) Pursuant to RCW 46.63.170(1)(f), notwithstanding any other provision of law, all photographs, microphotographs, or electronic images prepared under this section are for the exclusive use of law enforcement in the discharge of duties under this section, are not available to the public and may not be used in a court in a pending action or proceeding unless the action or proceeding relates to a violation under this section. No photograph, microphotograph, or electronic image may be used for any purpose other than enforcement of violations under this section nor retained longer than necessary to enforce this section.

(4) The city shall clearly mark all locations where automated traffic safety cameras are in use by placing signs in locations that clearly indicate to a driver that he or she is entering a zone where traffic laws are enforced by an automated traffic safety camera. (Ord. 3130 § 1, 2010).

**11.04.040 Definition.**

For the purposes of this chapter, "automated traffic safety camera" means a device that uses a vehicle sensor installed to work in conjunction with an intersection traffic control system or a speed measuring device, and a camera synchronized to automatically record one or more sequenced photographs, microphotographs, or electronic images of the rear of a motor vehicle at the time the vehicle fails to stop when facing a steady red traffic control signal or exceeds a speed limit to a school speed zone as detected by a speed measuring device. (Ord. 3130 § 1, 2010).

**11.04.060 Notice of infraction.**

(1) Whenever any vehicle is photographed by an automatic traffic safety camera, a notice of infraction shall be mailed to the registered owner of the vehicle within 14 days of the violation, or to the renter of a vehicle within 14 days of establishing the renter's name and address under this section.

(2) If the registered owner of the vehicle is a rental car business, the law enforcement agency shall, before a notice of infraction is issued, provide a written notice to the rental car business that a notice of infraction may be issued to the rental car business if the rental car business does not, within 18 days of receiving the written notice, provide to the issuing agency by return mail.

(a) A statement under oath stating the name and known mailing address of the individual driving or renting the vehicle when the infraction occurred; or

(b) A statement under oath that the business is unable to determine who was driving or renting the vehicle at the time the infraction occurred; or

(c) In lieu of identifying the vehicle operator, the rental car business may pay the applicable penalty. Timely mailing of this statement to the issuing law enforcement agency relieves a rental car business of any liability under this chapter for the notice of infraction.

(3) The law enforcement officer issuing the notice of infraction shall include with it a certificate or facsimile thereof, based upon inspection of photographs, microphotos, or electronic images produced by an automated traffic safety camera, stating the facts supporting the notice of infraction. This certificate or facsimile is prima facie evidence of the facts contained in it and is admissible in a proceeding charging a violation under this chapter. (Ord. 3130 § 1, 2010).

**11.04.080 Request for hearing.**

A person receiving a notice of infraction based on evidence detected by an automated traffic safety camera may respond to the notice by mail. The person receiving the infraction may also request a hearing. (Ord. 3130 § 1, 2010).

**11.04.100 Presumption of committed infraction – Presumption overcome.**

(1) In a traffic infraction case involving an infraction detected through the use of a photo enforcement system under RCW 46.63.160 or detected through the use of an automated traffic safety camera under this chapter, proof that the particular vehicle described in the

notice of traffic infraction was in violation of any such provision of RCW 46.63.160, together with proof that the person named in the notice of traffic infraction was at the time of the violation the registered owner of the vehicle, constitutes in evidence a prima facie presumption that the registered owner of the vehicle was the person in control of the vehicle at the point where, and for the time during which, the violation occurred.

(2) This presumption may be overcome only if the registered owner states, under oath, in a written statement to the court or in testimony before the court that the vehicle involved was, at the time, stolen or in the care, custody, or control of some person other than the registered owner. (Ord. 3130 § 1, 2010)

**11.04.120 Infractions processed.**

Infractions detected through the use of automated traffic safety cameras are not part of the registered owner's driving record under RCW 46.52.101 and 46.52.120. Additionally, infractions generated by the use of automated traffic safety cameras under this section shall be processed in the same manner as parking infractions including RCW 3.46.120, 3.50.100, 35.20.220, 46.16.216 and 46.20.270(3). (Ord. 3130 § 1, 2010).

**11.04.140 Penalty for violation of infraction noted by automated traffic safety cameras.**

(1) The fine for infractions detected under authority of, and committed pursuant to, the provisions of this chapter shall be as follows:

(a) The penalty for a red light violation shall be \$124.00.

(b) The penalty for a school zone speed violation shall be as set forth in the following schedule:

MPH Over Posted Speed	Penalty Amount
1 – 10	\$124.00
11 – 15	\$144.00
16 – 20	\$184.00
21 – 25	\$244.00
26 or more	\$250.00

(c) Fees and penalties for failure to respond shall follow the standard court schedule for infractions.

(2) Revenue from fines assessed under authority of this chapter shall be used solely as outlined in the public safety fund, set forth in Chapter 3.60 LMC. (Ord. 3130 § 1, 2010).

**11.04.145 Authorization for use of electronic signatures.**

In connection with the traffic safety camera program, the police chief, or his or her designee, is authorized to utilize electronic signatures in accordance with the provisions of Chapter 19.34 RCW. (Ord. 3130 § 1, 2010).

**11.04.150 Contracting for automated traffic safety camera equipment and operation and issuance and processing of infractions.**

(1) The authority of this chapter extends to contracting with a private company for the acquisition, installation, calibration and maintenance of the systems and for the processing of infractions.

(2) In implementing the use of an automated traffic safety camera enforcement program, the compensation paid to the manufacturer or vendor of the equipment used must be based only upon the value of the equipment and services provided or rendered in support of the system, and may not be based upon a portion of the fine or civil penalty imposed or the revenue generated by the equipment. (Ord. 3130 § 1, 2010).

**11.04.160 Nonexclusive enforcement.**

Nothing in this chapter prohibits a law enforcement officer from issuing a notice of traffic infraction to a person in control of a vehicle at the time a violation occurs under RCW 46.63.030(1)(a), (b), or (c). (Ord. 3130 § 1, 2010).

**11.04.180 Termination of authorization for use of automated traffic safety cameras.**

The authorization granted by this chapter to use automated traffic safety cameras for issuance of notices of infraction for violations regarding obedience to traffic control devices shall expire on May 1, 2012, unless the city council takes legislative action to extend the authorization. (Ord. 3148 § 1, 2010; Ord. 3130 § 1, 2010).

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City Website: <http://ci.longview.wa.us/>  
City Telephone: (360) 442-5041  
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**ATTACHMENT C**  
**(Chapter 1.35 Longview Municipal Code)**

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**Chapter 1.35  
INITIATIVE AND REFERENDUM**

Sections:

- 1.35.010 Authorized.
- 1.35.020 Exceptions.
- 1.35.030 Alternate measure by city council.

**1.35.010 Authorized.**

It is declared that the qualified electors of the city shall have the powers of initiative and referendum as authorized by RCW 35A.11.080 (Ord. 2131 § 1, 1983).

**1.35.020 Exceptions.**

It is declared that the exercise of such powers of initiative and referendum shall be restricted to the extent it is legally possible to do so, including, but not necessarily limited to, the following:

- (1) Ordinances initiated by petition shall not be subject to referendum;
- (2) Ordinances necessary for immediate preservation of public peace, health and safety, or for the support of city government and its existing public institutions, provided such ordinances contain a statement of urgency and are passed by an unanimous vote of the council, shall not be subject to referendum;
- (3) Ordinances providing for local improvement districts shall not be subject to initiative or referendum except as otherwise provided by state law;
- (4) Ordinances appropriating money shall not be subject to initiative or referendum;
- (5) Ordinances providing for or approving collective bargaining shall not be subject to initiative or referendum;
- (6) Ordinances providing for the compensation or working conditions of city employees shall not be subject to initiative or referendum;
- (7) Ordinances authorizing or repealing the levy of taxes shall not be subject to initiative or referendum;
- (8) Ordinances requiring the expenditure of public funds which the city council determines to be an invasion of its inherent budgetary powers and/or not within sound fiscal management policies as applied to city funds and property shall not be subject to initiative or referendum;
- (9) Ordinances which are not general ordinances shall not be the subject of initiative or referendum. For purposes of this section only, general ordinances are defined as those ordinances having general application throughout the city;
- (10) Ordinances, where the power of the city to legislate on the subject matter is derived

from a grant of power by the state legislature directly to the city council or other corporate authorities as opposed to a grant of such power to the city as a corporate entity, shall not be subject to initiative or referendum;

(11) Ordinances, the subject matter of which is exempted now or hereafter by state law or judicial decision of the superior court of Cowlitz County or any appellate court of the state, shall not be subject to initiative or referendum. (Ord. 2131 § 1, 1983).

**1.35.030 Alternate measure by city council.**

In the event an initiative measure is properly presented to the city council, the council reserves the authority to submit a different measure dealing with the same subject matter as the initiative measure to the qualified electors for approval or rejection at the same election. (Ord. 2131 § 1, 1983).

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