

original

36935-4
No. 79812-5

82225-5
SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES,

Respondent,

v.

OUR WATER-OUR CHOICE, and PROTECT OUR WATERS,

Appellants,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC

Respondent.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
07 AUG 21 AM 7:53
BY RONALD R. CANEENTER
CLERK

BRIEF OF RESPONDENTS

P. Stephen DiJulio
Roger A. Pearce
Attorneys for Respondent
Washington Dental Service
Foundation, LLC

William E. Bloor
Attorney for Respondent City of
Port Angeles

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Telephone: (206) 447-4400
Facsimile No.: (206) 447-9700

PORT ANGELES CITY ATTORNEY
321 East Fifth Street / P.O. Box 1150
Port Angeles, WA 98362-0217
Telephone: (360) 417-4530
Facsimile No.: (360) 417-4529

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
A. Background – the Political Action Committees’ Initiatives to Impose Controls on the City’s Water Utility.	1
B. The Trial Court Decision Relied on Settled Precedent Under the Three Independent Tests for the Scope of the Local Initiative Power.	2
1. The Administrative Action Test.	2
2. The Delegation to the Legislative Body Test.	3
3. The Substantive Invalidity Test.	3
C. The Political Action Committees Invite the Court to Overturn Established Precedent.	5
II. STATEMENT OF THE CASE.	6
A. The Parties to This Case.	6
B. The City’s Establishment and Operation of Its Water Utility.....	6
C. The City’s Decision to Accept the Fluoridation System from WDSF.	7
D. The Political Action Committees’ Initiative Petitions Seek to Invalidate the City’s Fluoridation Action and Impose Stringent Regulations on the City’s Water Utility.....	9
E. The City Filed a Declaratory Judgment Action to Determine the Validity of the Initiatives.	11
F. The Political Action Committees Filed a Competing Lawsuit, and the Parties Entered Into a Stipulation to Facilitate an Early Hearing.	11
G. The Trial Court Hearing and Detailed Decision.	12
H. There Is No Finding that Determines the “Fundamental and Overriding Purpose” of the Two Initiatives.	13
I. At Presentment, the Trial Court Rejected Additional Evidence Offered One Month After Trial by the Political Action Committees.....	14

III. ARGUMENT	14
A. Procedural Issues.....	14
1. The Political Action Committees Failed To Assign Error To The Trial Court’s Ruling Excluding Their Evidence of Other Water Providers.....	14
2. The Political Action Committees Failed to Request a Finding On What Is the “Fundamental And Overriding Purpose” of the Initiatives.....	18
B. The Court Should Not Accept the Political Action Committees’ Invitation to Create an Entirely New Test Applicable to Local Initiatives.	20
C. The Trial Court Correctly Held That the Political Action Committees’ Initiatives Are Beyond the Scope of the Local Initiative Power.	24
1. The Political Action Committees’ Initiatives Are Invalid Because They Address Administrative Subjects.....	24
a. Congress Set the Framework for Additives to Drinking Water in the Safe Drinking Water Act.	27
b. The EPA Set Drinking Water Standards With Which All Public Water Systems Must Comply.....	28
c. The Washington Legislature Required the Washington Board of Health to Establish Drinking Water Standards for All Washington Public Water Systems.	28
d. The Board of Health Has Adopted Detailed State Drinking Water Standards and Procedures Consistent with Federal Law.	28
e. Only Counties Over a Certain Population May Adopt “Local” Drinking Water Quality Standards Stricter Than the State Board of Health Standards.....	29
f. The City Established a Drinking Water Utility In Compliance With Federal and State Regulation.....	30

2.	The Political Action Committees’ Initiatives Are Invalid Because They Interfere With the City’s Power to Operate and Supply Utility Services, Which Is a Power Expressly Delegated to the Legislative Body of the City.....	33
a.	The Existence of General Authority Is Irrelevant if the Proposed Initiative Would Interfere With Powers Granted Exclusively to the City Council.....	34
b.	Chapter 70.142 RCW Does Not Grant Cities Authority to Set Water Quality Standards for Drinking Water.	37
3.	The Political Action Committees’ Initiatives Are Invalid Because They Propose Actions That Conflict with State Laws and the State Constitution.....	40
a.	The Political Action Committees’ Initiatives Are a Substantial Impairment of Contract.	42
b.	The Political Action Committees’ Initiatives Are Inconsistent With State Law and With Controlling Regulations of the Washington Board of Health.	44
c.	The OWOC Initiative Would Unconstitutionally Transfer Property Rights of the City’s Water Utility to Residents.....	47
IV.	CONCLUSION	49

TABLE OF AUTHORITIES

CASES

<i>1000 Friends of Washington v. McFarland</i> , 159 Wn.2d 165, 149 P.3d 616 (2007).....	35, 36
<i>Bidwell v. Bellevue</i> , 65 Wn. App. 43, 827 P.2d 339 (1992).....	3, 17, 24, 25, 32, 43
<i>City of Seattle v. Yes For Seattle</i> , 122 Wn. App. 382, 93 P.3d 176 (2004).....	35, 36, 45, 46, 47
<i>City of Sequim v. Malkasian</i> , 157 Wn.2d 251, 138 P.3d 943 (2006).....	3, 18, 33
<i>Clallam County Citizens for Safe Drinking Water v. City of Port Angeles</i> , 137 Wn. App. 214, 151 P.3d 1079 (2007).....	8, 9, 13, 26, 44
<i>Close v. Meehan</i> , 49 Wn.2d 426, 302 P.2d 194 (1956).....	4, 23, 40, 41
<i>Coppernoll v. Reed</i> , 155 Wn.2d 290, 119 P.3d 318 (2005).....	4, 20, 21, 22, 24, 42
<i>Heider v. City of Seattle</i> , 100 Wn.2d 874, 675 P.2d 597 (1984).....	3, 17, 20, 25, 31
<i>Kaul v. City of Chehalis</i> , 45 Wn.2d 616, 277 P.2d 352 (1955).....	6
<i>Louthan v. King County</i> , 94 Wn.2d 422, 617 P.2d 977 (1980).....	48
<i>Northlake Marine Works, Inc. v. City of Seattle</i> , 70 Wn. App. 491, 857 P.2d 283 (1993).....	48
<i>Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health</i> , 151 Wn.2d 428, 90 P.3d 37 (2004).....	17, 47
<i>Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health</i> , 151 Wn.2d 428, 90 P.3d 37 (2004).....	18, 47
<i>Philadelphia II v. Gregoire</i> , 128 Wn.2d 707, 911 P.2d 389 (1996).....	4, 20, 21
<i>Priorities First v. City of Spokane</i> , 93 Wn. App. 406, 968 P.2d 431 (1998).....	3, 18, 33, 34, 37

<i>Ruano v. Spellman</i> , 81 Wn.2d 820, 505 P.2d 447 (1981).....	24, 25, 32, 43
<i>Seattle Building and Construction Trades Council v. City of Seattle</i> , 94 Wn.2d 740, 620 P.2d 82 (1980).....	4, 22, 23, 24, 25, 40, 41, 42
<i>State v. Moore</i> , 7 Wn. App. 1, 6, 499 P.2d 16	18
<i>State v. Shelby</i> , 69 Wn.2d 295, 418 P.2d 246 (1966).....	18
<i>Thornton Creek Legal Defense Fund v. City of Seattle</i> , 113 Wn. App. 34, 69, 52 P.3d 522 (2002).....	39
<i>United and Informed Citizen Advocates Network, v. Washington Utilities and Transportation Commission</i> , 106 Wn. App. 605, 24 P.3d 471 (2001).....	15

STATUTES

Pub. L. 93-523	10
42 U.S.C. § 300g-1(b)(1)(A)	28, 46
Chap. 43.20 RCW.....	26
Chap. 43.70 RCW.....	27
RCW § 35.21.090	35
RCW § 35.31.090	35
RCW § 35.88.010.....	36
RCW § 35A.11.020	34, 36, 37, 38
RCW § 43.20.050	27
RCW § 43.20.050(3)	27, 29
RCW § 43.70.130	27
RCW § 47.52	22
RCW § 70.05.010(3)	39
RCW § 70.119A.080	27, 35
Chap. 70.142 RCW.....	39, 44
RCW § 70.142.010	28, 37, 39, 44
RCW § 70.142.010(2)	37, 39

RCW § 70.142.040	29, 38, 39, 40
RCW § 80.40.070	23
1973 Wash. Laws, 1 st Ex. Sess., Ch. 81 § 1	22
Chap. 246-290 WAC	7, 10, 27, 28, 46
WAC § 246-290-001	29
WAC § 246-290-010	10, 45, 46
WAC § 246-290-020	29, 38
WAC § 246-290-030(3).....	38
WAC § 246-290-310	29
WAC § 246-290-310	45
WAC § 246-290-460	29

OTHER AUTHORITIES

Washington Constit. Art. I § 23.....	42, 43
Washington Constit. Art. II § 1	4
Washington Constit. Art. XI § 11	35
Port Angeles Municipal Code, Ch. 1.12.....	6
Port Angeles Municipal Code, § 13.28.010.....	30
CR 59	14
CR 59(a)(4).....	16
CR 60(b)(3).....	16
FDA MOU 225-79-2001	10, 46
40 CFR Part 141	28

I. INTRODUCTION

Respondents City of Port Angeles (“City”) and Washington Dental Service Foundation, LLC (“WDSF”) submit this joint Brief of Respondents.¹

A. **Background – the Political Action Committees’ Initiatives to Impose Controls on the City’s Water Utility.**

This case concerns two local initiative petitions filed with the City by two political action committees (“PACs”): Protect Our Waters (“POW”) and Our Water-Our Choice (“OWOC”). The initiatives would require the City to change how it manages its proprietary water utility system.² Although the PACs, in the course of litigation, have attempted to portray them as something else, the thrust of those initiatives is to require the City to stop fluoridation of the City’s water supply. This is clear from the initiatives themselves, which specifically overturn the City Council’s decision to fluoridate the City’s municipal water utility supply, and from the testimony about the initiatives before the City Council.

¹ Respondents’ citations to the record will use a similar format as Appellant: 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____)”).

² RCP 220-223. The proposed initiatives are attached as Appendix B.

This case, however, is not about the merits of fluoridating a public water supply. The only issue in this case is whether the initiatives are within the scope of the local initiative power.

In a well-reasoned decision, the trial court determined on three independent bases that the initiatives, as written and presented to the Port Angeles City council, are outside the scope of the local initiative power. ACP 25-35.³

B. The Trial Court Decision Relied on Settled Precedent Under the Three Independent Tests for the Scope of the Local Initiative Power.

The trial court's conclusions are solidly founded on controlling precedent. Based on the uncontested facts and well-settled precedent, the trial court held that the proposed initiatives did not satisfy any of the three tests for determining whether a local initiative is within the scope of the local initiative power:

1. The Administrative Action Test.

The first test is whether the initiative's subject matter is legislative or administrative. Only legislative matters can be enacted by initiative

³ A copy of the trial court's Findings of Fact, Conclusions of Law, and Judgment is attached as Appendix A.

power.⁴ The trial court appropriately held that the initiatives dealt with administrative matters – how the City operates its proprietary municipal water utility. ACP 32.

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.⁵ The trial court appropriately held that the Legislature in RCW 35A.11.020 expressly delegated to city councils the operating and supplying of utility services, and that the initiatives would interfere with that expressly delegated authority. ACP 32.

3. The Substantive Invalidity Test.

The third test for local initiatives is whether the subject matter of the initiative exceeds the authority of the City. If the initiative is outside the authority of the City to enact, it is outside the local initiative power.⁶ The trial court appropriately held that the PACs' initiatives would conflict

⁴ *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).

⁵ *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).

with state law and that the City Council did not have authority to adopt the standards set out in the initiatives. ACP 32-33.

This third test is sometimes called “substantive invalidity” and is clearly appropriate in preelection review of local initiatives.⁷ As to statewide initiatives, this “substantive invalidity” test is disfavored in a preelection review, because the statewide initiative power is constitutionally guaranteed.⁸ The “substantive invalidity” test has been held appropriate for review of local initiatives by the Supreme Court.⁹ In two cases, 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 authority of the Washington Legislature.¹⁰ Those cases carefully distinguish statewide initiatives from *local* initiatives, and precedent

⁶ *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).

⁷ *Seattle Building and Construction Trades*, 94 Wn.2d at 747.

⁸ Washington Const., Art. 2, §1; *see Coppernoll v. Reed*, 155 Wn.2d 290, 298-300, 119 P.3d 318 (2005).

⁹ *Seattle Building and Construction Trades*, 94 Wn.2d at 746-747; *Meehan*, 49 Wn.2d at 432.

¹⁰ *Coppernoll*, 155 Wn.2d at 302; *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.2d 389 (1996).

related to local initiatives clearly allows a preelection challenge based on substantive invalidity.¹¹

In sum, the trial court decision relied on settled precedent. The PACs did not present any new or unique arguments. The trial court's decision did not involve any new or unique rulings regarding the local initiative or referendum power.

C. The Political Action Committees Invite the Court to Overturn Established Precedent.

The PACs request this Court to overturn established precedent regarding preelection review of local initiatives. The PACs ask this Court to look only at the “fundamental and overriding purpose” of their initiatives, and to ignore the fact that the initiatives violate state law. Not only do the PACs ask the Court to apply their “fundamental and overriding purpose” test to the substantive validity of local initiatives, where it has never been applied, but also they ask the Court to insert this “fundamental and overriding purpose” test into the other two tests for the validity of local initiatives: the administrative action test and the delegation to the legislative body test. The PACs do not provide any compelling reason for this fundamental change to established precedent on preelection review of local initiatives.

¹¹ *Id.*

II. STATEMENT OF THE CASE.

A. The Parties to This Case.

The City of Port Angeles (“City”) is a noncharter Code City.¹² The City owns and operates a drinking water utility in its proprietary capacity.¹³

Washington Dental Service Foundation, LLC (“WDSF”) sponsors oral health programs in Washington. WDSF is a party to a contract with the City to provide a fluoridation system for the City’s water utility. RCP 170-178. The proposed initiatives would require the City to eliminate that system.

OWOC and POW are political action committees that filed petitions with the City seeking to have the City Council pass ordinances entitled the Medical Independence Act and the Water Additives Safety Act. RCP 218-223.

B. The City’s Establishment and Operation of Its Water Utility.

In 1924, the City established a municipal water system. RCP 210 - 213. Over the years, the City has provided utility services, acquired property for its utility, and built system components. *Id.* The City has

¹² Port Angeles Municipal Code, Chap. 1.12 (Noncharter Code City).

¹³ *See Kaul v. City of Chehalis*, 45 Wn.2d 616, 618, 277 P.2d 352 (1955) (municipality owning and operating a municipal water system was acting in its proprietary capacity).

also worked with the Washington Department of Health and other regulatory agencies in treating the water and complying with state regulations. *Id.*

Over forty chemicals are used in public water systems to treat water to make it safe, palatable and aesthetically acceptable. One of tasks in operating a 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* WAC Ch. 246-290.

C. 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. Their experience in treating residents, young and old, of Port Angeles suggested that fluoridation would produce a measurable benefit for a significant portion of the local population. RCP 132. At February 18, 2003, after extensive research on fluoridation and after a public hearing on the issues, the City Council passed a motion approving fluoridation of the City's water supply on the condition that fluoridation would be implemented when assistance in the cost of equipment purchase and installation was provided. RCP 133-144.

On March 1, 2005, the City Council passed a motion to approve a contract titled Agreement Regarding Gift of Fluoridation System (“Agreement”) between the City and WDSF. In the Agreement, the City agreed to accept a fluoridation system. RCP 149; RCP 170-178. The Agreement obligated WDSF to construct and install a fluoridation system, which would then be given to the City at no cost. *Id.*

The City agreed to own and operate the system, and to use the system for fluoridation of the public water supply for a continuous period of ten years. *Id.* In the event the City fails to meet those obligations, the City is obligated to repay up to \$433,000.000 to WDSF for the costs and expenses of system design, construction and installation. *Id.* The City is currently utilizing this system to fluoridate the City’s water supply. ACP 29.

The City’s decision to accept the fluoridation system was challenged in court and upheld by Division II in the case of *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 151 P.3d 1079 (2007). In that decision, Division II of the Court of Appeals upheld the City’s action approving fluoridation. The court specifically found that the decision to fluoridate the public water supply was categorically exempt from SEPA as an action under a program administered by the Washington Department of Health.

D. The Political Action Committees' Initiative Petitions Seek to Invalidate the City's Fluoridation Action and Impose Stringent Regulations on the City's Water Utility.

On September 8 and 12, 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 this affects a "property right" and is "a takings" [sic]. The proposed legislation would specifically overturn the City Council action approving fluoridation of the City's water supply and requires all fluoridation to cease. The initiative would also prohibit addition to the water of any substance for the purpose of affecting bodily functions. This prohibition does not apply to substances that would make water "safe" so long as specific fluoride criteria are met (fluoride could not be increased more than 0.1 parts per million over naturally-occurring background levels).

On September 8 and 11, 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 proposed ordinance defines "contaminant" as any detectable quantity of any substance intended to be

dispensed into drinking water.¹⁴ The POW proposal goes on to provide 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.¹⁵ The initiative also requires all additives to be independently analyzed on a batch-by-batch basis, which is inconsistent with Washington Department of Health requirements¹⁶ and would place large administrative burdens on the City’s water utility operation.¹⁷ As with the POW initiative, the OWOC initiative exempts substances added to make water safe or potable, so long as fluoride is not increased more than 0.1 part per million over natural background levels.

¹⁴ Note this is different from and inconsistent with the definition of “contaminant” adopted by the Washington Department of Health at WAC 246-290-010 (defining “contaminant” as a substance present in drinking water that may adversely affect the health of the consumer or the aesthetic qualities of the water).

¹⁵ 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 the EPA has the authority to promulgate federal standards for drinking water additives. See Pub. L. 93-523.

¹⁶ See WAC 246-290

¹⁷ RCP 206 - 208.

E. 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 action on the initiatives. ACP 164-166. Because of concerns about the validity of the initiatives, the City Council authorized a declaratory judgment action. *Id.*

The City's declaratory judgment action was filed on September 18, 2006. ACP 05-22. The City sought a declaration that the initiatives were beyond the scope of the local initiative power for three independent reasons: (1) because the operation of its proprietary water utility would be affected; (2) because the Legislature expressly delegated to the Port Angeles City Council the operation and supply of municipal water; and (3) because the initiatives would violate a number of provisions of state law and the Washington Constitution.

F. The Political Action Committees Filed a Competing Lawsuit, and the Parties Entered Into a Stipulation to Facilitate an Early Hearing.

Shortly after the City's declaratory action was filed, the PACs filed a lawsuit on September 19, 2006, seeking to require the City to place the initiatives on the ballot. ACP 150-156; 179-188.

In order to efficiently brief the issues and facilitate a timely presentation of the issues to the trial court, the parties entered into a Stipulation and Order on September 26, 2006. ACP 145-149. In the

Stipulation and Order, the two cases were consolidated, WDSF was granted intervention in the PACs lawsuit, and a briefing schedule for all issues and target trial date were set. *Id.* The City agreed to forward the petitions to the County Auditor, and the parties agreed that the City would have no other duties regarding the petitions until the Superior Court's final decision on the lawsuits. *Id.*

G. The Trial Court Hearing and Detailed Decision.

The hearing on the merits for the consolidated actions was held December 11, 2006. Because of recusals in Clallam County, the matter was heard by Judge Haberly of the Kitsap County Superior Court. The issues were briefed to the Court pursuant to the Stipulation and Order, and evidence was presented in the form of declarations. The City and WDSF moved to dismiss and for judgment on the pleadings. RCP 59-64. Based on the Stipulation and Order, and because the material facts were undisputed, the trial court treated the case as a trial on undisputed facts. VRP1 at 102 (line 14) – 103 (line 13).

On appeal, none of the parties have assigned error to the factual findings entered by the trial court.

The trial court entered an oral ruling on December 11, 2006. VRP1 at 102 – 113. On January 19, 2007, the trial court entered detailed findings of fact and conclusions of law. VRP1 at 2 – 23; ACP 25 – 35.

H. There Is No Finding that Determines the “Fundamental and Overriding Purpose” of the Two Initiatives.

The PACs’ request, that this court change the rules on preelection review of local initiatives, is linked directly to their characterization of the two initiatives. The PACs proffer these initiatives, at least in the course of this litigation, as dealing with water pollution. The PACs argue that the “fundamental and overriding purpose” of their initiatives is to prevent pollution of the City’s and other public drinking water systems. However, the PACs did not ask 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. In this appeal, the PACs did not assign any error to the trial court for failure to make such a finding.

The City and WDSF have never acquiesced to the PACs’ characterization of the initiatives. While it appears that the single purpose of the initiatives is to prohibit the City’s water utility from adding fluoride to the water, there was no request for a finding about “fundamental and overriding purpose” and no assignment of error regarding the trial court’s failure to make such a finding. Accordingly, that issue is not properly before the Court in this appeal.

I. At Presentment, the Trial Court Rejected Additional Evidence Offered One Month After Trial by the Political Action Committees.

On January 19, 2007, over one month after trial, the PACs submitted a declaration with two attached letters to the trial court. One letter recited that Clallam County PUD No. 1 serves approximately 46 customers within the City of Port Angeles, and the other letter recited that the Dry Creek Water Association serves approximately 31 customers within the City. The declaration and letters were handed to the trial judge at the presentment of the findings of fact and conclusions of law on January 19, 2007. VRP2 at 15 - 16. The City and WDSF objected that this late-offered evidence was too late, misleading and immaterial. VRP2 at 15 (line 21) – 19 (line 9). The trial court declined to enter that evidence into the record. *Id.* The PACs did not ask for a new trial, for reconsideration, or to reopen the judgment pursuant to CR 59 based on that trial court ruling.

III. ARGUMENT

A. Procedural Issues.

1. The Political Action Committees Failed To Assign Error To The Trial Court's Ruling Excluding Their Evidence of Other Water Providers.

Washington law requires an appellant to specify each error that the appellant contends was made by the trial court in an assignment of error.

RAP 10(a)(3). If no assignment of error is made, the issue is waived and is not considered on appeal. *United and Informed Citizen Advocates Network, v. Washington Utilities and Transportation Commission*, 106 Wn. App. 605, 616, 24 P.3d 471 (2001), *review denied*, 145 Wn.2d 1021 (2002) (appellant's failure to assign error to administrative law judge's refusal to disqualify herself constituted a waiver of that issue for appeal).

On appeal, the PACs argue that this Court should supply a finding that there are other public water systems operating within the City of Port Angeles "based on the undisputed facts in the record."¹⁸ The PACs claim is not based on undisputed facts in the record, but it is based on two letters provided to the trial court on January 19, 2007 – over a month after trial at the presentment of findings of fact and conclusions of law. Those letters and their accompanying declaration were not accepted in the record by the trial court.¹⁹ The PACs did not seek a new trial or reconsideration in order

¹⁸ Appellant's Opening Brief at 13 (line 8).

¹⁹ VRP2 at 15 – 19 (denying admissibility of the proffered declaration into the record). The only evidence in the record of other water providers is a declaration from counsel for OWOC and POW, who filed a declaration stating that there was a private well within the City's limits that could provide drinking water for three tax parcels. ACP 71-90. No evidence was offered that this well was actually used for drinking water by the residents at any of those parcels.

to get their late-filed declaration in the record. Likewise, the PACs did not make any attempt to show that the declaration and letters were material to the validity of the initiatives or were new evidence that could not with reasonable diligence have been produced at trial. *See* CR 59(a)(4); CR 60(b)(3).

At presentment, the trial court refused to admit that evidence. VRP2 at 19 (lines 2 – 9). The trial court specifically ruled that the declaration and attached letters were not accepted as part of the record. *Id.* The PACs have not assigned error to that trial court ruling. Therefore, because there is no evidence in the record tending to support the finding requested by the PACs, this Court may not supply a finding that there are other public water systems operating within the City of Port Angeles.

There are two additional reasons why this Court should not consider the PACs proffered evidence regarding other public water systems.

First, that evidence is not material. The PACs argue that evidence of other water systems validates the initiatives. Just the opposite is true. The Port Angeles City Council does not have the authority or jurisdiction to impose the types of constraints called for in the PACs initiatives on other public water systems, even if those other water systems serve some customers inside the city limits of the City of Port Angeles. As explained

in more detail below, only counties with a population of 125,000 or more can establish water quality criteria stricter than those adopted by the Washington Board of Health. *See also Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 432-434, 90 P.3d 37 (2004) (county could not require water district to fluoridate its water system because that decision-making power is granted to water districts by statute). So the fact that other public water systems may conduct some operations within the corporate limits of the City is not relevant to determining the validity or invalidity of the two proposed initiatives.

Second, as discussed in more detail below, even if there are other water providers that serve a handful of the City's 19,000 plus residents, that would be irrelevant because the initiatives clearly interfere with the City's operation of the City's water utility. The City's operation of that utility is both an administrative action and a function expressly delegated to the City Council by the Washington Legislature. A local initiative that addresses administrative matters²⁰ or that interferes with a function

²⁰ *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).

expressly delegated to the City Council²¹ is beyond the scope of local initiative power.

Because the PACs did not assign error to the trial court's exclusion of their post-trial evidence of other water systems, however, there is no basis for this Court to make the finding requested by the PACs.

2. The Political Action Committees Failed to Request a Finding On What Is the "Fundamental And Overriding Purpose" of the Initiatives.

When written findings of fact are required, failure to request entry of a written finding of fact is an implied waiver. *State v. Moore*, 7 Wn. App. 1, 6, 499 P.2d 16, *review denied*, 81 Wn.2d 1004 (1972); *State v. Shelby*, 69 Wn.2d 295, 418 P.2d 246 (1966). In a case tried to the court, as here, findings of fact are required. CR 52(a)(1).

The PACs claim in their Opening Brief to this Court that the "fundamental and overriding purpose" of their initiatives is to regulate pollution of the City's and other public drinking water systems. The City disputed that claim. VRP1 at 79 (line 22) – 80 (line 21).

To the City and WDSF, it appears that the purpose of the initiatives is to halt fluoridation of the City's water supply, to which the

²¹ *E.g.*, *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261-262; *Priorities First v. City of Spokane*, 93 Wn. App. 406, 411, 968 P.2d 431 (1998), *review denied*, 137 Wn.2d 1035 (1999).

PACs object. The initiatives specifically discuss how they will overturn City Council decisions about fluoridation and specifically discuss only the City's water utility. RCP 221 (OWOC petition which would specifically overturn City Council action approving addition of fluoride to municipal water supply); RCP 223 (POW petition directed at the "drugs" that are "currently being added to its drinking water" by the City).

The PACs did not request a finding specifying the initiatives' "fundamental and overriding purpose." The trial court did not enter any finding regarding the "fundamental and overriding purpose" of the initiatives. ACP 36-49; VRP2 at 1-23. The PACs also did not assign any error to the trial court for failure to make such a finding.²²

Because the PACs did not request a finding of fact to determine the "fundamental and overriding purpose" of their initiatives, and because they made no assignment of error regarding the trial court's failure to enter such a finding of fact, the "fundamental and overriding purpose" of the initiatives is not something this Court may review.

²² Even if the "purpose" of the initiatives were considered a conclusion of law, the PACs did not request any such ruling nor did the trial court enter such a conclusion.

B. The Court Should Not Accept the Political Action Committees' Invitation to Create an Entirely New Test Applicable to Local Initiatives.

Apart from the fact that the issue is not properly before this Court, the purpose of the initiatives is not relevant to the settled tests for determining whether a proposed local initiative is within the scope of the local initiative power. The tests for invalidity of a proposed local initiative do not require the court to determine the “fundamental and overriding purpose” of the initiative measure. The only cases in which this language is used involved statewide initiatives and only involved review of the statewide initiative for “substantive invalidity.” *Coppernoll v. Reed*, 155 Wn.2d 290, 298-300, 119 P.3d 318 (2005) (statewide initiative limiting recovery in medical malpractice actions was not beyond the scope of the Legislature to enact and was therefore not substantively invalid); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.2d 389 (1996) (recognizing that even a statewide initiative must be within the power of the legislative body to adopt, and holding that the proposed *Philadelphia II* initiative was substantively invalid because the Legislature did not have the authority to create a nationwide process to call a world meeting).

The *Coppernoll* and *Philadelphia II* decisions limit the preelection review of the substantive invalidity of *statewide* initiatives to whether the

“fundamental and overriding purpose” of the proposed legislation is within the Washington Legislature’s power to enact under Article II Section 1 of the Washington Constitution. *Coppernoll*, 155 Wn.2d at 303-304 (statewide initiative limiting recovery in medical malpractice actions was not beyond the power of the Washington Legislature to enact, even though some parts may have been constitutionally infirm, and was therefore not a substantively invalid initiative); *Philadelphia II*, 128 Wn.2d at 719-720 (recognizing that a proposed statewide initiative must be within the power of the legislative body to adopt, and holding that the *Philadelphia II* initiative was substantively invalid because the Washington Legislature did not have the authority to create a federal initiative process to call a world meeting).

Neither the *Coppernoll* case nor the *Philadelphia II* case had anything to do with the first two tests of whether a matter is within the local initiative power: (1) whether the subject matter of the initiative is legislative or administrative in nature, or (2) whether the subject matter of the initiative is delegated to the local legislative body. The attempt by the PACs to import “fundamental and overriding purpose” language into those tests is contrary to settled case law regarding those two tests.

Similarly, neither the *Coppernoll* case nor the *Philadelphia II* case addressed the review of a *local* initiative for substantive invalidity. Both

cases addressed statewide initiatives, and the *Coppernoll* court was careful to limit its holding to “statewide initiatives and referenda” and expressed concern about any interference with the “constitutional preeminence of the right to initiative.” *Coppernoll*, 155 Wn.2d at 297. For local initiatives, the *Coppernoll* court recognized that preelection review was more appropriate because the local initiative power is limited. *Id.* at 299. It is not surprising because the Court would have no concern about the constitutional right to local initiative since there is no constitutional right to local initiative. The constitutional provision for initiatives applies only to statewide initiatives. Washington Const. Art. II §1. The power to enact a local initiative process in a noncharter Code city such as Port Angeles, like all other powers of local government, is granted by the Legislature. The Legislature did not grant that optional initiative power to Code cities until 1973. RCW 35A.11.080; 1973 Wash. Laws, 1st Ex. Sess. Ch. 81 §1.

With respect to local initiatives, the controlling case law clearly allows substantive validity challenges to those local initiative measures. *Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 747-748, 620 P.2d 82 (1980) (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 RCW 47.52 for determining location of

limited access routes); *Close v. Meehan*, 49 Wn.2d 426, 430-432, 302 P.2d 194 (1956) (local initiative that would have changed the site for a proposed sewage treatment plan was beyond the scope of the local initiative power because it violated the sewage treatment plant planning requirements of RCW 80.40.070).

The reason that broader review is appropriate for local initiatives is inherent in the fundamental principles underlying the powers of local governments. Local governments are created by, and are subordinate to, the Legislature. They possess only that authority specially bestowed upon them by the Legislature. As explained by the Supreme Court in the *Seattle Building and Construction Trades Council* decision, the fundamental proposition underlying the powers of municipal corporations is that they are creatures of the state and subordinate to the supremacy of the Legislature. *Seattle Building and Construction Trades Council*, 94 Wn.2d at 747. Therefore, while the citizens of a municipality may enact legislation governing local affairs via initiative, they cannot enact legislation that conflicts with state law or the state constitution. *Id.* Because local laws, including local initiatives, that conflict with state law are outside the scope of the power of local government to enact, they are also outside the scope of the initiative power. *Seattle Building and*

Construction Trades Council, 94 Wn.2d at 746-747.²³ The *Coppernoll* court was well aware of this precedent and cited the *Seattle Building and Construction Trades Council* case with approval. *Coppernoll*, 155 Wn.2d at 297, 299.

C. The Trial Court Correctly Held That the Political Action Committees' Initiatives Are Beyond the Scope of the Local Initiative Power.

The Trial Court's ruling was based on three separate and independent grounds. On all three bases, the PACs initiatives are beyond the scope of the local initiative power.

1. The Political Action Committees' Initiatives Are Invalid Because They Address Administrative Subjects.

The power of the people to adopt legislation directly through the initiative process is limited to actions that are legislative in nature. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1981); *Bidwell v. Bellevue*, 65 Wn. App. 43, 46, 827 P.2d 339 (1992) . The standard used by the Washington appellate courts in determining whether a function is legislative or administrative in nature is:

²³ The PACs mischaracterize the holding in the *Seattle Building and Construction Trades Council* case. The PACs cite this case for the proposition that local initiatives may not be challenged for substantive invalidity. But that is precisely what that case did allow. Because the proposed local initiative in that case was inconsistent with a state statute, the Supreme Court ruled that the initiative should be invalidated on

The power to be exercised is legislative in nature if it prescribes a new policy or plan; whereas, it is administrative if it merely pursues a plan already adopted by the legislative body itself or some power superior to it.

Bidwell, 65 Wn. App. at 46 (rejecting initiative that would require voter approval for convention center bonds, because the bond issuance was in pursuit of a plan that had already been adopted), *see also Ruano*, 81 Wn.2d at 823-24; *Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984). All these cases are clear that 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.” *Id.* In this case, under both criteria, the action of the City in electing to fluoridate the water supply is administrative.

First, in 1924 the City government made a legislative decision, to create a municipal water system. Prior to that decision by the City Council, a private company operated the water system that provided water to residents of the City. After the City Council made the legislative decision to establish a municipal water system, the details of the operation of that system are an administrative matter. The operation of the water

preelection challenge. *Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d at 747-748.

system is in pursuit of the plan already adopted by the City Council. The creation of that plan was a legislative matter, but the continuing implementation of it is administrative.

Second, in this case the City's operation of its water utility is pursuant to a plan that has been adopted by a "power superior to it." As discussed below, the administration of a public water system is subject to extensive rules and regulations established by state and federal authority. With respect to the City's water system, Division II of the Court of Appeals has recently decided, in a case challenging the City's fluoridation decision, that the City's decision regarding the operation of its public water system was taken "under a program administered by" the Washington Department of Health. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 220, 151 P.3d 1079 (2007). This holding recognizes that all the decisions of the City regarding the operation and addition of additives to its water utility are administrative decisions taken pursuant to a detailed and comprehensive regulatory plan required by the Washington Legislature and established by the Washington Department of Health and Washington Board of Health.²⁴

²⁴ The Washington Board of Health was created by the Legislature in Chap. 43.20 RCW. The Board of Health has authority to adopt rules necessary to assure safe and reliable public drinking water. RCW

This overall plan regulating drinking water prescribes what additives may be placed in public drinking water, what concentrations are legally permissible based on best scientific evidence, how the maximum concentrations must be determined, and what entities can set those standards. Ch. 246-290 WAC.

A brief outline of federal and state drinking water legislation shows the comprehensive nature of the plan which the City must follow in operating its water utility:

a. Congress Set the Framework for Additives to Drinking Water in the Safe Drinking Water Act.

Congress has required the EPA - not the FDA - to set drinking water regulations for all public water systems in the country. 42 U.S.C. §300g-1 Maximum concentration levels must be set for any substance the

43.20.050. The Board may delegate any of its rule-making authority to the Secretary of the Department of Health. RCW 43.20.050(3).

The Washington Department of Health was created by the Legislature in Chap. 43.70 RCW. The Department of Health has enforcement authority over all state health laws and regulations, including regulations adopted by the Board of Health. RCW 43.70.130. The Department of Health is also required to administer a statewide drinking water program to ensure compliance with the federal Safe Drinking Water Act. RCW 70.119A.080.

The Washington Administrative Code regulations governing Public Water Supplies were adopted pursuant to the authority granted to both the Board of Health and the Department of Health. Ch. 246-290 WAC.

EPA determines “may have an adverse effect on the health of persons.”

42 U.S.C. §300g-1(b)(1)(A).

b. The EPA Set Drinking Water Standards With Which All Public Water Systems Must Comply.

Pursuant to Congress’ direction, the EPA has published detailed primary drinking water standards applicable to all public water systems in the nation. 40 CFR Part 141. These regulations specify maximum contaminant levels for substances that EPA has determined may be a health risk, as well as monitoring requirements for those substances. *Id.*

c. The Washington Legislature Required the Washington Board of Health to Establish Drinking Water Standards for All Washington Public Water Systems.

Consistent with federal law and regulation, the Washington Legislature required the Washington Board of Health to establish allowable concentrations from all chemical contaminants in drinking water. RCW 70.142.010. The Board is required to consider best available scientific information when establishing those standards. *Id.*

d. The Board of Health Has Adopted Detailed State Drinking Water Standards and Procedures Consistent with Federal Law.

Pursuant to the Legislature’s direction, the Washington Board of Health has promulgated detailed drinking water standards. Ch. 246-290 WAC. Those Board of Health regulations include requirements for water

system plans, water system design, water system operation and maintenance, and water quality and maximum contaminant levels. *Id.* All public water systems must comply with those standards. WAC 246-290-001; WAC 246-290-020.

By way of example, the maximum concentration level for fluoride is set by the Board of Health at two (2) ppm. WAC 246-290-310. In addition, all public water systems must obtain written Department of Health approval for fluoridation treatment facilities and undertake detailed monitoring to assure levels in the range of 0.8 and 1.3 ppm throughout the distribution system – lower than even the required maximum concentration level. WAC 246-290-460.

e. Only Counties Over a Certain Population May Adopt “Local” Drinking Water Quality Standards Stricter Than the State Board of Health Standards.

The Legislature has authorized only one type of local government to adopt stricter water quality standards than those established by the state Board of Health. Counties with a population of 125,000 or greater may adopt standards more stringent than the State Board of Health standards. RCW 70.142.040. Those standards must be set by the local health department of the county, and those standards must be based on the “best available scientific information.” RCW 70.142.040. No city is allowed to

adopt stricter water quality standards than those established by the state Board of Health. Thus, it is not surprising that the City has not adopted detailed regulations specifying the precise contaminant level requirements for its public drinking water supply. The Board of Health has already done so, and the City does not have the authority to do so, because it is not a county of over 125,000 population.

f. The City Established a Drinking Water Utility In Compliance With Federal and State Regulation.

The City of Port Angeles itself has adopted regulations governing the service and extension of service from its public drinking water system. The City has also explicitly recognized that the system is established “in accordance with the standards established” by the state and federal governments discussed above. Port Angeles Municipal Code §13.28.010. That ordinance acknowledges that the City’s water system is subject to the comprehensive regulations established by the Legislature, the state Board of Health, and the state Department of Health.

The acknowledgement by the City, together with the comprehensive standards for drinking water additives adopted by a power superior to the City, shows that there is a legislative plan already in place. That plan comprehensively governs what additives may be placed in public drinking water; what concentrations of additives are permissible in

public drinking water; how the maximum concentrations for additives in public drinking water must be determined; and what entity can set those standards. Any decisions by the City – to add or delete a particular additive such as fluoride or to change a method of monitoring or testing so long as it meets the strict requirements of the Board of Health – meets the controlling case law definition for administrative action. It is an action in furtherance of those already existing plans and not a new plan or policy.

This controlling principle here is illustrated by the decision in *Heider v. City of Seattle*, 100 Wn.2d 874, 675 P.2d 597 (1984). In *Heider*, the City has established a comprehensive street-naming ordinance. The Seattle City Council subsequently passed an ordinance changing the name of one of Seattle's streets. The Supreme Court held that the name change, even though it was permanent and enacted by the City Council, was not a new policy or plan, but merely pursued the plan established in the comprehensive street-naming ordinance. Therefore, Seattle's ordinance was administrative in nature, not legislative in nature, and was not subject to the initiative or referendum power. *Id.* at 877.

The only argument raised by the PACs is that their proposed initiatives are legislative because the City *itself* does not have an ordinance expressly setting permissible maximum levels for drinking water additives and testing methods. Therefore, the PACs argue, their proposed initiatives

must be legislative because they allegedly set local maximum levels for fluoride, provide other local standards for additives to drinking water (measured by non-existent FDA standards), and provide local methods for testing additives to drinking water.

The PACs' argument misstates the long-established standard employed by Washington courts for determining whether an action is legislative or administrative. The standard is not whether the City itself has adopted a plan regulating additives to public drinking water, but whether a plan has already been adopted "by the legislative body [of the City] itself or some power superior to it." *Ruano*, 81 Wn.2d at 873 (emphasis added); *Bidwell*, 65 Wn. App. at 46 (same). Here, 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. For that reason, the City actions implementing that general plan are administrative, not legislative. Because the ordinances in the PACs' initiative petitions would affect administrative matters, not legislative matters, the PACs' initiatives are beyond the scope of the local initiative power for Washington noncharter Code cities.

2. The Political Action Committees' Initiatives Are Invalid Because They Interfere With the City's Power to Operate and Supply Utility Services, Which Is a Power Expressly Delegated to the Legislative Body of the City.

A proposed local initiative is also 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 (initiative that would require 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 that would require voter approval prior to creating a public development authority for garage facilities interfered with the authority granted to the city legislative body to create a special fund to defray costs of municipally-owned facilities). As the *Priorities First* court explained in its decision:

The critical distinction here is whether the Legislature has delegated the power that is the subject of the initiative to the municipal corporation's governing body or to the city itself, as an entity. An initiative cannot interfere with the exercise of a power delegated by state law to the governing body of the City. [Citation omitted.] Stated another way, the people cannot deprive the city legislative authority of the power to do what the constitution and/or a state statute specifically permit it to do. [Citations omitted.]

Priorities First, 93 Wn. App. at 411. In *Priorities First*, the proposed initiative would have required voter approval prior to any parking meter revenue being pledged to fund a parking garage. The court held that this would have interfered with the authority granted by the Legislature to the Spokane City Council to defray costs of a municipally owned facility. *Id.*

Similar to the *Priorities First* case, the initiatives here would interfere with the Port Angeles City Council's authority to operate and supply municipal water utility services. That authority has been 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.

In an attempt to overcome this unambiguous grant of authority to the City Council, the PACs argue that the City has other, general authority to adopt water quality additive standards. That argument is without merit.

a. The Existence of General Authority Is Irrelevant if the Proposed Initiative Would Interfere With Powers Granted Exclusively to the City Council.

The existence of general authority that would arguably allow a city's corporate body to regulate the City's water utility is irrelevant if a proposed initiative would interfere with a power expressly granted to the

legislative body of that city. *City of Seattle v. Yes For Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1228 (2005).

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 Growth Management Act (“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. *Yes For Seattle*, 122 Wn. App. at 389; *see 1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2007) (rejecting referenda on critical areas ordinance because Legislature had delegated GMA planning and regulatory authority to local legislative body).

In *Yes For Seattle*, the creek activists made the identical argument that the PACs are making in this case – that 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 the Washington Const. Art. XI § 11 granted authority to cities to make all regulations not inconsistent with state laws. The court 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 to enact development regulations.

The principles applicable in this case are identical to the *Yes for Seattle* case. Indeed, this case is stronger than *Yes For Seattle* or *1000 Friends* because the grant of authority to the "legislative body" in RCW 35A.11.020 is so explicit. The proposed the PACs initiatives would interfere with the City Council's authority to operate and supply water utility service, and "operating and supplying of utilities" is a power expressly granted to legislative bodies of Code cities in RCW 35A.11.020.

In support of their argument, the PACs quote a sentence fragment from a 1907 statute that allows cities to protect water works from pollution, and then claim broadly, with no reference to any other authority, that this allows any city to set standards for additives to public drinking water systems. This 1907 law, which predated both the initiative authority to Code cities and the Board of Health, gives cities jurisdiction over water works, reservoirs, lakes and streams that constitute the source of the municipal water to protect the water source from pollution. RCW 35.88.010. This unremarkable authority allows protection of water bodies from polluting sources (such as drainfields, mines, tanneries, and a host of other operations that may have been problematic in the early 1900s).

Even if this statute could be read expansively enough to grant authority to set standards for drinking water additives, it would be irrelevant. 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*, 93 Wn. App. at 411. In this case, the proposed initiatives would clearly interfere with the City Council’s authority to manage its water utility, which is a power expressly delegated to the City Council by the Legislature.

b. Chapter 70.142 RCW Does Not Grant Cities Authority to Set Water Quality Standards for Drinking Water.

The PACs also argue that RCW 70.142.010 grants authority to cities to adopt local drinking water standards that are stricter than the standards established by the Board of Health. It does not.

Chapter 70.142 RCW authorizes the State Board of Health (and certain county health departments) to set state water quality standards for contaminants in public drinking water. RCW 70.142.010(2) provides as follows:

(2) the board [Washington Board of Health] shall consider the best available scientific information in establishing the standards. The board may review and

revise the standards. State and local standards for chemical contaminants may be more strict than the federal standards.

RCW 70.142.010(2) (emphasis added). This statute, which is relied on by the PACs, merely provides that the state Board of Health standards for additives to public drinking water in Washington may be more strict than the federal standards; and if local standards are authorized, they too may be more strict than the *federal* standards. This statute does not give cities authority to establish local standards that are stricter than state Board of Health standards.

The only authority granted to a local government to establish “local standards” is found in RCW 70.142.040:

Each local health department serving a county with a population of one hundred twenty-five thousand or more may establish water quality standards for its jurisdiction more stringent than standards established by the state board of health. Each local health department establishing such standards shall base the standards on the best available scientific information.

RCW 70.142.040. Thus, “local” standards stricter than the state board of health may be adopted only by counties with populations over 125,000; must be adopted by that county’s health department; and must be based on best available scientific information. RCW 70.142.040. The Board of Health regulations also recognize that a “local board of health” may adopt rules governing water systems within its jurisdiction. WAC 246-290-030(3). But this does not provide any authority to cities. A “local board

of health” is a county board of health or a district (more than one county) board of health. RCW 70.05.010(3).

The PACs then leap to the conclusion that RCW 70.142.010 includes an implied grant of authority to cities to enact “more strict” standards for drinking water than the state Board of Health standards, merely because the statute does not specifically prohibit cities from doing so. This misstates the law. Nothing in RCW Ch. 70.142 gives cities (or city legislative bodies) the authority to set standards for additives to drinking water that are more strict than the Board of Health regulations. The only authority in RCW 70.142 for local regulations is in RCW 70.142.040 for local health departments serving a county of 125,000 or more; and even then the regulations must be adopted by a county department of health and must be based on “best available scientific information.”

The City and WDSF believe this authority is clear and needs no interpretation. If there is any doubt, the Court must interpret Chapter. 70.142 RCW to give meaning to all its provisions and to avoid an absurd result. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 69, 52 P.3d 522 (2002), *review denied*, 149 Wn.2d 1013 (2003). In this case, if every municipality could adopt local drinking water additive limits, without consideration of best available scientific

information, then the prohibitions in RCW 70.142.040 would have no meaning and be absurd. Clearly, the Legislature meant to delegate standard-setting for contaminant levels in drinking water to the state Board of Health and to then allow only local boards of health in large counties to set stricter levels.

With respect to the legislative delegation test for the validity of local initiatives, however, whether the City can enact stricter regulations in the operation of its water utility is not relevant. The Legislature has expressly delegated the power to operate and supply a water utility to the Port Angeles City Council, and because the PACs' initiatives would interfere with that authority, the initiatives are beyond the scope of the initiative power for a noncharter Code city such as Port Angeles.

3. The Political Action Committees' Initiatives Are Invalid Because They Propose Actions That Conflict with State Laws and the State Constitution.

For local initiatives, Washington law is clear. A proposed initiative is beyond the scope of the initiative power if it violates a state law of general application or if it is otherwise outside the authority of the legislative body. *Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980) (in preelection challenge, Supreme Court overturned local initiative because it conflicted with state statute and was therefore outside the scope of the local

legislative power); *Close v. Meehan*, 49 Wn.2d 426, 302 P.2d 194 (1956) (proposed local initiative was outside the scope of the local legislative power, and therefore outside scope of the local initiative power, because it conflicted with state statute). Here, the proposed initiatives conflict with numerous state laws and constitutional provisions.

The PACs do not defend the validity of their proposed initiatives. Instead, the PACs rely solely on the argument that these “substantive invalidity” challenges are not allowed prior to election. As discussed above in Section III.B of this Brief of Respondents, the *Seattle Building and Construction Trades Council* case and the *Meehan* case expressly allow the substantive invalidation of local initiatives. *Seattle Building and Construction Trades Council*, 94 Wn.2d at 746-747; *Meehan*, 49 Wn.2d at 432. The PACs rely exclusively on the *Coppernoll* case, but that case very explicitly applied only to state-wide initiatives:

Preelection challenges to statewide initiatives and referenda fit into three categories: “(1) the measure, if passed, would be substantively invalid because it conflicts with a federal law of state constitutional ... provision; (2) the procedural requirements for placing the measure on the ballot have not been met; and (3) the subject matter is not proper for direct legislation.” [Citation omitted.]

The first type of challenge, substantive invalidity, is not allowed in this state because of the constitutional preeminence of the right of initiative. [Citations omitted.]

Coppernoll, 155 Wn.2d at 297 (emphasis added) . The *Coppernoll* court limited its holding to “statewide initiatives and referenda.” *Id.*

As explained by the Supreme Court in the *Seattle Building and Construction Trades Council* case, municipal corporations are creatures of the state and subordinate to the supremacy of the Legislature. *Seattle Building and Construction Trades Council*, 94 Wn.2d at 747. Therefore, while the citizens of a municipality may enact initiative legislation governing local affairs, they cannot enact legislation that conflicts with state law or the state constitution. *Id.* Consequently, proposed legislation that would conflict with state law or the state constitution is beyond the scope of the local initiative power. *Id.* at 746-747. Thus, with regard to local initiative proposals, it is proper and logical in keeping with the fundamental principles of municipal governance and authority that local initiative proposals should be subject to judicial scrutiny on “substantive invalidity” grounds. In this instance, that scrutiny shows that the proposed initiatives are invalid.

a. The Political Action Committees’ Initiatives Are a Substantial Impairment of Contract.

Article I, Section 23, of the Washington State Constitution provides that “[n]o...law impairing the obligations of contracts shall ever be passed.” Proposed initiatives that would substantially impair

contractual obligations without reasonable justification violate this impairment of contract provision of the Washington Constitution. *Ruano*, 81 Wn.2d at 825-826; *Bidwell*, 65 Wn. App. at 343-344. In *Bidwell*, the impairment was substantial because subjecting the financing agreements to a vote would have defeated the parties' expectations. *Id.* The impairment was not reasonably necessary because the public had already had a substantial opportunity to participate in the early phases of project planning regarding all phases of the proposed convention center project. *Id.*

In this case, if the proposed initiatives were passed, the impairment of the Agreement between WDSF and the City would be absolute, thus defeating the expectations of the parties. The impairment is also not reasonably necessary. At base, the PACs want to one more opportunity for input on the City's fluoridation decision. However, the public already has had a full and fair opportunity to speak. There was a lengthy initial hearing before the City Council, as shown by the thirteen pages of summarized testimony in the City Council minutes. RCP 132-145. At the hearing regarding the City's environmental review before the City Council, there was another opportunity for public input. A citizens group appealed the determination of nonsignificance issued by the City pursuant to the State Environmental Policy Act in accordance with Port Angeles

Municipal Code §15.04.280, and argued that fluoridation could have significant detrimental effects to public health. *Clallam County Citizens for Safe Drinking Water*, 137 Wn. App. at 217. The Council heard extensive testimony from numerous witnesses concerning the adequacy of the City's environmental review on the potential health issues or fluoridation.

Thus, if enacted, the initiatives would effect an absolute impairment of contract and there is no reasonable necessity to justify such total impairment. Because the proposed initiatives would violate Article I, Section 23, of the Washington Constitution, they are beyond the scope of the initiative power.

b. The Political Action Committees' Initiatives Are Inconsistent With State Law and With Controlling Regulations of the Washington Board of Health.

Many portions of the proposed initiatives are inconsistent with the requirements of state statutes and with the rules regulating drinking water utilities promulgated by the Washington Board of Health.

In Chapter 70.142 RCW, the Legislature required the Washington Board of Health to promulgate standards for maximum contaminant levels (MCLs). RCW 70.142.010. The Board of Health standards must be based on best available scientific information. *Id.* Local health departments in

counties of at least 125,000 in population and must also be may set local MCLs that are more strict than the state board of health MCLs, if such standards are based on best available scientific information, but other local governments are not authorized to establish local standards. RCW 70.142.040. The proposed initiatives violate these regulations in several ways.

First. The initiatives contain “intent-based” standards that prohibit any contaminant that is “intended” to affect the mind or body of persons. They also contain a standard that prohibits additives that would raise fluoride by more than 0.1 ppm over background. These standards in the proposed initiatives are not based on best available scientific information. Instead, one is based on the “intent” of the person putting the substance into the drinking water, and the other is not based on any scientific study.

Second. The statute specifically requires local standards to be established by the health department, and only in counties of 125,000 or greater population; the setting of such health-based standards by initiative is outside the scope of the initiative power of Code cities.

Third. The “Water Additives Safety Act” defines “contaminant” as any detectable substance in drinking water. This is contrary to the definition adopted by the Board of Health in WAC 246-290-010.

Fourth. The “Water Additives Safety Act” contains detailed requirements about how shipments of substances must be independently analyzed by the same method recommended for pharmacies. This is inconsistent with the requirements in Ch. 246-290 WAC, which establishes a “uniform process” for water purveyors to demonstrate operational and technical compliance, including compliance with the detailed water quality monitoring requirements in WAC 246-290-100.

Fifth. The Water Additives Safety Act relies on standards to be set by the FDA. As discussed above, the FDA does not set standards for additives to drinking water. Under federal law, that is the exclusive prerogative of the EPA. The FDA and the 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 the EPA has the authority to promulgate federal standards for drinking water additives. FDA MOU 225-79-2001; RPC 180-183; RPC 216-217; *see* 42 U.S.C. §300g-1. There is no authority in any statute or regulation that would allow a local government to delegate standard-setting authority to the FDA, or to any federal agency.

Sixth. According to the PACs’ argument to this court, the initiatives are intended to impose strict standards on all “public” water systems that conduct any operations within the corporate limits of Port

Angeles. The City Council has no jurisdiction or authority to impose the sorts of controls in the initiatives on other public water systems. As explained in more detail above, only counties with a population of 125,000 or more can establish water quality criteria stricter than those adopted by the Board of Health.

In practical terms, the PACs' argument is that the City Council has authority to mandate that Clallam County PUD No. 1 must fluoridate (or not fluoridate) its public water system. That proposition has already been rejected. *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 432-434, 909 P.3d 37 (2004) (county could not require water district to fluoridate its water system because that decision-making power is granted to water districts by statute). The City Council of Port Angeles simply has no authority to impose that type of control on other public water systems.

c. The OWOC Initiative Would Unconstitutionally Transfer Property Rights of the City's Water Utility to Residents.

The Washington Constitution prohibits the grant of property rights from a city without legally sufficient consideration.

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of

any stock in or bonds of any association, company or corporation.

Washington Constitution, Art. 8, §7 (Credit not to be Loaned). A transfer of property without consideration violates this constitutional provision.

Louthan v. King County, 94 Wn.2d 422, 617 P.2d 977 (1980); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 857 P.2d 283 (1993).

The OWOC initiative (called the Medical Independence Act) purports to transfer a property right to all users of the City's water utility.

Section One of the OWOC initiative provides as follows:

The citizens herewith determine that access to a public water supply constitutes a property right shared by all users of that water supply. They find that the property rights of persons to whom medicated water is unacceptable are impaired by addition of medication to the common supply of water and that this is a takings [sic] which has not been compensated in any way.

RCP 221. The plain language of this provision grants a new property right, which does not currently exist, to the users of the City's water system. Accordingly, that provision would violate the Washington Constitution and is beyond the scope of the City to enact.

For the reasons discussed above, the PACs' proposed initiatives violate state law and provisions of the Washington Constitution. For this third independent reason, the initiatives are beyond the scope of the local initiative power for noncharter Code cities.

IV. CONCLUSION

Respondent City of Port Angeles and Respondent Washington Dental Service Foundation respectfully request the Court to uphold the decision of the trial court.

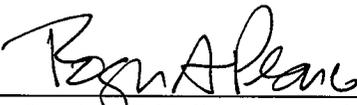
DATED this 20th day of August 2007.

WILLIAM E. BLOOR, PORT ANGELES
CITY ATTORNEY



William E. Bloor, WSBA #4084
Attorney for Respondent City of Port Angeles
*Email signature
page attached*

FOSTER PEPPER PLLC



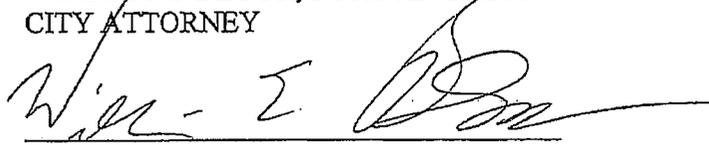
P. Stephen DiJulio, WSBA #7139
Roger A. Pearce, WSBA #21113
Attorneys for Respondent, Washington Dental Service Foundation, LLC

IV. CONCLUSION

Respondent City of Port Angeles and Respondent Washington Dental Service Foundation respectfully request the Court to uphold the decision of the trial court.

DATED this 20th day of August 2007.

WILLIAM E. BLOOR, PORT ANGELES
CITY ATTORNEY



William E. Bloor, WSBA #4084
Attorney for Respondent City of Port
Angeles

FOSTER PEPPER PLLC

P. Stephen DiJulio, WSBA #7139
Roger A. Pearce, WSBA #21113
Attorneys for Respondent, Washington
Dental Service Foundation, LLC

APPENDIX A

The Honorable M. Karlynn Haberly
Kitsap County Superior Court
Trial Date: Monday, December 11, 2006, 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CLALLAM COUNTY

CITY OF PORT ANGELES,

Plaintiff,

v.

OUR WATER-OUR CHOICE, and
PROTECT OUR WATERS,

Defendants,

v.

WASHINGTON DENTAL SERVICE
FOUNDATION, LLC,

A Party in Interest,

OUR WATER-OUR CHOICE, and
PROTECT OUR WATERS,

Plaintiffs/Petitioners,

v.

PORT ANGELES CITY CLERK, CITY OF
PORT ANGELES, and WASHINGTON
DENTAL SERVICE FOUNDATION, LLC,

Defendants/Respondents

No. 06-2-00828-9

(Having been consolidated with
No. 06-2-00823-8)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 1

ORIGINAL

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

50757162.2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1. JUDGMENT SUMMARY

PREVAILING PARTIES:

City of Port Angeles
Washington Dental Service Foundation, LLC

ATTORNEYS FOR
PREVAILING PARTIES

William E. Bloor, City Attorney
321 East Fifth Street/PO Box 1150
Port Angeles WA 98362-0217
For City of Port Angeles

Foster Pepper PLLC by Roger A. Pearce and
P. Stephen DiJulio
1111 Third Avenue, Suite 3400
Seattle WA 98101-3299
For Washington Dental Service Foundation, LLC

NON-PREVAILING PARTIES

Our Water – Our Choice
Protect Our Waters

ATTORNEY FOR
NON-PREVAILING PARTIES

Gerald Steel, PE
7303 Young Road NW
Olympia WA 98502

SYNOPSIS OF JUDGMENT:

Declaratory Judgment GRANTED in favor of
Prevailing Parties that the initiatives entitled
Medical Independence Act and Water Additives
Safety Act are beyond the scope of the local
initiative power of the City of Port Angeles, and
that the City has no duty to place said initiatives on
the ballot;

Writ of Mandamus sought by Non-Prevailing
Parties is DENIED;

Complaint for Writ of Mandamus and Petition
Pursuant to RCW 35.17.290 brought by Non-
Prevailing Parties is DISMISSED with prejudice.

AMOUNT OF MONETARY
JUDGMENT

\$0.00 (Not Applicable)

ATTORNEYS' FEES AND COSTS

\$0.00 (Not Requested by Prevailing Parties)

////

////

////

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

50757162.2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

2. INTRODUCTION

2.1 Consolidated Cases. This case consists of two consolidated actions involving initiative petitions filed by political action committees Our Water - Our Choice and Protect Our Waters with the City Clerk of the City of Port Angeles. The City of Port Angeles filed a Complaint For Declaratory Judgment under Clallam County Cause No. 06-2-00823-8, in which the City requested a declaration that the initiatives are beyond the scope of the initiative power for noncharter Code cities such as the City of Port Angeles. Protect Our Waters and Our Water - Our Choice filed a Complaint For Writ Of Mandamus and Petition Pursuant to RCW 35.17.290 and also filed a Verified Application For Peremptory Writ Of Mandamus To The Port Angeles City Clerk And Request For Further Relief ("Verified Application") under Clallam County Cause No. 06-2-00828-9, in which the political action committees requested the Court to find the initiative petitions legally sufficient and to order the City to hold an election for the purpose of voting on the ordinances proposed in the initiatives. The Court consolidated the two actions (Cause Nos. 06-2-00823-8 and 06-2-00828-9) for all purposes under the later-filed cause number (Cause No. 06-2-00828-9).

2.2 Hearing On The Merits. At the hearing on the merits on December 11, 2006, the City was represented by William E. Bloor, City Attorney for the City of Port Angeles, Our Water - Our Choice and Protect Our Waters were represented by Gerald Steel, P.E., attorney at law, and the Washington Dental Service Foundation was represented by Roger A. Pearce and Foster Pepper PLLC. After its review of the evidence submitted in the form of declarations by the parties, the briefing of the parties, the arguments of counsel at the hearing on the merits, and the pleadings and papers in the court record, the Court entered its oral ruling on December 11, 2006, and now enters the following:

3. FINDINGS OF FACT

3.1. In September 2006 shortly after the two actions were filed, the parties entered into a Stipulation and Order (1) Consolidating Actions, (2) Permitting Intervention, (3) Forwarding

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 3

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 Initiative Petitions to County Auditor, and (4) Setting Hearing Schedule and Trial Date
2 ("Stipulation and Order"). In the Stipulation and Order, the Court consolidated the two actions
3 for all purposes; joined Washington State Dental Service Foundation as a party defendant,
4 ordered that the City had no further legal obligations with respect to the initiative petitions (the
5 City had stipulated to forward the petitions to the County Auditor for determination of
6 sufficiency) pending the final order of this Court in the consolidated cases, ordered that the
7 parties would follow an agreed-upon briefing schedule, and agreed to schedule a hearing on the
8 merits as soon as possible after November 27, 2006.

9 3.2. Procedurally, each of the parties submitted opening, response and reply briefs
10 accompanied by declarations and exhibits. The Stipulation and Order contemplated a hearing on
11 the merits, which was scheduled for December 11, 2006, and a final order. Accordingly, the
12 Court treats the hearing as a trial on undisputed facts. Even though the parties did not submit a
13 set of stipulated facts, the following relevant facts were undisputed and, ~~in light of the~~ *based on these*
14 ~~undisputed facts below,~~ the initiative petitions filed by Our Water-Our Choice and Protect Our
15 Waters (attached to those parties' Verified Application For Peremptory Writ), and the
16 Agreement Regarding Gift of Fluoridation System (attached to the City's Complaint For
17 Declaratory Judgment), the Court ~~may enter~~ *enters* the final judgment herein.

18 3.3. The City of Port Angeles (the "City") is a Code city operating under RCW Title
19 35A. Pursuant to the authority in Title 35A, the City owns and operates a drinking water utility.
20 RCW 35.11.020.

21 3.4. Our Water – Our Choice ("OWOC") is a political action committee registered
22 with the Washington Public Disclosure Commission, listing an address of 1114 E. 4th Street, Port
23 Angeles WA 98362. Lynn Warber is listed as "campaign chair" of OWOC. Lynn Warber is a
24 registered voter and taxpayer of the City, and is the person who filed the proposed Medical
25 Independence Act with the Port Angeles City Clerk.
26

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 4

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

50757162.2

1 3.5. Protect Our Waters ("POW") is a political action committee registered with the
2 Washington Public Disclosure Commission, listing an address of 1923 W. 6th Street, Port
3 Angeles, WA 98362. Ann Mathewson is listed as treasurer of POW. Ann Mathewson is a
4 registered voter and taxpayer of the City, and is the person who filed the proposed Water
5 Additives Safety Act with the Port Angeles City Clerk.

6 *MKS* 3.6. Washington Dental Service Foundation, LLC, ("WDSF") is an ²essential party to
7 these actions. WDSF has a contract interest that relates to the subject matter of the actions. The
8 contract is between the City and WDSF and is titled Agreement Regarding Gift of Fluoridation
9 System (the "Agreement").

10 3.7. ~~In February 2003, the Port Angeles City Council held a lengthy public hearing on~~
11 ~~the question of whether to fluoridate the City's drinking water supply. At least 45 people gave~~
12 ~~oral testimony, and voluminous documents were presented to the City Council.~~ On February 18,
13 2003, the City Council passed a motion to approve fluoridation of the City's water supply.

14 *MKS* 3.8. Subsequently, on March 1, 2005, the City Council approved, by motion, a
15 contract between the City and WDSF – the Agreement. Under the Agreement, WDSF agreed to
16 pay for the design, construction and installation of a fluoridation system and then transfer the
17 system to the City. For its part, the City agreed that it would fluoridate the Port Angeles' public
18 water supply for a continuous ten (10) year period. In the event the City fails to meet its
19 obligations under the Agreement, the City is to repay up to four hundred thirty-three thousand
20 (\$433,000) to WDSF for the costs of design, construction, and installation of the fluoridation
21 system and could be liable for other expenses.

22 3.9. WDSF delivered the fluoridation system to the City on May 18, 2006, and the
23 City is currently using the system to fluoridate the City's public water supply.

24 3.10. On September 8 and September 12, 2006, OWOC and Lynn Warber filed
25 initiative petitions to have the City Council enact an ordinance or in the alternative have the city
26 residents vote on the "Medical Independence Act." On September 8 and September 11, 2006,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 5

50757162.2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 POW and Ann Mathewson filed initiative petitions to have the City Council enact an ordinance
2 or in the alternative have the city residents vote on the "Water Additives Safety Act."

3 3.11. Following the filing of the initiative petitions, on September 13, 2006, the City
4 Council conducted a public meeting to consider the action to be taken. The procedure set out in
5 the state statutes is that the City will deliver the petitions to the County Auditor to verify
6 signatures. Then, RCW 35A.11.110 and 35.17.260 provide that in the event the Clallam County
7 Auditor certifies that an initiative petition has received the requisite number of valid signatures,
8 the City Clerk will transmit the initiative to the City Council for introduction. The Council may
9 either: (1) adopt the initiative as an ordinance, or (2) reject it and order it to be placed on the
10 ballot no later than the next election.

11 3.12. The City Council elected not to send the initiative petitions to the County Auditor,
12 but rather to ask for a declaratory judgment regarding the validity of the two initiative petitions.

13 3.13. On September 18, 2006, the City filed an action for a declaratory judgment under
14 Clallam County Superior Court Cause No. 06-2-0823-8. On September 19, 2006, the initiative
15 backers, POW and OWOC, filed a separate action under Clallam County Superior Court Cause
16 No. 06-2-00828-9 in which they sought, among other things, relief that would require the City
17 Clerk to deliver the initiative petitions to the County Auditor for validation of signatures.

18 3.14. In the days following the filing of the two lawsuits, the parties reached agreement
19 on the procedure to be followed. The agreement was intended to facilitate the timely
20 presentation of the substantive issues to the Court for a ruling. The agreed Stipulation and Order
21 was filed in this action on September 26, 2006.

22 3.15. In 1924 the City made the decision to establish a municipal water system. In
23 1924 the City purchased the water system from the North Pacific Public Service Company of
24 Tacoma. Since then, the City has operated its municipal water system as a proprietary function
25 of the City. In the course of doing so, the City, administratively, has made numerous significant
26 and substantial changes to the system and the water supplies. These include, among others,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 6

50757162.2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 changing the source of water from Ennis Creek to Morse Creek; changing the source again from
2 Morse Creek to the Elwha River; negotiating settlements with the EPA and Department of Social
3 and Health Services (now Department of Health (DOH)) over issues of water quality and water
4 treatment; modifying, and sometimes not modifying, treatment facilities; and addressing
5 measures to be taken when the water supply was reclassified from "ground water" to "ground
6 water under the influence of surface water."

7 3.16. In summary, since 1924 the City has made numerous significant and substantial
8 decisions relating to its municipal water system. It purchased the system, and then moved major
9 components from time to time. It changed primary sources of water. It has chosen to treat, and
10 not treat, the water for various purposes; and it has chosen among alternative means of
11 complying with state regulations for operating the facility.

12 3.17 The OWOC and POW initiative petitions signed by registered voters were
13 properly submitted to the City Clerk on September 8, 2006. As of September 18, 2006, the City
14 Clerk had failed to transmit the OWOC and POW initiative petitions to the County Auditor.

15 3.18. Pursuant to the Stipulation And Order, on or about September 26, 2006, the City
16 Clerk forwarded the OWOC and POW initiative petitions to the County Auditor for a
17 determination of sufficiency, and on October 7, 2006, the County Auditor found the initiative
18 petitions to be sufficient and sent letters back to the City Clerk stating, "[t]he required number of
19 signatures has been met, thus allowing submission to the voters at an election to be determined."

20 3.19. The City of Port Angeles is not a county and is not 125,000 or greater in
21 population.

22 4. CONCLUSIONS OF LAW

23 4.1. There are three, independent tests considered by the Court to determine whether
24 the OWOC and POW initiatives are within the scope of the local initiative power and therefore
25 proper to go forward to a vote of the voters of Port Angeles.
26

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 7

50757162.2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 4.1.1. The first test is whether the subject matter of the initiatives deals with
2 legislative rather than administrative matters. Only legislative matters are within the initiative
3 power.

4 4.1.2. The second test is whether, even if the subject matter is legislative, the
5 authority to deal with that subject matter was expressly delegated to the legislative body of the
6 City rather than to the City as a corporate body. Matters expressly delegated to the local
7 legislative body are not within the local initiative power.

8 4.1.3. The third test is whether the subject matter of the initiative exceeds the
9 legislative authority of the City. Matters exceeding the local legislative authority are likewise
10 outside the local initiative power.

11 4.2. With respect to the first test, the Court concludes that each initiative seeks to
12 regulate matters that are administrative in nature, which is the operation of a municipal water
13 system, including operation and supply of water through that municipal water system.
14 Accordingly, the initiatives are beyond the scope of the local initiative power.

15 4.3. With respect to the second test, under RCW 35A.11.020, the state Legislature has
16 vested within the City of Port Angeles legislative body, which is the Port Angeles City Council,
17 the authority to operate and supply utilities. In this case, the operation of the municipal water
18 system utility is at issue. The Court concludes that these initiatives interfere with the City's
19 operation of its public water system, and seek to regulate the operation of that municipal water
20 system. For this second reason, the initiatives are beyond the scope of the local initiative power.

21 4.4. The third test is whether either or both of these initiatives exceed the authority of
22 the City Council to enact laws. The Court concludes that both initiatives are beyond that
23 authority. The language of each initiative clearly seeks to direct the City's operation of the
24 municipal water system and manner of supply of public water. The Medical Independence Act
25 seeks to control substances that are put into the water, which is an administrative matter for the
26 City. Both of the initiatives conflict with federally mandated and state administered regulation

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 8

50757162.2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 of public drinking water. In particular, the state has preempted the field for setting maximum
2 permissible concentrations for additives to drinking water. It is the State Board of Health that is
3 legislatively mandated to set standards for contaminants in drinking water based on best
4 available scientific information. RCW 70.142.010 - .030. Only certain local governments may
5 adopt stricter standards – the local health department serving counties with populations of
6 125,000 or greater may adopt more strict standards, again based on best scientific information.
7 RCW 70.142.040. Because the City is not a county of 125,000 or greater in population, it does
8 not have the authority to adopt stricter standards than the State Board of Health maximum
9 allowable concentration standards; and because the initiatives would adopt stricter standards than
10 the State Board of Health standards, the ordinances proposed by the initiatives are beyond the
11 scope of the local initiative power.

12 4.5. The Water Additives Safety Act seeks to impose an obligation on the United
13 States FDA to approve substances that are added to public drinking water systems. The City has
14 no authority to direct the FDA to regulate such substances. This also exceeds the authority of the
15 City to regulate public water systems.

16 4.6. The City does not have authority to regulate public drinking water in a manner
17 inconsistent with the controlling state and federal regulation. ~~The Medical Independence Act is~~
18 ~~ambiguous. An example is its provisions in Sections 2 and 3 that relate to making water "safe"~~
19 ~~and whether certain substances are added for "treating" versus "preventing" disease. The~~
20 ~~ambiguities are not themselves determinative, but despite them, it is clear that the Medical~~
21 ~~Independence Act is intended to create new regulations that are, to some extent, inconsistent with~~
22 state and federal law regulating water quality and water additives. As such it is beyond the scope
23 of the legislative authority of the City and is invalid.

24 4.7. The Medical Independence Act would also establish a new property right of
25 access to a public water supply, and would transfer that right to all persons using a public water
26 supply. This is in violation of the Washington State Constitution, Article 8, Section 7, which

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 9

50757162.2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 prohibits gifts of City property without any consideration. The Court notes that this could also
2 subject the City to claims if this new property right affected the security of bond holders for
3 improvements to the City water system. But it is enough for purposes of this litigation to hold
4 that the initiatives would violate the Washington Constitution.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

5. JUDGMENT

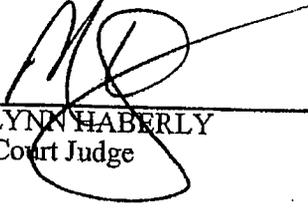
Based on the foregoing findings of fact and conclusions of law, it is ORDERED,
ADJUDGED and DECREED as follows:

5.1. Declaratory judgment is **GRANTED** in favor of the City of Port Angeles that the
Medical Independence Act and the Water Additives Safety Act are invalid as exceeding the
scope of the local initiative power because the initiatives affect administrative rather than
legislative matters, because the initiatives deal with matters delegated specifically to the
legislative body of the City of Port Angeles, and because the ordinances proposed by the
initiatives are beyond the authority of the City of Port Angeles to enact.

5.2. The Writ of Mandamus sought by the Our Water – Our Choice and Protect Our
Waters political action committees is **DENIED** and the Complaint For Writ Of Mandamus And
Petition Pursuant to RCW 35.17.290 brought by Our Water – Our Choice and Protect Our
Waters is **DISMISSED** with prejudice because the proposed initiatives are invalid. Accordingly,
there is no requirement for the City of Port Angeles to act to place the initiatives on the ballot.

5.3. The Court finds no need to rule on the motion to dismiss or motion for judgment
on the pleadings brought by Washington Dental Service Foundation, LLC, as those motions are
subsumed in the foregoing ruling on the merits as to all issues presented to the Court.

DATED this 19th day of January, 2007.



M. KARLYNN HABERLY
Superior Court Judge

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 10

50757162.2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Presented by:

Rogn A Pearce for
WILLIAM E. BLOOR, WSBA No. 4084
City Attorney for City of Port Angeles

per permission

FOSTER PEPPER PLLC

Rogn A Pearce
P. Stephen DiJulio, WSBA No. 7139
Roger A. Pearce, WSBA No. 21113
Attorneys for Washington Dental Service Foundation, LLC

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
JUDGMENT - 11

90757162.2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

APPENDIX B

Sponsored by
OUR WATER—OUR CHOICE!
 P O Box 2423, Port Angeles, WA 98362
 Campaign Manager Lynn Warber—lynnw@olympen.com

B-423

MASS MEDICATION IS FORCED MEDICATION

VOTE
 YES FOR CHOICE

INITIATIVE PETITION FOR SUBMISSION TO THE PORT ANGELES CITY COUNCIL

TO: The City Council of the City Of Port Angeles:

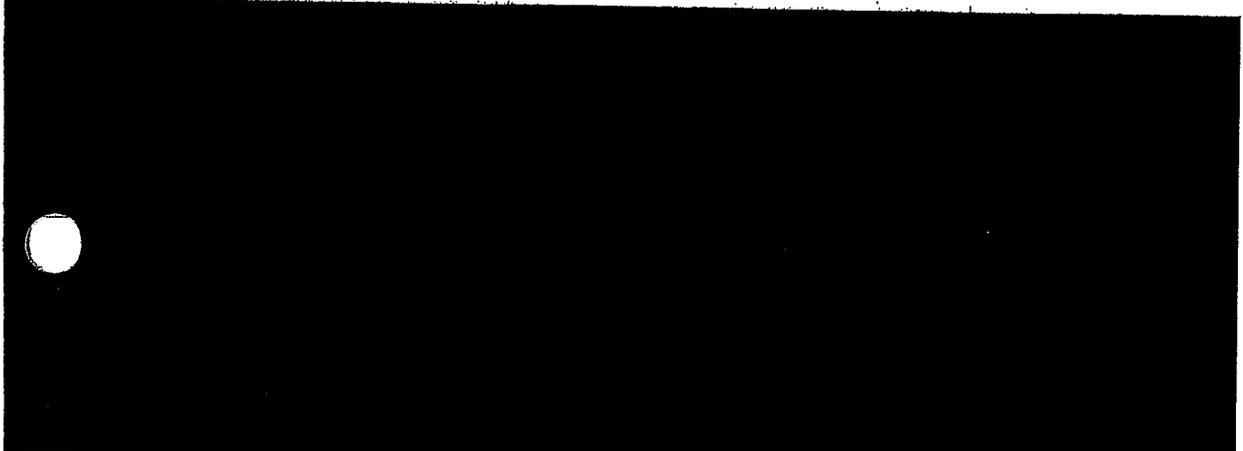
We, the undersigned registered voters of the City of Port Angeles, State of Washington, respectfully request that the following ordinance be enacted by the City Council or, if not so enacted, be submitted to a vote of the residents of the City. The proposed title of the said ordinance is the

MEDICAL INDEPENDENCE ACT.

The full text of the ordinance is on the reverse side of this petition.

THE INTENT OF THIS ORDINANCE is to prohibit medication of people through public drinking water supplies while allowing necessary treatment of water to make it safe to drink. People claim the right to control what medication is given them, and a right to their fair share of a public water supply which is free of medication.

EXHIBIT A



Medical Independence Act

SECTION 1. Intent. Over the objection of many of its citizens, the City Council approved the addition of hexafluorosilicic acid (a form of fluoride) to the City's public drinking water for the express purpose of reducing tooth decay. This action has forced the entire community either to submit to this medication for tooth decay, to remove it as best individuals can, or to not use the water. Extraordinary effort and expense are required to escape being medicated by this substance which is absorbed even through unbroken skin. For many, effective avoidance is an economic and practical impossibility resulting in their enforced medication. The citizens herewith determine that access to a public water supply constitutes a property right shared by all users of that water supply. They find that the property rights of persons to whom medicated water is unacceptable are impaired by addition of medication to the common supply of water and that this is a takings which has not been compensated in any way. Furthermore, the citizens declare that the right of all adult and mentally competent citizens to control their own medical care and the right to informed consent for medical treatment are essential to their pursuit of life and liberty. The citizens of Port Angeles now declare that public water supplies should not be used to medicate citizens.

SECTION 2. It shall be unlawful for any person, agent, or any public water system to put or continue to put any product, substance, or chemical in public water supplies for the purpose of treating physical or mental disease or affecting the structure or functions of the body of any person, or with any other intent of acting in the manner of a preventive or treating medication or drug for humans or animals.

SECTION 3. This ordinance does not apply to substances which are added to treat water to make water safe or potable such as use of agents for disinfection, or corrosion control PROVIDED that water treatment substances contaminated with fluoride in amounts sufficient to elevate levels of fluoride in the finished water by more than 0.1 parts per million above those background levels which occur naturally in the raw supply water shall be prohibited.

SECTION 4. In case of conflict with any law, regulations, resolutions, or ordinances of the City of Port Angeles, this ordinance shall prevail to the maximum extent allowed by law. The action by the City Council taken Feb. 18, 2003 to approve addition of fluoride to the municipal water supply is hereby repealed.

SECTION 5. This ordinance shall take effect thirty days after certification of the election at which it was approved by the Port Angeles electorate. Additions of hexafluorosilicic acid solution to the municipal water supply will then cease.

SECTION 6. If any provision, phrase, or part of this ordinance or its underlying legal basis, or the application to any person or circumstance is held invalid, the remainder of the provisions of this ordinance or the application thereof shall be given effect insofar as possible, and to this end the provisions of this ordinance are severable.

B-191

112.3

Sponsored by
PROTECT OUR WATERS
 Ann Mathewson, Treasurer
 PO Box 2423 Port Angeles, 98362
 powowoc@yahoo.com

**IMPROVING STANDARDS FOR MEDICATIONS
 PUT IN PUBLIC DRINKING WATER**

INITIATIVE PETITION FOR SUBMISSION TO THE PORT ANGELES CITY COUNCIL

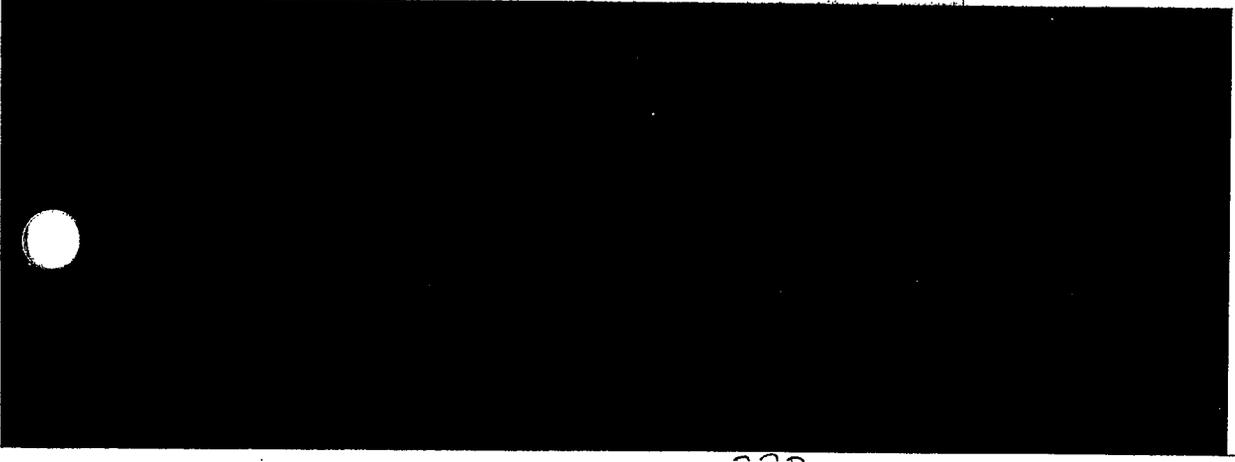
TO: The City Council of the City Of Port Angeles:
 We, the undersigned registered voters of the City of Port Angeles, State of Washington, respectfully request that the following ordinance be enacted by the City Council or, if not so enacted, be submitted to a vote of the residents of the City. The proposed title of the said ordinance is the

WATER ADDITIVES SAFETY ACT.

This initiative requires specific safety standards for any substance intended to act on the mind or body of people and added to public drinking water. FDA approval is required. No component of the additive may cause water to exceed existing federal standards determined to protect the health of everyone— infant to aged—for a lifetime. This ordinance does not regulate chemicals added to water to make water safe or potable.

The full text of the ordinance is on the reverse side of this petition.

EXHIBIT B



WATER ADDITIVES SAFETY ACT

WHEREAS substances intended to treat or prevent human illness (including tooth decay) are by definition drugs which are mandated by Congress to be regulated by the Food and Drug Administration (FDA),
WHEREAS the FDA as well as the Washington State Department of Health and WAC 246-895-070 all require full disclosure of all components of drugs, which the City has yet to reveal for the formulation currently being added to its drinking water,
WHEREAS under Article 11 SECTION 11 of the State Constitution, RCW 35.88.020 and RCW 35A.70.070(6). The City Of Port Angeles may prescribe what acts shall constitute offenses against the purity of its water supply and exercise control over water pollution, and RCW 70.142.010 (2) expressly states that State and local standards for chemical contaminants may be more strict than the federal standards,
WHEREAS the citizens of Port Angeles, taking great pride in the pristine water of this area, desire to enact the following ordinance to ensure the healthfulness and aesthetic qualities of its water for all of its citizens including infants, the infirm and elderly.
Now, therefore we hereby ordain that the City of Port Angeles add to the Municipal Code:

SECTION 1

Intent: A public drinking water supply is a public resource essential to life and health. Drinking water additives intended to make water safe from microbiologic contaminants and to treat water to control corrosion and other physical properties of the water are accepted. However, the deliberate addition to drinking water of substances intended to treat the mind or body of persons in an entire population is highly controversial. This ordinance requires that any substances which are added with the intention of treating people, not the water, must meet existing health-based standards which protect the entire population, including infants, the infirm and the elderly over their lifetime.

SECTION 2

Definitions:

(A) Substance: A substance may be organic or inorganic in nature and includes drugs as defined in RCW 69.04.009, and RCW 69.41.010(9).

(B) Contaminant: A contaminant is a chemically or physically detectable quantity of any substance other than the named substance which is present in a concentrated formulation intended to be dispensed into drinking water. As used here, the term includes all components including by-products from source materials and their manufacturing process.

(C) "Contaminated with filth" is a term applicable to contaminants taken singly or as a group which are present in a product intended to be added to drinking water and which are present in quantities which would, when dispensed at the manufacturer's Maximum Use Level, allow the final consumer-ready product to exceed for one or more contaminants the Maximum Contaminant Level Goals ("MCLGs") as published by the U.S. Environmental Protection Agency ("EPA") pursuant to the Federal Drinking Water Act, 42 USC 300f et. seq.

SECTION 3

(A) A person or entity shall not add any substance to a public drinking water supply with the intent to treat or affect the physical or mental functions of the body of any person or which is intended to act as a medication for humans unless the manufacturer, producer, or supplier provides proof that the substance is specifically approved by the United States Food and Drug Administration ("FDA") for safety and effectiveness with a margin of safety that is protective against all adverse health and cosmetic effects at all dosage ranges consistent with unrestricted human water consumption.

(B) It is prohibited to add to a public water supply any substance which is contaminated with filth. No component of the additive mixture shall cause the drinking water to exceed the "MCLGs" determined for that component.

(i) For purposes of determining the specific contaminant contribution under paragraph (B), each shipment of the substance must include its own certificate of independent analysis provided by the manufacturer, producer, or supplier. This certificate must reveal all detectable components in the specific batch of product pursuant to WAC 246-895-070(9). Analysis of the contaminant contribution of each component shall be based on conventional tests made of the undiluted product at the application rate stated by the manufacturer to be the Maximum Use Level. The substance shall not be added to drinking water if it contains any contaminant at a concentration that will cause the drinking water to exceed the MCLG, which is the scientific health-based point of safety established by the U.S. EPA for lifetime consumption of that contaminant in drinking water.

(C) The provisions of this ordinance do not apply to substances which are added to treat water to make water safe or potable PROVIDED that water treatment substances which contain fluoride in amounts sufficient to elevate levels of fluoride in the finished water by more than 0.1 parts per million above background levels shall not be exempted by this subsection.

SECTION 4

Violations of this ordinance constitute a public nuisance and violation of this ordinance shall be punishable as a gross misdemeanor under RCW 70.54.020.

SECTION 5

(A) To the maximum extent permitted by law, this ordinance takes precedence over any conflicting provisions in the laws, regulations, resolutions, or other ordinances of the City of Port Angeles. It does not prohibit fluoridation provided the substance used for that purpose meets the approval of FDA and the stringent safety standards as prescribed herein.

(B) This ordinance is to take effect thirty days after certification of the election in which it was approved by the Port Angeles electorate. Additions of hexafluorosilicic acid solution to the municipal water supply will then cease until proof is publicly available that the substance meets all the criteria set by this ordinance.

SECTION 6

If any provision, phrase, or part of this ordinance or its underlying legal basis, or the application to any person or circumstance is held invalid, the remainder of the provisions of this ordinance or the application thereof shall be given effect insofar as possible, and to this end the provisions of this Act are severable.