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82225-5

No. 82225-5

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE and PROTECT OUR WATERS,
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

ANSWER TO PETITION FOR REVIEW

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1. IDENTITY OF RESPONDENTS AND INTRODUCTION

Respondents City of Port Angeles (“City”) and Washington Dental Service Foundation, LLC (“WDSF”) submit this joint Answer and request the Court to deny review of the decision of the Court of Appeals in *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008). A copy of the signed decision is attached as Appendix A, and page number references to the decision herein are to App. A.

This case concerns local initiative petitions filed with the City by two political action committees (“PACs”): Protect Our Waters (“POW”) and Our Water-Our Choice (“OWOC”). The thrust of those initiatives is to stop fluoridation of the City’s municipal water utility. This case is not about the merits of fluoridation, but only about whether the PACs’ initiatives are within the scope of the local initiative power.

The Court of Appeals decision is solidly founded on controlling Supreme Court precedent. Based on the undisputed facts found by the trial court, the Court of Appeals held that the proposed initiatives did not meet two of the three tests for determining whether a local initiative is within the scope of the local initiative power.

1.1 The Administrative Action Test.

The first test is whether an initiative's subject matter is legislative or administrative. Only legislative matters can be enacted by initiative.¹ Based on settled Supreme Court case law, the Court of Appeals held that the initiatives deal with administrative matters—how the City operates its proprietary municipal water utility. App. A at 6 – 8.

1.2 The Delegation to the Legislative Body Test.

The second test is whether the subject matter of an initiative is expressly delegated to the legislative body of the city rather than to the city as a corporate body. Matters expressly delegated to the legislative body are not subject to initiative.² Again relying on settled case law from the Supreme Court, the Court of Appeals held that the Legislature in RCW 35A.11.020 expressly delegated to city councils the operating and supplying of utility services, and that the PACs' initiatives would interfere with that expressly delegated authority. App. A at 10 – 13.

¹ *E.g., Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984); *Bidwell v. Bellevue*, 65 Wn. App. 43, 46-47, 827 P.2d 339, *review denied*, 119 Wn.2d 1023 (1992).

² *E.g., City of Sequim v. Malkasian*, 157 Wn.2d 251, 261-262, 138 P.3d 943 (2006); *Priorities First v. City of Spokane*, 93 Wn. App. 406, 411, 968 P.2d 431 (1998), *review denied*, 137 Wn.2d 1035 (1999).

1.3 The Substantive Invalidity Test.

The third test for local initiatives is whether the subject matter of the initiative is within the city's power to enact. This third test is sometimes called "substantive invalidity." For *statewide* initiatives, this "substantive invalidity" test is disfavored.³ The Supreme Court has held that statewide initiatives should be invalidated on preelection review for substantive invalidity only if the "fundamental and overriding purpose" of the initiative is beyond the broad authority of the Washington Legislature.⁴

For *local* initiatives, the Supreme Court has held that cities have limited powers, and if an initiative is outside the authority of a city to enact, it is outside the local initiative power.⁵ This "substantive invalidity" test for local initiatives is, however, not an issue in this petition for review, because the Court of Appeals declined to decide that issue:

[W]hile differences between state-wide and local initiatives arguably dictate that a court should employ different methods of preelection review, in this case it is unnecessary for us to decide this point. Both initiatives clearly fail because they are administrative in nature and improperly infringe on rights delegated by the legislature to the city council.

³ Washington Const., Art. 2, §1; see *Coppernoll v. Reed*, 155 Wn.2d 290, 298-300, 119 P.3d 318 (2005).

⁴ *Coppernoll*, 155 Wn.2d at 302; *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.2d 389 (1996).

⁵ *Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980); *Close v. Meehan*, 49 Wn.2d 426, 432, 302 P.2d 194 (1956).

App. A at 10.

2. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

2.1 Issue 1 (Restatement of Petitioner Issue 1). RCW 35A.11.020 specifically delegates “operating and supplying of municipal services” to the “legislative body” of the City. The Court of Appeals relied on settled Supreme Court precedent to hold that the PACs’ initiatives interfered with the City Council’s authority to manage its municipal water system. Does the Court of Appeals’ reliance on Supreme Court precedent raise an issue of substantial public interest that should be determined by the Supreme Court?

2.2 Issue 2 (Restatement of Petitioner Issue 2 and 5). City administrative decisions regarding additives to drinking water are done pursuant to a detailed regulatory plan adopted and administered by the State Department of Health and State Board of Health. The Court of Appeals relied on settled Supreme Court precedent to hold that the initiatives were administrative, not legislative, in nature. Is the decision of the Court of Appeals that the initiatives call for administrative actions, not legislative action, and therefore not subject to initiative an issue of substantial public interest that should be determined by the Supreme Court?

2.3 Issue 3 (Restatement of Petitioner Issue 3). In *Coppernoll v. Reed*,⁶ and later Supreme Court cases, the Court considered “fundamental and overriding purpose” of legislation only when applying the substantive invalidity test to statewide legislative initiatives. Did the Court of Appeals’ decision that the initiatives call for administrative actions, not legislative action, and therefore not subject to initiative, conflict with the Supreme Court when (a) that Court of Appeals holding applies to a local initiative relating to whether the proposed initiatives involve administrative actions; and (b) the trial court did not make any finding of the fundamental and overriding purpose of the PACs’ initiatives and were not requested by Petitioners to make any such finding?

2.4 Issue 4 (Restatement of Petitioner Issues 4, 5 and 1). The Court of Appeals decided that the initiatives are clearly beyond the scope of the local initiative power for two independent reasons: a) the initiatives are administrative in nature; and b) the initiatives interfere with the legislative body’s exclusive authority to operate and supply municipal utilities. The Court of Appeals made no decision as to the substantive invalidity of the initiatives. Is there an issue of substantial public interest that should be

⁶ 155 Wn.2d 290, 119 P.3d 318 (2005).

decided by the Supreme Court when that issue (substantive invalidity) was not necessary for or a basis of the Court of Appeals' decision?

3. RESPONDENTS' STATEMENT OF THE CASE⁷

3.1 The City's Establishment and Operation of Its Water Utility.

In 1924 the City established a municipal water system. RCP 210 - 213. The City owns and operates that water utility in its proprietary capacity.⁸ Over the years, the City has provided the water system for its citizens, operating under regulations of the Washington Department of Health, State Board of Health, and other regulatory agencies in treating the water and complying with state regulations . *Id.*

One of the tasks in operating and supplying a municipal water system is to decide what chemicals to add to the water, and balance those against naturally occurring chemicals. RCP 213. Another task is to comply with the comprehensive state regulation of water utilities. RCP 206 - 207; *see* Chapter 246-290 WAC. Those state regulations

⁷ Citations to the record are in the following form: Appellants Designation of Clerk's Papers ("ACP ___"); Respondent's Supplemental Designation of Clerk's Papers ("RCP ___"); Verbatim Report of Proceedings from the December 11, 2006, hearing on the merits ("VRP1 at ___ (line ___)"); and Verbatim Report of Proceedings from the January 19, 2007, presentation of the final order and judgment ("VRP2 at ___ (line ___)").

⁸ *See Kaul v. City of Chehalis*, 45 Wn.2d 616, 618, 277 P.2d 352 (1955) (municipality owning and operating a municipal water system is acting in its proprietary capacity).

include detailed rules about how and under what circumstances fluoride may be added to municipal water systems. WAC 246-290-460.

3.2 The City's Decision to Accept the Fluoridation System from WDSF.

In 2003, a group of local health care professionals in Port Angeles asked the City to consider fluoridation of the City's water supply.

RCP 132. In February 2003, after extensive research on fluoridation and after public hearing on the issues, the City Council passed a motion approving fluoridation of the City's water supply. The City conditioned its approval on the availability of assistance for the cost of equipment purchase and installation. RCP 133-144.

On March 2005, the City Council passed a motion to approve an agreement with WDSF to accept a fluoridation system. RCP 149; RCP 170-178. The Agreement obligated WDSF to construct and install a fluoridation system. The system would be given to the City at no cost, but subject to City repayment for construction costs if the City did not continue use of the system. *Id.*

The City's decision to accept the fluoridation system was challenged and upheld in *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 151 P.3d 1079 (2007). In that case, Division II specifically found that the decision to fluoridate

the public water supply was as an action taken under a program administered by the Washington Department of Health. *Id.* at 220 There was no appeal from that decision.

3.3 The PACs' Initiative Petitions Seek to Invalidate the City's Fluoridation Action and Impose Unmanageable Regulations on the City's Water Utility.

In September 2006, OWOC filed an initiative petition with the City for a proposed ordinance titled the Medical Independence Act. RCP 220-221. The proposed ordinance first defines fluoridation as "enforced medication" and then declares that fluoridation affects a "property right" and is "a takings" [sic]. The initiative would specifically overturn the City Council action approving fluoridation of the City's water supply, would require all fluoridation to cease; and would prohibit addition to the City water of any substance for the purpose of affecting bodily functions.

Also in September 2006, POW filed an initiative petition with the City for a proposed ordinance titled the Water Additives Safety Act. RPC 222-223. The Water Additives Safety Act purports to regulate substances added to drinking water. The POW proposal requires that no substance may be added to drinking water intended to affect physical or mental functions, unless the substance is approved by the U.S. Food and Drug Administration ("FDA"). The proposed ordinance makes no attempt

to reconcile this provision with the fact that the FDA does not regulate additives to drinking water.⁹ The initiative also requires all additives to be independently analyzed on a batch-by-batch basis, which is inconsistent with Washington Department of Health requirements;¹⁰ would place significant administrative burdens on the City's water utility operation, and, as with the OWOC petition, would require fluoridation of the City's water supply to cease.¹¹

3.4 The City Filed a Declaratory Judgment Action to Determine the Validity of the Initiatives.

On September 13, 2006, the City Council held a public meeting to consider the initiatives. ACP 164-166. Because of concerns about the validity of initiatives, the City Council authorized a declaratory judgment action. Shortly after the City's action was filed, the PACs filed a lawsuit, seeking to require the City to place the initiatives on the ballot. ACP 150-156; 179-188.

⁹ FDA MOU 225-79-2001. RPC 180-183; RPC 216-217. The FDA and the U.S. Environmental Protection Agency ("EPA") have agreed that the federal Safe Drinking Water Act of 1974 repealed FDA's authority "over water used for drinking water purposes" and that, as a result, the EPA has the authority to promulgate federal standards for drinking water additives. *See* Pub. L. 93-523.

¹⁰ *See* WAC 246-290.

¹¹ RCP 206 - 208.

3.5 The Trial Court and Appellate Court Decisions.

Based on undisputed facts, the trial court entered an oral ruling on December 11, 2006; and detailed findings and conclusions on January 19, 2007. The trial court held the initiatives beyond the scope of the local initiative power. VRP1 at 102 – 113; VRP1 at 2 – 23; ACP 25 – 35.

The PACs did not ask the trial court for a finding specifying the “fundamental and overriding purpose” of the initiatives. VRP2 at 2 – 23; ACP 36 – 49. The trial court itself did not enter a finding specifying the purpose of the initiatives. ACP 25 – 35. On appeal, the PACs did not assign error to the trial court for failure to make such a finding.

In its decision of January 15, 2008, the Court of Appeals upheld the trial court on two independent grounds: 1) the initiatives are invalid because they call for administrative actions, not legislative actions; and 2) the initiatives are invalid because they interfere with the operation and supply of utility service, which is a power expressly delegated by the legislature to the City’s legislative body. The Court of Appeals declined to decide whether the initiatives are within the power of the City to enact.

4. ARGUMENT

4.1 Considerations for Accepting Review:

Petitioners rely only on RAP 13.4(b)(1) and (4) in support of their claim for this Court’s review. Under RAP 13.4(b)(1) the Court grants

review only if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, but the Court of Appeals decision is directly supported by and is not in conflict with this Court's long-established precedent. Under RAP 13.4(b)(4) the Court grants review only if there is an issue of substantial public interest that should be determined by the Supreme Court. Here, again, the Court of Appeals has not addressed or decided issues that have not previously been decided by this Court. That decision does not give rise to an issue of substantial public interest that needs to be decided by this Court.

4.2 Under Settled Supreme Court Precedent, the PACs' Initiatives Interfere with Authority Expressly Granted to the City Council.

A local initiative is beyond the scope of the initiative power if it interferes with powers or functions that have been granted by the Legislature to the governing body of the city, rather than to the city as a corporate entity. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261-266, 138 P.3d 943 (2006) (initiative requiring revenue bonds to be subject to voter ratification interfered with the authority granted to the city's legislative body over revenue bonds); *Priorities First v. City of Spokane*, 93 Wn. App. 406, 410-411, 968 P.2d 431 (1998), *review denied*, 137 Wn.2d 1035 (1999) (initiative requiring vote prior to creating a public

development authority interfered with the authority granted to the city legislative body to create a special fund for municipal facilities).

In this case, the Court of Appeal held that the PACs' initiatives would interfere with the Port Angeles City Council's authority to operate and supply municipal water utility services, as granted specifically to the City Council by the Legislature in RCW 35A.11.020. That statute expressly grants to the "legislative body" of a code city the power of:

operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.

RCW 35A.11.020. The undisputed facts in this case showed that the PACs' initiatives would clearly interfere with the operation of the City's water utility.

The Court of Appeals relied on settled Supreme Court case law as the basis of its holding. *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2007) (referendum on critical area ordinance was invalid because Legislature had delegated GMA regulatory authority to local legislative body); see *City of Seattle v. Yes For Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1228 (2005) (even though other general authority to regulate creeks existed, initiative to zone creek areas impinged on authority to enact development regulations that was delegated to local legislative body). Because the

Court of Appeals decision is founded upon undisputed facts, and was based on settled and consistent precedent, there is no issue that needs to be determined by the Supreme Court.

4.3 Under Settled Supreme Court Precedent, the PACs' Initiatives Are Invalid Because They Are Directed at Administrative, Not Legislative, Subjects.

The local initiative power is limited to actions that are legislative in nature. Administrative actions are outside the initiative power. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1981). This Court's holdings are clear. 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. *Ruano*, 81 W.2d at 823-24; *Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984). Here, the Court of Appeals relied on that settled Supreme Court precedent to decide that the actions contemplated by the PACs initiatives are administrative.

The Legislature has charged the State Board of Health with establishing drinking water standards. RCW 43.20.050(2)(a); RCW 70.142.010. The Board of Health has adopted detailed standards for additives (including fluorides) to drinking water in Chapter 246-290 WAC. The City's standards for additives to its drinking water are administered under that detailed regulatory program adopted by a "power

superior to” the City. In the earlier case regarding fluoridation of the City’s water supply, the Court of Appeals expressly found that the City action was taken pursuant to a program administered by the Department of Health. *Clallam County Citizens*, 137 Wn. App. at 220. The PACs initiatives would regulate additives to public drinking water, an administrative action to be undertaken pursuant to a plan adopted by the Legislature and Board of Health. App A at 10 – 13.

The Court of Appeals decision was based on settled and consistent Supreme Court precedent. There is no issue in this case that needs to be determined by the Supreme Court.

4.4 The Court of Appeals Decision Does Not Conflict With the Supreme Court’s Holding in *Coppernoll*.

The Court of Appeals decision is not in conflict with *Coppernoll v. Reed*, 155 Wn.2d 290, 119 P.3d 318 (2005). The Court of Appeals properly recognized that the *Coppernoll* Court stated only that, when reviewing a statewide initiative to determine if it is within the state’s power to enact (the substantive invalidity test), the court should review the “fundamental and overriding purpose” of the legislative initiative. App. A at 5 – 6; *Coppernoll*, 155 Wn.2d at 303. The Supreme Court has never applied the “fundamental and overriding purpose” evaluation to determine whether a local government action is administrative of legislative.

The PACs request that this “fundamental and overriding purpose” review be extended beyond *Coppernoll* and incorporated into the distinct test that determines whether a city’s action is legislative or administrative (the administrative action test).¹² Such review has never been used by the Supreme Court outside the substantive invalidity test and has never been extended to the administrative action test for the validity of local initiatives. More recently, the Supreme Court decisions on statewide initiatives confirm the limited application of the “fundamental and overriding purpose” review:

If an initiative otherwise meets procedural requirements, is legislative in nature, and its “fundamental and overriding purpose” is within the State’s broad power to enact, it is not subject to preelection review.

Futurewise v. Reed, 161 Wn.2d 407, 411, 166 P.3d 708 (2007) (emphasis supplied). The Court of Appeals, recognizing the distinction, held that the legislative/administrative action test is a separate and different consideration from the substantive invalidity test; and a court may review more than merely the “fundamental and overriding purpose” of a local initiative when determining whether an initiative is legislative or

¹² As the Court of Appeals also noted, the trial court did not make any finding of the “fundamental and overriding purpose” of the initiatives, and Petitioners did not request such a finding, so there is no factual background to allow Court review of this issue. App. A at 6 (f.n .4).

administrative in nature. Accordingly, there is no conflict between the Court of Appeals decision and the Supreme Court's *Coppernoll* decision.

4.5 The Issue of Substantive Invalidity Was Not Decided by the Court of Appeals and Is Not Part of the Supreme Court's Review of the Court of Appeals Decision.

The Court's third test for *local* initiatives is whether the subject matter of the initiative is within the city's power to enact. This third test is sometimes called "substantive invalidity." The Court of Appeals expressly declined to decide this issue. App A at 8 – 10.

The Court of Appeals understood and discussed the Supreme Court's contrasting treatment of *statewide* initiatives and *local* initiatives under this "substantive invalidity" test.¹³ Because local governments have limited powers, the Supreme Court has held that a local initiative is outside the authority of a city to enact, it is outside the local initiative power. *Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980); *Close v. Meehan*, 49 Wn.2d 426, 432, 302 P.2d 194 (1956). This "substantive invalidity" test for local initiatives is, however, not an issue in this petition for review. The Court of Appeals specifically declined to decide that issue:

[W]hile differences between state-wide and local initiatives arguably dictate that a court should employ different methods of

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preelection review, in this case it is unnecessary for us to decide this point. Both initiatives clearly fail because they are administrative in nature and improperly infringe on rights delegated by the legislature to the city council

App. A at 10.

The Petition for Review asks the Court to decide an issue that was not decided, or necessary to be decided, below.

The PACs repeatedly invite this Court to address this issue and issue an advisory opinion about the preelection review of local initiatives for substantive invalidity. The Court should decline that invitation. *See Mathewson v. Gregoire*, 139 Wn. App. 624, 638, 161 P.3d 486 (2007) (merits of issues not decided below should not be addressed on appeal);

Moreover, consideration of this issue would not change the outcome of the case. The Court of Appeals declined to rule on the substantive invalidity issue because the initiatives were invalid under either of the Court's other two tests: administrative action and subject matter dedicated to the City Council. There was no reason to consider the substantive invalidity test. Any decision on that issue would be surplusage—the initiatives are invalid regardless of what the Court might decide about the substantive invalidity test. The same will still be true if this Court were to make an advisory ruling on the issue.

Further, under the Rules of Appellate procedure, the Supreme Court addresses only issues not determined by the Court of Appeals when it reverses a decision by the Court of Appeals. RAP 13.7(b). This case is not at the stage of being upheld or reversed, but at the stage of petition for review. In considering a petition for review, the Court should consider only the issues actually decided by the Court of Appeals, and whether *those* issues in the Court of Appeals decision meet the standard for accepting review. The Court of Appeals actually decided that the initiatives were invalid under the other two tests: administrative action and subject matter dedicated to the City Council. Those issues decided in the Court of Appeals decision do not meet the standard for accepting review.

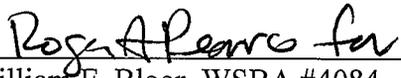
5. CONCLUSION

In this case, the considerations governing acceptance of review are not met. The issues decided by the Court of Appeals are clearly based on settled Supreme Court case law. There is no conflict between the Court of Appeals decision and any decision of the Supreme Court. The Court of Appeals decision does not present an issue of substantial public interest to be determined by the Supreme Court. For these reasons, Respondents City of Port Angeles and Washington Dental Service Foundation, LLC,

respectfully request the Court to deny the Petition For Review submitted
by Petitioners.

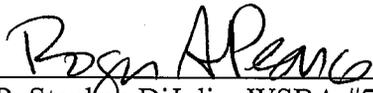
RESPECTFULLY SUBMITTED this 10th day of November 2008.

WILLIAM E. BLOOR, PORT ANGELES
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APPENDIX A

FILED
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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF PORT ANGELES,

Respondent,

v.

OUR WATER-OUR CHOICE; and PROTECT
OUR WATERS,

Appellants,

v.

WASHINGTON DENTAL SERVICE
FOUNDATION, LLC,

A Party in Interest,

No. 36935-4-II

PUBLISHED OPINION

PENOYAR, J. — Our Water-Our Choice and Protect Our Waters, appeal a trial court decision ruling their initiatives invalid. Both initiatives deal with controlling additives to Port Angeles' public water supply. Courts do not review initiatives for whether the proposed law is good public policy but do review initiatives for whether they would be lawful if approved. Unlike statewide initiatives, trial courts review the substance and nature of local initiatives before they are submitted to the voters because local initiatives must be consistent with federal and state laws. The trial court found the initiatives invalid because they were administrative in nature, they exceeded local initiative power because the legislature specifically delegated

authority to operate the city water system to the city council, and the city had no power to enact ordinances such as those represented by the initiatives. We agree with the trial court and hold the initiatives invalid.

FACTS

In 2003 the Port Angeles City Council decided to fluoridate the City's water system at the urging of local health care professionals. In 2005, the council passed a motion approving a contract with the Washington Dental Service Foundation (WDSF). The contract provided that WDSF would construct and install a fluoridation system, and the city agreed to operate the system for 10 years or pay the foundation \$343,000 for the system. Clallam County Citizens for Safe Drinking Water challenged the council's decision that the fluoridation system was categorically exempt from environmental review under the State Environmental Policy Act. We ultimately upheld the council's decision in a previous appeal. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 220, 151 P.3d 1079 (2007).

Meanwhile, each of the appellants in this case filed an initiative, the effect of which, if enacted, would prohibit the city from adding fluoride to the public water supply. The Our Water-Our Choice initiative, the "Medical Independence Act," would prohibit the city from adding to the water supply any substance designed to treat mental or physical disease or which would affect the function or structure of the human body. Appellant's Clerk's Papers (ACP) at 10-11. The Protect Our Waters initiative, the "Water Additives Safety Act," would criminalize the addition of any substance intended to treat or affect the mental or physical health of a person

unless the Food and Drug Administration specifically approved the substance for use in public water systems.¹ ACP at 12-13.

Port Angeles (City) filed a declaratory judgment action, asking the trial court to rule that the initiatives were beyond the local initiative power. The Committees responded with a mandamus action seeking an order requiring the City to place the initiatives on the ballot. The parties agreed to consolidate the actions and try the case on undisputed facts.² The trial court ruled that the City's decision to fluoridate the water was administrative and thus beyond the local initiative power. The trial court also concluded that the initiatives exceeded the local initiative power because the legislature specifically delegated to the city council the authority to operate the city water system, and because the City had no power to enact ordinances such as those represented by the initiatives.

The Committees sought direct review by the Supreme Court, which declined to grant review and transferred the case to us.

ANALYSIS

I. PREELECTION REVIEW OF INITIATIVE

The Committees challenge the trial court's conclusions of law and its judgment based on those conclusions of law. At trial, the court determined that both initiatives were invalid because (1) they sought to regulate matters administrative in nature, (2) they improperly interfered with

¹ Our Water-Our Choice and Protect Our Waters will be collectively referred to as "Committees" in this opinion.

² Both county superior court judges recused themselves, and Judge Karlynn Haberly from Kitsap County was appointed as a visiting judge.

the City's legislatively granted right to operate the public water system, and (3) they exceeded the City Council's lawmaking authority.

A. Standard of Review

We review issues of law de novo. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994).

Preelection review of an initiative is disfavored, but appropriate when the initiative is beyond the scope of the initiative power. *Coppernoll v. Reed*, 155 Wn.2d 290, 301, 119 P.3d 318 (2005). An initiative is generally within the initiative power if it meets two requirements: It is "legislative in nature," and it would enact a "law that is within the [state/city's] power to enact." *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007); *Coppernoll*, 155 Wn.2d at 302; *see also Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.2d 389 (1996). Generally, an act is "legislative" if it creates a new policy or plan, while an act is only "administrative" if it "merely pursues a plan already adopted by the legislative body itself, or some power superior to it." *Bidwell v. City of Bellevue*, 65 Wn. App. 43, 46, 827 P.2d 339 (1992) (quoting *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 748, 620 P.2d 82 (1980)); *see also Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984); *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973).

Additionally, initiative rights do not extend to matters that state law delegates exclusively to local legislative authorities. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 264, 138 P.3d 943 (2006); *Whatcom County v. Brisbane*, 125 Wn.2d 345, 350, 884 P.2d 1326 (1994). With respect to the power to enact a law, a state initiative must be within "the scope of the state legislative power." *Coppernoll*, 155 Wn.2d at 301. Local initiatives, in turn, must be within the *local* legislative power.

B. Fundamental and Overriding Purpose

The Committees urge us to hold that the trial court erred in its conclusions of law by reviewing more than just the “fundamental and overriding purpose” of the initiative to determine both whether they are legislative and whether their purpose is within the City’s power to enact. Appellant’s Br. at 20. The Committees argue that per *Coppernoll*, the court must limit its preelection inquiry to only the “fundamental and overriding purpose of the initiative”:

In *Philadelphia II*, we used a two part test to determine whether the initiative exceeded the legislative power. ‘[I]n order to be a valid initiative, [an initiative] must be legislative in nature and enact a law that is within the [jurisdiction’s] power to enact.’ . . . We looked at the ‘fundamental and overriding purpose’ of the initiative rather than mere ‘incidentals’ to the overriding purpose.

Coppernoll, 155 Wn.2d at 302 (citations omitted).

The Committees argue that *Coppernoll*’s use of “fundamental and overriding purpose” extends to the court’s entire review of an initiative, and that this standard applies not only to determine whether the initiative is within the city’s power to implement, but also to decide the legislative/administrative issue. *Coppernoll* does state that when reviewing a state-wide initiative to determine if it is in the state’s power to enact, the court should review only the “fundamental and overriding purpose” of the initiative. 155 Wn.2d at 303. A close reading of *Coppernoll* reveals that the court does not suggest that the same “fundamental and overriding purpose” test applies in determining whether an initiative’s purpose is legislative in nature. Instead, the opinion connects the “fundamental and overriding purpose” language solely to the

determination of whether the initiative is within the State's power to enact.³ 155 Wn.2d at 303.

This reading of *Coppernoll* is further confirmed by the Washington Supreme Court's subsequent decision in *Futurewise v. Reed*, where it states:

If an initiative otherwise meets procedural requirements, is legislative in nature, and its "fundamental and overriding purpose" is within the State's broad power to enact, it is not subject to preelection review.

161 Wn.2d at 411 (citing *Coppernoll*, 155 Wn.2d at 302-03).

In sum, an initiative must be both legislative in nature and within the locality's power to enact. After examining *Coppernoll* and *Futurewise*, it is clear that a court may review more than the "fundamental and overriding purpose" of the initiative when determining whether it is legislative or administrative in nature.⁴

C. The Committees' Initiatives are Administrative in Nature

Public water systems operate under a complex regulatory scheme. The federal Environmental Protection Agency (EPA), through its Office of Ground Water and Drinking Water, regulates all public water systems in the United States under the Safe Drinking Water Act

³ In *Coppernoll* there was no question that the initiative was legislative in nature. Thus, *Coppernoll* concludes: "In adherence to our prior decisions, we therefore restrict analysis of I-330 to determining if its 'fundamental and overriding purpose' is within the state's power to enact." *Coppernoll*, 155 Wn.2d at 303. The court makes no similar assertion for determination of whether an initiative is legislative or administrative.

⁴ Additionally, we note that the trial court did not make a finding as to the fundamental and overriding purpose of the initiatives, and the Committees did not request that the court make one. Only now do they assert that the fundamental purpose of their initiatives is to "prohibit pollution of all public water systems serving [Port Angeles] and to protect health and safety" of its citizens by either prohibiting the addition of medications to the water supply or by strictly monitoring those medications deemed appropriate. Appellant's Br. at 21. This is an assertion which the City challenges by noting that the purpose of the initiatives is to "halt fluoridation of the City's water supply." Resp't's Br. at 18. The trial court is the proper body to determine the initiatives' purpose, though, for our purposes, such a determination of fundamental and overriding purpose is unnecessary as the initiatives fail on other grounds.

(Act). The EPA sets national standards for drinking water, but generally, the direct oversight of public water systems is conducted by the states. Under the Act, a state can apply to implement the Act by agreeing to set standards at least as stringent as the federal standards and then enforce those standards.

The EPA granted Washington primacy to implement the Act (primacy has been granted to all but one state). See RCW 70.119A.080 (Department of Health ensures compliance with Safe Drinking Water Act). The State Board of Health is charged with regulating the purity of public water systems. RCW 43.20.050(2)(a). The legislature created a single exception, allowing the local health departments in every county with a population larger than 125,000 to “establish water quality standards for its jurisdiction more stringent than standards established by the state board of health,” should it choose to do so. RCW 70.142.040. This statute, however, does not apply here.⁵

Given this legal framework, the trial court’s determination that the Committees’ initiatives are administrative in nature is correct. Each initiative would regulate additives to Port Angeles’ public water system. The Committees argue that the initiatives merely add new restrictions not already found in the regulatory scheme and thus create new law (i.e. legislative, not administrative). This argument fails. Under the Department of Health’s regulatory scheme, the test here is whether the only decisions left are administrative in nature. *Ruano*, 81 Wn.2d at 824-25.

As we previously held in *Clallam County Citizens*, the City’s initial proposal to fluoridate its water was an action under a program administered by the Department of Health. 137 Wn.

⁵ Port Angeles is not a county and does not have more than 125,000 residents.

App. at 220. The Department of Health has authority under RCW 70.119.050 to adopt rules and regulations relating to public water systems. Decisions by local water companies about which chemicals to add to public water systems are administrative in nature because those decisions merely implement plans already adopted and supervised by the Health Department. WAC 246-290.⁶ Here, the City itself lacks the authority to add additional legal restrictions; thus, any decisions regarding the purity of public water systems are administrative in nature.

Additionally, the Committees argue that their initiatives are legislative in nature because the City itself does not have an ordinance expressly setting permissible maximum levels for drinking water additives and testing methods. Thus, they argue, their proposed initiatives must be legislative because they would set local maximum levels for fluoride and other additives as well as provide testing standards for those additives. This argument also fails. The standard is not whether the City itself has adopted a plan regulating the additives, but whether a plan has already been adopted "by the legislative body [of the city] itself or some power superior to it." *Heider*, 100 Wn.2d at 876. Here, both the Washington Legislature and the Washington Board of Health are powers superior to the City and their comprehensive regulations constitute a plan regulating additives to public drinking water. Thus, the City's actions implementing that general plan are administrative, not legislative. Since the initiatives seem to pursue/affect a plan already in place, they are administrative in nature and therefore invalid.

D. Initiatives Not Within the City's Power to Enact

The trial court ruled, additionally, that the initiatives were not within the City's power to enact. The Committees argue that the trial court erred in this conclusion as it should not have

⁶ This WAC describes all of the rules and regulations a public water system provider must comply with.

looked beyond the fundamental and overriding purpose of the initiatives in making its conclusion. They argue that by looking only at the overriding purpose, the measures are within the City's power to enact. The City disagrees, noting that though this State has adopted the method of reviewing only the fundamental and overriding purpose of an initiative—to determine whether a state has the power to enact a *state-wide* initiative—it has not extended this test to review of local initiatives.

The City is correct that the Supreme Court has not yet discussed limiting their preelection review of local initiatives (to determine whether they are within a city's power to enact) to only the fundamental and overriding purpose of the initiative. The City argues that we should not extend the "fundamental and overriding purpose" test to preelection review of local initiatives because of the basic differences in the right of initiative between state-wide and local initiatives.

Though the right to state-wide initiative is protected by our state constitution, there is no similar constitutional protection or right of local initiative. WASH. CONST. art. II, § 1. The legislature did not grant optional initiative powers in noncharter code cities, such as Port Angeles, until 1973. RCW 35A.11.080; 1973 Wash. Laws, 1st Ex. Sess. Ch. 81 § 1. Besides this basic difference, there is a practical difference between the two types of initiatives that warrants different types of preelection review.

Where a state-wide initiative creates new state law, binding upon all, a local initiative can only create new law that is not inconsistent with or inapposite to state and federal law. *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747. Where substantive review of a state-wide initiative is inappropriate, a similar review for a local initiative is warranted given the greater restrictions placed upon them. The City properly cites to several cases where the Washington Supreme Court has undertaken a substantive review of local initiatives or referendums to

determine whether they were within the cities' power to enact. *See Seattle Bldg. & Const. Trades Council*, 94 Wn.2d 740 (local initiative purporting to prohibit bridge across Lake Washington in the City of Seattle was beyond the scope of the local initiative power because it was inconsistent with the exclusive method provided in chapter 47.52 RCW for determining location of limited access routes); *Close v. Meehan*, 49 Wn.2d 426, 430-32, 302 P.2d 194 (1956) (local initiative that would have changed the site for a proposed sewage treatment plant was beyond the scope of the local initiative power because it violated the sewage treatment plant planning requirements of RCW 80.40.070).

Though both cases are on point, they were both decided by the court well in advance of its decisions discussing preelection review of the fundamental and overriding purpose of initiatives.⁷ Furthermore, while differences between state-wide and local initiatives arguably dictate that a court should employ different methods of preelection review, in this case it is unnecessary for us to decide this point. Both initiatives clearly fail because they are administrative in nature and improperly infringe on rights delegated by the legislature to the city council.

E. Delegation to City Legislative Body

The trial court correctly determined that the initiative power does not extend to regulating public water systems because the legislature granted city legislative bodies the power to operate water utilities. *See* RCW 35A.11.020 ("The legislative body of each code city shall have all

⁷ The court decided *Philadelphia II* in 1996, *Coppernoll* in 2005, and *Futurewise* in 2007.

powers . . . [necessary for] operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.”).⁸

As the Washington Supreme court recently explained in *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 174, 149 P.3d 616 (2006), when the legislature clearly delegates power to a local legislative body as opposed to the city as a whole, referendums and initiatives that attempt to limit or modify that power are beyond the initiative power. The *1000 Friends* court reaffirmed its holding in *Brisbane*, 125 Wn.2d 345, that the legislature granted the local legislative body the power to implement the Growth Management Act (GMA), and thus local citizens may not exercise the referendum or initiative power to limit, modify, or overturn a local legislative body’s actions under the act. *1000 Friends*, 159 Wn.2d at 174-75. Likewise, zoning decisions cannot be made by referendum or initiative because that power was expressly delegated to the local legislative body. *Lince v. City of Bremerton*, 25 Wn. App. 309, 312-13, 607 P.2d 329 (1980). The legislature in RCW 35A.11.020 clearly delegated the authority to operate a municipal water system to local legislative bodies rather than local municipal corporations. This delegation placed the operation of a municipal water system beyond the initiative power.⁹

The Committees urge us to discount the grant of power through RCW 35A.11.020, and instead find that the initiative is valid because the corporate city has the power to regulate water pollution through its police power. Chapter 35.88 RCW. Division One found a similar argument

⁸ It is well settled that in the context of statutory interpretation, a grant of power to a city’s governing body (“legislative body”) refers exclusively to the mayor and city council and not the electorate. *City of Sequim*, 157 Wn.2d at 266.

⁹ WAC 246-290 dictates how a municipal/public water system should be run. It further dictates water quality standards and testing procedures.

in *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004), unpersuasive. Similarly, we are not persuaded by the Committees' argument in this case.

In *Yes for Seattle*, creek protection activists proposed an initiative to place development restrictions on property near creeks. The court held that this was a development regulation as defined by the GMA and that the legislature had granted authority to a city's legislative body to enact GMA development regulations, not to the city as a corporate body. 122 Wn. App. at 389. The activists argued that besides the GMA, there were broad grants of authority to cities generally for regulating creeks. For example, RCW 35.21.090 granted authority to cities to manage watercourses; RCW 35.31.090 granted authority to cities to regulate pollution in streams; and article XI, section 11 of the Washington Constitution granted authority to cities to make all regulations not inconsistent with state laws. *Yes for Seattle*, 122 Wn. App. at 392. Division One held that these grants of authority were not controlling, because the creek activists' proposed initiative would interfere with the legislature's *specific* grant of power to the legislative body of the city to enact development regulation. *Yes for Seattle*, 122 Wn. App. at 392.

As with the GMA, the legislative grant of authority to the legislative body of the city to "[operate] and [supply] utilities" is explicit. RCW 35A.11.020. The legal test for the validity of a local initiative is not whether some general law might supply authority to the city as a corporation, but whether the 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). Put another way, the people cannot deprive the City's legislative authority of the power to do what the constitution and/or a state statute specifically permit it to do. *King County v. Taxpayers*, 133 Wn.2d 584, 608, 949 P.2d 1260 (1997). To allow the initiatives to proceed on the basis of police power, or some other general theory, would

be to undermine the legislative grant of authority to the local legislative body and the complex regulatory scheme public water systems operate under.¹⁰

III. ADDITIONAL FINDINGS OF FACT

The Committees assign error to the trial court's failure to adopt an additional finding of fact at presentment on January 19, 2007. This proposed finding of fact, 3.20, reads: "There are other public water systems besides the Port Angeles municipal water system that provide water service in the City of Port Angeles." Appellant's Br. at 13. Instead of asking us to hold that the trial court abused its discretion in not including the finding of fact, the Committees encourage us to adopt the missing finding of fact on our own. We decline to address this as it would not change our decision that the initiatives are administrative and beyond the scope of initiative power.

IV. ELECTION SHOULD NOT BE ORDERED

Because the trial court ruled properly that the initiatives are invalid, we will not issue a decree pursuant to RCW 35.17.290 to place the initiatives on the ballot.

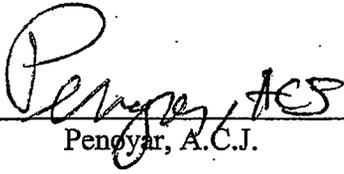
V. ATTORNEY FEES

The Committees request attorney fees and costs should they prevail on appeal. The City (and WDSF) does not make a request for fees. Since the City prevailed on appeal, it is entitled to costs and the Committees are not. RAP 18.1.

¹⁰ The Committees urge us to "harmonize" RCW 70.142.040 with chapter 35.88 RCW. Appellant's Reply Br. at 5. Given the explicit grant of power, harmonizing the statutes is unnecessary.

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We affirm the trial court.

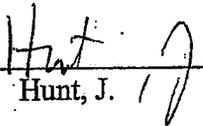


Penoyar, A.C.J.

We concur:



Houghton, J.



Hunt, J.