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Washington State Supreme Court

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NO. 92749-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, on the Relation of Gregory M. Banks,
Prosecuting Attorney of Island County,

Appellant,

vs.

SUSAN E. DRUMMOND, and Law Offices of Susan Elizabeth
Drummond, PLLC;

Respondents,

and

ISLAND COUNTY BOARD OF COMMISSIONERS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Brian L. Stiles, Judge

BRIEF OF APPELLANT

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 3. Whether a Board of County Commissioners may expend public funds to employ a special counsel to perform the duties of the duly elected and qualified prosecuting attorney when the prosecuting attorney is not temporarily unable to perform his or her duties and the prosecuting attorney has not refused to perform the duties for which the special counsel is employed?

 4. Whether a contract entered into by a Board of County Commissioners with a special counsel pursuant to RCW 36.32.200 is ultra vires where the duly elected and qualified prosecuting attorney has not been found to be temporarily unable to perform the duties of his office and the prosecuting attorney does not consent to the special counsel performing the duties of his office?

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I. INTRODUCTION

This case presents a fundamental issue affecting the government of all 39 Washington counties: Who chooses the legal advisor to county officials? Can each official or body of officials select his, her, or their own advisor, to serve at public expense? Or do the voters select a single person who will advise all the County officials, by electing a County Prosecutor?

This Court previously answered this question in favor of the voters. Every jurisdiction that elects its prosecuting attorney also ruled in favor of the electorate. The trial court, however, ruled that a Board of County Commissioners may disenfranchise the electorate and employ a private attorney to perform the duties of the duly elected prosecuting attorney whenever it desires. This holding violates the Washington Constitution. It cannot stand.

II. ASSIGNMENTS OF ERROR¹

1. The superior court erred in denying the State's motion for summary judgment. CP 1.
2. The superior court erred in denying the State's request for an order ousting Susan Drummond and the Law Offices of Susan Elizabeth Drummond, PLLC from the Office of the Island County Prosecuting Attorney. CP 1.
3. The superior court erred in granting the Island County Board of Commissioners' and Susan Drummond and the Law Offices of Susan

¹The State also sought review of two other orders entered by the superior court: (1) Order Denying Plaintiff's Motion to Strike Non-Party County Response Letters; and (2) Order on State's Evidentiary Objections. The State voluntarily withdraws its notice of appeal as to these evidentiary orders. *See* RAP 18.2.

Elizabeth Drummond, PLLC's motions for summary judgment. CP 1.

4. The superior court erred by declaring the employment contract between the Board and Ms. Drummond to be valid. CP 1.

III. STATEMENT OF ISSUES

1. Whether a Board of County Commissioners may disenfranchise the electorate by appointing a lawyer to perform the core duties of the duly elected and qualified prosecuting attorney?

2. Whether it is an unconstitutional use of RCW 36.32.200 to employ a special counsel to perform the core functions of the duly elected and qualified prosecuting attorney when the prosecuting attorney is not temporarily unable to perform his duties and the prosecuting attorney does not consent to the employment of a special counsel?

3. Whether a Board of County Commissioners may expend public funds to employ a special counsel to perform the duties of the duly elected and qualified prosecuting attorney when the prosecuting attorney is not temporarily unable to perform his or her duties and the prosecuting attorney has not refused to perform the duties for which the special counsel is employed?

4. Whether a contract entered into by a Board of County Commissioners with a special counsel pursuant to RCW 36.32.200 is ultra vires where the duly elected and qualified prosecuting attorney has not been found to be temporarily unable to perform the duties of his office and the prosecuting attorney does not consent to the special counsel performing the duties of his office?

IV. STATEMENT OF FACTS

Gregory Banks is the duly elected Island County Prosecuting Attorney. Prosecutor Banks, who is currently serving his fifth term of office, is fully qualified to serve. CP 109 at ¶¶ 1 and 3, 134-35, 388-389, 409-416, 477 at ¶¶ 3.1 - 3.7, 551 at ¶¶ 3.1-3.7, 1298.

The Island County Board of Commissioners (hereinafter “the Board”) retained Susan Drummond and the Law Offices of Susan Elizabeth Drummond, PLLC (hereinafter “Ms. Drummond”) to perform legal services and duties “which any prosecuting attorney is authorized or required by law to perform.” RCW 36.32.200. The employment contract between Ms. Drummond and the Board complied with the procedural requirements of RCW 36.32.200, as it was reduced to writing, was approved by the Island County Superior Court presiding judge, and was limited to a period of two years.² CP 461-469, 479 at ¶¶ 3.21 - 3.24, 538; 552-53 at ¶¶ 3.21 - 3.24.

Prosecutor Banks objected to the hiring of any attorney to perform the duties identified in the contract between the Board and Ms. Drummond. CP 130 ¶ 62, 303, 309-15, 478 at ¶ 3.20, 538, 552 at ¶ 3.20, 633-34, 901. Prosecutor Banks’s office is capable of providing the services and his office has never refused to perform the duties identified in the contract. CP 279-281, 392- 396, 400, 402-03, 433-437, 1227-1244, 1301. Furthermore, no court of competent jurisdiction has determined in accordance with RCW 36.27.030 that Prosecutor Banks is temporarily disqualified from performing any of the duties contained in the contract between Ms. Drummond and the

²A copy of the employment contract and the associated resolution may be found in appendix A.

Board. *See generally* CP 305, 389, 400, 477 at ¶ 3.8, 538,³ 551 at ¶ 3.8; CP 628.

Prosecutor Banks specifically objected to the employment of Ms. Drummond. Prosecutor Banks declined to exercise the authority granted to him by RCW 36.27.040, to appoint Ms. Drummond to the positions of deputy prosecuting attorney, special deputy prosecuting attorney, or temporary deputy prosecuting attorney. CP 405-08, 479-80 at ¶¶ 3.19-3.20, 538, 552 at ¶¶ 3.19 - 3.20, 634-36, 709 at ¶ 14. No court of competent jurisdiction exercised the power granted by RCW 36.27.030 to appoint Ms. Drummond a special prosecuting attorney. CP 305, 389, 400, 628, 634.

Nonetheless, Ms. Drummond began providing legal advice and performing the other duties identified in the employment contract shortly after April 28, 2015. CP 406, 479 at ¶ 3.25, 553 at ¶ 3.25, 635. Prosecutor Banks filed a quo warranto information seeking the ouster of Ms. Drummond from the office of the Island County Prosecuting Attorney. CP 407, 476-536.

The Board intervened in the quo warranto action to support Ms. Drummond's claim that her employment contract with the Board entitles her to perform legal services and duties "which any prosecuting attorney is authorized or required by law to perform." RCW 36.32.200. CP 1028-29, 1340 at ¶ 6. The Board filed a counterclaim, seeking a declaration that the employment contract with Ms. Drummond "is valid in general and in particular under RCW 36.32.200 and the Washington Constitution." CP 556

³*But see* CP 546.

at ¶ 8.9.

The superior court resolved this matter by granting summary judgment in favor of Ms. Drummond and the Board. CP 1. The superior court also granted declaratory relief to the Board. *Id.* The State filed a timely notice of appeal direct to the Washington Supreme Court. CP ____.

V. STANDARD OF REVIEW

The trial court disposed of this case in a summary judgment proceeding. An appellate court reviews a grant of summary judgment de novo. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 212, 254 P.3d 778 (2011). Summary judgment is appropriate where there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The evidence and inferences from the evidence are construed in favor of the nonmoving party. *Burton*, 171 Wn.2d at 212. When reviewing an appeal from summary judgment, an appellate court will disregard any findings of fact that were entered by the trial court. *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991).

Interpretation of statutes and the Washington Constitution are issues of law, subject to de novo review. *State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009) (“Construction of the state constitution is a question of law that is reviewed de novo.”); *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (“Construction of a statute is a question of law that we review de novo ...”).

VI. ARGUMENT

A. **A quo warranto proceeding is the proper means of ousting an attorney whose employment contract to perform the duties of the prosecuting attorney violates the Washington Constitution.**

This matter is a quo warranto action. “Quo warranto is Latin for “by what authority.”” BLACK'S LAW DICTIONARY 1447 (10th ed. 2014). It is a common law writ that allows someone to challenge a person's authority to hold public office. *Id.*” *Grant County Prosecuting Attorney v. Jasman*, 183 Wn.2d 633, 636 n. 1, 354 P.3d 846 (2015). The common law writ has, in Washington, been supplanted by statute. *See* Chapter 7.56 RCW; RCW 4.04.010 (common law controls decisions unless inconsistent with statute). The applicable statutes authorize the prosecuting attorney to file a public quo warranto action against any person who “intrude[s] upon” or “unlawfully exercise[s] any public office.” RCW 7.56.010(1); RCW 7.56.020.

When a prosecuting attorney files a public quo warranto action in the name of the State, the sole remedy available is the entry of a judgment of ouster against the person who has been found guilty of any usurpation of or intrusion into, or unlawful exercise of any office. *See* RCW 7.56.070 and 7.56.100. The availability of a judgment of ouster is not dependent upon the title the alleged usurper has assumed. The application of the quo warranto statute turns upon the person's actual job duties. *See Grant County Prosecuting Attorney*, 183 Wn.2d at 645.

Quo warranto actions are the proper mechanism by which a prosecuting attorney seeks to have his office fully restored to him. *See Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990) (quo

warranto action to oust special prosecutor appointed by the district court); RCW 7.56.020; 27 C.J.S. District and Prosecuting Attorneys § 10, at 543-44 (2009). A quo warranto proceeding is properly brought against a person whose sole claim to the office of prosecuting attorney is a contract with the board of county commissioners. *See State ex rel. Cline*, 21 Ohio C.D. 236, 31 Ohio C.C. 236, 12 Ohio C.C. (n.s.) 103 (1909) (quo warranto action to oust attorneys employed as legal counsel pursuant to a contract that was authorized by a statute and was entered into between the attorneys and the board of county commissioners).

The defendant in a quo warranto action has the burden of establishing a de jure title to the office the defendant is seeking to exercise. *See generally* 65 Am. Jur. 2d, *Quo Warranto* § 103, at 162 (2011) (burden is upon the defendant in a quo warranto action to establish good legal title to the office and not merely a right de facto).⁴ Ms. Drummond's sole justification for

⁴One learned treatise explains the characteristics of an officer de jure and an officer de facto as follows:

An officer *de jure* is one who, possessing the legal qualifications, has been lawfully chosen to the office in question, and has fulfilled any conditions precedent to the performance of its duties. By being thus chosen and observing the precedent conditions, such a person becomes of right entitled to the possession and enjoyment of the office, and the public, in whose interest the office is created, is entitled of right to have him perform its duties. If he is excluded from it, the exclusion is both a public offense and a private injury.

An officer *de jure* may be excluded from his office by either an officer *de facto* or an intruder. An officer *de facto* is one who by some color of right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His color of right may come from an election or appointment made by some officer or body having colorable but no actual right to make it; or made to fill the place of an officer illegally removed, or made in favor of a party not having the legal qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such

providing legal services to the Board is Resolution C-48-15. *See generally* CP 538-44. The Washington Constitution, however, prohibits a Board from contracting with a private attorney to perform the duties of the duly elected and qualified prosecuting attorney outside of three narrow circumstances.

B. The Washington Constitution serves as a bulwark against any one official gaining too much power by diffusing power among many elected officials, and prohibiting any one from exercising the powers of another.

The office of Prosecuting Attorney was created by the Washington constitution: “The legislature ... shall provide for the election in the several counties of ... prosecuting attorneys...” Const., art XI, sec. 5. The significance of this provision should be assessed in light of the circumstances that led to its adoption.

On July 4, 1889, an elected convention of delegates assembled in Olympia, Washington for the purpose of drafting a constitution for our state. Twenty-four of these delegates were lawyers, including J.B. Hoyt and George Turner, who had served as supreme court judges in Washington Territory. Beverly Rosenow, *The Journal of the Washington State Constitutional Convention 1889*, at 465-67, 469-71, 473-477, 480-481, 483- 489 (1962). The delegates came to their task with models and drafts of constitutions adopted by other states. Charles M. Gates, *Foreword to The Journal of the*

circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be. An intruder is one who attempts to perform the duties of an officer without authority of law, and without the support of public acquiescence.

² Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, at 1354-55 (8th ed. 1927) (footnotes omitted).

Washington State Constitutional Convention 1889, at v (Beverly Paulik Rosenow ed., 1962). These delegates also had available to them the leading treatise of the day, Thomas Cooley, *A Treatise on the Constitutional Limitation Which Rest Upon the Legislative Power of the States of the American Union* (5th ed. 1883) (hereinafter “*Constitutional Limitations* (5th ed.)”),⁵ and the interpretive decisions of the courts whose constitutions served as the model for Washington’s constitution.

Any inquiry into the thoughts of the delegates must begin with article I, section 1, of the constitution. This provision announces to one and all that the people reserve unto themselves the right to select who may exercise political power in Washington:

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Const. art. I, § 1.

The final constitution constituted an express surrender of much of the people’s sovereignty to the state government. *See Amalgamated Transit v. State*, 142 Wn.2d 183, 238, 11 P.3d 762 (2000). The people, however, reserved to themselves the right to determine who could serve in the

⁵Decisions of the Territorial Supreme Court repeatedly cited this treatise. *See, e.g., Harland v. Territory*, 3 Wash. Terr. 131, 145-146, 13 P. 453 (1887) (Associate Justice Turner, who later served as a delegate to the Constitutional Convention, discussing Cooley’s treatise); *Bloomer v. Todd*, 3 Wash. Terr. 599, 618, 19 P. 135 (1888) (citing to Cooley’s treatise); *Maynard v. Hill*, 2 Wash. Terr. 321, 326, 5 P. 717 (1884) (Associate Justice Hoyt, who later served as president of the Constitutional Convention, citing to Cooley’s treatise); *Maynard v. Valentine*, 2 Wash. Terr. 3, 9, 3 P. 195 (1880) (“Especially valuable we have found the observations of ... and those of Judge Cooley, in his work on *Constitutional Limitations*”).

government. By specifying in the constitution the terms of offices,⁶ providing for the election of officers,⁷ setting the qualifications for service as an officer,⁸ and naming the officers and offices,⁹ the delegates ensured that power could not become concentrated in any one person or any one branch of government.

At the state government level, the Washington Constitution created three branches of government: the judicial, the legislative, and the executive. *See, e.g., Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 696, 310 P.3d 1252 (2013). The powers of the executive branch were further subdivided through the direct election of the attorney general, the state treasurer, the state auditor, the secretary of state, the attorney general, the superintendent of public instruction, and the commissioner of public lands,¹⁰ rather than allowing the governor to appoint these individuals.¹¹

At the county level, the Washington Constitution divides county government between a number of offices— county commissioners, sheriffs,

⁶See Const. art. II, §§ 4 and 6; Const. art. III, §§ 2 and 3; Const. art. IV, §§ 3 and 5.

⁷See Const. art. II, §§ 4, 5, and 6; Const. art. III, § 1; Const. art. IV, §§ 3 and 5; Const. art. XI, §§ 4 and 5.

⁸See Const. art. II, § 7; Const. art. III, § 25; Const. art. IV, § 17.

⁹See Const. art. III, § 1; Const. art. IV, Const. art. XI, §§ 4 and 5.

¹⁰ See Const. art. III, §§ 17, 19, 20, 21, 22, 23. See William P. Marshall, *THE MOST DANGEROUS BRANCH? MAYORS, GOVERNORS, PRESIDENTS, AND THE RULE OF LAW: A SYMPOSIUM ON EXECUTIVE POWER: ESSAY: Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2551-52 (2006) (discussing the trend among the states to weaken the power of a central executive and create intrabranched systems of checks and balances).

¹¹The United States Constitution grants the president the power to appoint all other officers of the United States, whose appointments are not otherwise provided for in the constitution. See U.S. Const. Art. II, sec. 2.

county clerks, treasurers, prosecuting attorneys and other officers. See Const. art. XI, § 5 (“The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers . . .”). Each of these officials are directly elected by the people. *Id.* The delegates were able to rest securely in the knowledge that the black letter law applicable to constitutions would protect their carefully crafted plan to diffuse power:

The authority that makes the law has large discretion in determining the means through which they shall be executed; and the performance of many duties which they may provide by law they may refer either to the chief executive of the State, or, at their option, to any other executive or ministerial officer, or even to a person specially named for the duty. What can be definitely said on this subject is this: That such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law.

Constitutional Limitations (5th ed.), at 135-36.

At the local level, this bedrock principle meant that:

[I]f the term of an office is fixed by the Constitution, the legislature cannot remove the officer, — except as that instrument may allow, — either directly, or indirectly by abolishing the office... Or by shortening the constitutional term. . . . Nor can the legislature take from a constitutional officer a portion of the characteristic duties belonging to that office, and devolve them upon an office of its own creation. . . . Nor, where the office is elective, can the legislature fill it, either directly, or by extending the term of the incumbent.

Constitutional Limitations (5th ed.), at 335 n. 1 (citations omitted).

The delegates demonstrated their understanding of these principles throughout the constitution they sent to the people. In article I, sec. 23, they

proclaimed that “[t]he provisions of this Constitution are mandatory, unless by expressed words they are declared to be otherwise.” Other provisions of the constitution expressly granted the legislature and local government the option of abolishing certain offices. *See, e.g.*, Const. art. III, § 25 (1889) (“The legislature may in its discretion abolish the offices of the lieutenant governor, auditor and commissioner of public lands.”); Const. art. XI, § 5 (1889) (“That the legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers.”).

The bedrock principle that the legislature may not, by statute, authorize another to perform the duties of a constitutionally created office is recognized by multiple courts, including this Court. *See State ex rel. Johnston v. Melton*, 192 Wash. 379, 388, 73 P.2d 1334 (1937) (“In naming the county officers in § 5, Article 11 of the constitution, the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold.”).

This bedrock principle applies to a wide range of offices, including sheriffs, county auditors, state examiner, and district attorneys. *See, e.g., Meller v. Board of Commissioners of Logan County*, 4 Idaho 44, 35 P. 712, 714-15 (1894) (district attorney); *Judith Basin County ex rel. Vralsted v. Livingston*, 89 Mont. 438, 298 P.356 (1931) (state examiner); *Murphy v. Swanson*, 50 N.D. 788, 198 N.W. 116, 119-120 (1924) (county auditor); *State ex rel. Johnston v. Melton, supra* (sheriffs); *State ex rel. Kennedy v.*

Brunst, 26 Wis. 412 (1870) (sheriff).

This bedrock principle applies whether the duties are shifted from the constitutionally created office to another elected official or to a private actor. *See, e.g., State ex rel. Johnston v. Melton, supra* (sheriff's duties could not be lawfully performed by an investigator hired by the prosecuting attorney); *Meller*, 35 P. at 715 (private counsel could not lawfully perform the duties of the prosecuting attorney and/or the attorney general).

Modern treatises recognize the continuing validity of this bedrock principle, stating with respect to prosecuting attorneys that

Although the term of office may be shortened or lengthened by constitutional amendment at any time the people choose to express their will in the manner provided by the constitution, if the office is created and the term fixed by the constitution, the legislature cannot abridge the term thereof, as by providing for a new election before the expiration thereof, changing the name of the circuit, assigning the duties of the prosecuting attorney to the attorney of another district, redividing one judicial circuit into two, or by changing or abolishing judicial circuits.

27 C.J.S. District and Prosecuting Attorneys § 16, at 550 (2009) (footnotes omitted). This treatise further states that “[i]f a prosecutor’s official duties are prescribed by the state constitution, they cannot be increased or diminished by statute.” *Id.*, § 26, at 562. This black letter law was ignored by the superior court when it denied the State’s request for entry of an order ousting Ms. Drummond from the office of the Island County Prosecuting Attorney.

C. Prosecuting attorneys are elected by the people in Washington to ensure autonomy and to prevent concentration of power in the county commissioners.

The office at issue in this case is that of Island County Prosecuting Attorney. The office of prosecuting attorney is enumerated in the Washington Constitution. *See* Wash. Const. art. XI, sec. 5 (“The legislature, by general and uniform laws, shall provide for the election in the several counties of . . . prosecuting attorneys”).

Prosecuting attorneys have been elected in Washington since 1855.¹² This method of selecting a prosecuting attorney was the culmination of a trend toward locally elected officials which began around 1820. The purpose of electing, rather than appointing, prosecuting attorneys was to provide greater independence and freedom to exercise discretion and to provide accountability to local communities. *See generally* Michael Ellis, *The Origin of the Elected Prosecutor*, 121 Yale L.J. 1528 (2012); Joan E. Jacoby, *The American Prosecutor: A Search for Identity* 22 (1980); *State v. Rice*, 174 Wn.2d 884, 904-05, 279 P.3d 849 (2012) .

Washington’s commitment to an independent prosecuting attorney is demonstrated by the restriction placed upon home rule counties. A home rule county may not shift the power, authority, or duties of the prosecuting attorney to some other office or officer and may not provide for the appointment of, rather than the election of, the prosecuting attorney. *See* Const. art. XI., sec. 4 (“Any home rule charter proposed as herein provided,

¹² *See generally* Laws of 1855, pg. 416, § 1; Laws of 1860, pg. 334, § 1; Laws of 1863, pg. 408, § 1; Laws of 1877, pg. 245, § 1; Laws of 1879, pg. 92, § 1; Laws of 1883, pg. 72, § 1; Laws of 1885, pg. 59, § 1; Laws of 1889, pg. 304, § 2; Laws of 1891, chapter V.

may provide for such county officers as may be deemed necessary to carry out and perform all county functions as provided by charter or by general law, and for their compensation, but shall not affect the election of the prosecuting attorney”); AGO 2015 No. 6, at 3 (2015) (Const. art. XI, sec. 4 “bars county home rule charters from converting the position of county prosecutor into a non-elected, appointive position”).

As an elected officer, the prosecuting attorney owes his or her allegiance to the inhabitants of the county rather than to an appointing authority. *See generally* Michael Ellis, *The Origins of the Elected Prosecutor*, 121 Yale L. J. 1528 (2012) (explaining the factors that led to a shift from appointed prosecutors to elected prosecutors). As an elected officer, the prosecuting attorney may exercise his or her independent judgment without fear of repercussion from other branches of government or other government actors. *See, e.g.*, Washington Const. art. XI, sec. 8 (“The salary of any county . . . officers shall not be . . . diminished after his election, or during his term of office”); *State v. Heaton*, 21 Wash. 59, 62, 56 P. 843 (1899) (“The prosecuting attorney, in the faithful discharge of his duties, must exercise his independent judgment as to the prosecution or dismissal of an information or indictment, and it is in the interest of sound public policy that his discretion in the exercise of his duties should not be in any wise controlled by legal consequences unpleasant or unfavorable to himself.”).

The person that the citizens of Island County selected to perform the duties of the prosecuting attorney was Gregory Banks. Transferring some of his duties to a private attorney hired by the Board disenfranchised the public.

D. The prosecuting attorney's core functions include serving as legal advisor to the legislative authority and county officers.

While constitution article XI, section 5, authorizes the legislature to prescribe the duties of the prosecuting attorney, the legislature may not interfere with the core functions that make them prosecuting attorneys. *Rice*, 174 Wn.2d at 905. The core functions of the prosecuting attorney are those that were assigned to the prosecuting attorney in the years leading up to the adoption of the constitution. See *Melton*, 192 Wash. at 388 (“In naming the county officers in § 5, Article 11 of the constitution, the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold.”).

The duties of the prosecuting attorney have remained largely unchanged since territorial days. By 1889, when the Washington Constitution was drafted, the prosecuting attorney, in addition to representing the territory or the state in all criminal matters, was the legal advisor to county officers and the legislative authority and was responsible for representing the territory or county in civil actions in which the territory or county may be a party.¹³

The core duties of the prosecuting attorney are the same today. RCW 36.27.020 provides, in part, that:

¹³See Laws of 1855, pg. 417, § 4; Laws of 1860, pg. 334, § 3; Laws of 1863, pg. 408, § 4; Laws of 1877, pg. 246-47, §§ 6-9; Laws of 1879, pg. 93-94, §§ 6-8; Laws of 1883, pg. 73-74, §§ 10-13; Laws of 1885, pg. 61, §§ 5-8. Copies of these session laws may be found in appendix B

The prosecuting attorney shall:

(1) *Be legal adviser of the legislative authority, giving it his or her written opinion when required by the legislative authority or the chairperson thereof touching any subject which the legislative authority may be called or required to act upon relating to the management of county affairs;*

(2) *Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;*

(3) *Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;*

(4) *Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;*

RCW 36.27.020 (emphasis added).

The fact that the prosecuting attorney's core function included the role of civil legal advisor to the county is further established in an unbroken line of attorney general opinions (hereinafter "AGO") and attorney general letter opinions (hereinafter "AGLO")¹⁴ which establish that only the prosecuting attorney serves as the civil legal advisor for the county. "Although not controlling, these attorney general opinions are entitled to great weight." *Thurston County v. City of Olympia*, 151 Wn.2d 171, 177, 86

¹⁴Courts frequently given deference to these informal letter opinions. *See, e.g., Thurston County*, 151 Wn.2d at 177 ("A 1974 attorney general letter opinion (AGLO) is particularly instructive here."); *State ex rel. Evergreen Freedom Foundation v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 602, 49 P.3d 894 (2002) ("the trial court properly adopted the test from a 1973 Attorney General Letter Opinion").

P.3d 151 (2004). One reason why significant weight is given to an AGO is that the opinion “represent[s] the considered legal opinion of the constitutionally designated ‘legal adviser of the state officers.’ Wash. Const. art. III, § 21.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011).

In AGO 1907-08, p. 113 (1907), the attorney general’s office identified the legal advisor for the county and explained the restrictions placed upon other attorneys when the office of prosecuting attorney is occupied. In response to a question from the Whatcom County assessor, the attorney general stated that:

Your official legal adviser is the prosecuting attorney of your county, and it is not within the official duties of this office to advise, except through the prosecuting attorney’s office. However, with the consent of the latter we reply . . .

In 1937, the attorney general’s office sought to clarify who is authorized to provide legal opinions to county commissioners. In AGO 1937-38, p. 84 (1937), the attorney general explained that no attorney could provide advice to a county commissioner without the consent of the prosecuting attorney:

As a county commissioner, your legal adviser is the prosecuting attorney and as he has not invited me to give an opinion I must refer you to him . . .

It is of paramount importance that you know who your legal adviser is, for his advice alone will protect you as a public official.

...

A copy of this letter is being forwarded to the prosecuting attorney of Spokane county, as your legal adviser, and we respectfully request that you take up all matters of a legal nature with him.

AGO 1937-38, p. 84, at p. 84 and 86.

The attorney general opined in AGO 1937-38, p. 190 (1937), that the county planning commission could not hire an attorney to advise the commission in their duties of advising the county commissioners. The prohibition stemmed from the fact that the county commissioners are amply provided with legal services through the prosecuting attorney. AGO 1937-38, p. 190, at 192. The attorney general further opined that “no rules of statutory construction” allowed a statute which authorized the commission to “employ such employees and expert consultants as are deemed necessary for its works” to be construed as allowing the commission to employ an attorney. *Id.*

Changes to the core duties of the prosecuting attorney require a constitutional amendment. *See* AGLO 1973, No. 115;¹⁵ AGLO 1974 No. 15 at n 1. *Cf. State ex rel. Hamilton v. Troy*, 190 Wash. 483, 486 P.2d 413, 110 A.L.R. 1211 (1937) (changing the name of “prosecuting attorney” to “district attorney” requires a constitutional amendment). A constitutional amendment requires a two-thirds vote of both branches of the legislature, followed and confirmed by a vote of the people. *See* Wash. Const. art. XXIII, sec. 1.

E. The Board of County Commissioners may not disenfranchise the voters by retaining someone else to perform some or all of the core duties of a separately elected official.

A board of county commissioners is assigned many responsibilities. The most sweeping responsibility is “the care of the county property and the management of the county funds and business . . . and such other powers as

¹⁵A copy of this AGLO and the other cited AGOs may be found in appendix C.

are or may be conferred by law.” RCW 36.32.120(6). This responsibility and the other duties assigned to the county legislative authority require a high degree of cooperation with separately elected county officials.

At times, a board of county commissioners may lack confidence in a separately elected official. The lack of confidence may arise from the separately elected official’s relative inexperience, education, choice of employees or deputies, political affiliations, or differing priorities. Sometimes the lack of confidence arises from some general disharmony in the personal relationship between the separately elected official and members of the legislative authority. Whatever the source of the discord, a board of county commissioners may not hire or fire the separately elected official. *See generally Oster v. Valley County*, 2006 MT 180, 333 Mont. 76, 140 P.3d 1079, 1084 (2006) (“the Commissioners may neither hire nor fire the county attorney once the voters have elected him”). Nor may the county legislative authority disenfranchise the voters by retaining someone else to perform some or all of the duties of the separately elected county official. *Salt Lake County Comm’n v. Short*, 199 UT 73, 985 P.2d 899, 907 (1999) (“the Commission cannot hire outside counsel to advise it when it disagrees with the advice of the elected attorney, or when it does not like the manner in which that person performs the duties of the office”); *Hoppe v. King County*, 95 Wn.2d 332, 340, 622 P.2d 845 (1980) (public funds may not be expended on a private attorney merely because a public official disagrees with the judgment of the prosecuting attorney).

In *Northwestern Improvement Co. v. McNeil*, 100 Wash. 22, 170 Pac.338 (1918), this Court expressly rejected a board of county

commissioners' claim that the general power conferred upon the legislative authority to manage the county business, RCW 36.32.120(6), allowed the board to hire a private person to perform the core functions of the separately elected county official. Holding that the county commissioners exceeded their authority in hiring an expert to value undeveloped coal and timber lands, this Court noted that regardless of the circumstances, the county commissioners may not disenfranchise the voters by installing a private individual to perform the duties of a separately elected county officer. *Northwestern Improvement Co.*, 100 Wash. at 33.

The *Northwestern Improvement Co.* Court identified the mischief that allowing commissioners to contract with a private individual to perform a separately elected county officer's duties would foster, as follows:

In the final analysis this case comes down to one question: Whether the county commissioners, however necessary a thing may seem to be, have the power to appoint a private individual to do a thing, or perform a duty, which the law imposes upon one of the regular county officers -- one who is charged with the doing of the very thing sought to be accomplished by independent contract with a stranger to the county. If this contract were to be upheld, the county commissioners might, by entering into one or many contracts, entirely usurp the powers of the county assessor and functions of his office on the theory that he, or they, were incompetent to make valuations on any one, or all classes of property; . .

Northwestern Improvement Co. 100 Wash. at 33.

In other words, allowing such contracts would be a return to the patronage system of the legislative body appointing other county officers rather than the election of such officers. This is contrary to Washington's Constitutional Convention's strong preference for decentralized government that is directly accountable to the people. *See Rice*, 174 Wn.2d at 900-01

(Washington's constitution divides government into three branches for the protection of individuals against centralized authority and abuse of power), and at 904-05 (Washington's constitution provided for locally elected officials to increase democratization and further diffuse governmental power).

The Court did suggest that the legislature could act to fill the perceived "expertise gap" that led the commissioners to retain a private individual to value undeveloped coal and timber lands. *Northwestern Improvement Co.*, 100 Wash. at 31. Within a decade, the legislature enacted Laws of 1925, Ex. Sess., ch. 130, § 56, which authorized the *assessor* to retain expert appraisers to assist in the valuation of property. While the commissioners needed to authorize payment for the experts, the assessor made the actual appointment. *Id.* This legislation honored the strong preference for decentralized government that is directly accountable to the people that permeates the Washington Constitution.¹⁶

The prohibition upon a board of county commissioners hiring a

¹⁶The policy that imbued the 1925 legislation is still honored today. See RCW 36.21.011 (authorizing the assessor, rather than the county commissioners, to retain expert appraisers).

The legislature has similarly authorized prosecuting attorneys to retain private attorneys when the prosecutor believes specialized assistance is required. See RCW 36.27.040. Prosecuting attorneys throughout the state utilize this authority. See generally CP 284-293, 642-676.

Prosecutor Banks consented to or acquiesced in the employment of private counsel on eighteen of twenty occasions. See generally CP 110-111 at ¶¶ 110-111, 398-399, 761-62 at ¶ 2. Prosecutor Banks withheld his consent as to Ms. Drummond for rational and cogent reasons, including problems caused by the County's use of outside counsel in the 1990s and 2000s, the expense of outside counsel, a desire to cultivate institutional knowledge, a desire that county officials are uniformly advised in areas of government transparency, a belief that someone with an understanding of pending GMA litigation, the unique geography of Island County, and local politics is best able to serve the citizenry. See generally CP 393-95, 399-400, 404-05, 1227-1244, 1299-1300, 1302.

private person to perform the duties of a separately elected county officer applies with greater force to the office of prosecuting attorney. The elected official in *Northwestern Improvement Co.* was the assessor. The office of county assessor is solely a creature of statute, while the office of county prosecuting attorney has constitutional stature. Compare Const. art. XI, sec. 5 (“The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office:”), with Laws of 1889, pg. 304, sec. 2 (“The officers of the county shall be: One county sheriff, one county clerk, one county auditor, one county treasurer, one county attorney,^[17] one county assessor. . .”).

In 1937, this Court rejected the notion that the legislature may authorize one elected official to retain a private person to perform the duties of a separately elected official. See *State ex rel Johnston v. Melton, supra*.

¹⁷The Legislature realized its error in calling the office “county attorney.” Laws of 1891, chapter V, pg. 6, sec. 1 clarified that the reference to “county attorney” actually should read “prosecuting attorney.” Laws of 1891, chapter V, pg. 6 (H.B. No. 99) stated that:

Section 1. That all officers elected as county attorneys at the last general election be, and they are hereby declared to be, prosecuting attorneys for the counties for which they were respectively elected, and shall be known and designated as such, and perform all the duties prescribed by law as the duties of the prosecuting attorneys.

Section 2. Whereas, doubt exists as to the duties of prosecuting officers; therefore, an emergency exists, and this act shall take effect immediately upon its passage and approval.

The emergency clarification was required because a change in the name of one of the constitutional offices requires a constitutional amendment. *State ex rel. Hamilton v. Troy*, 190 Wash. 483, 486 P.2d 413, 110 A.L.R. 1211 (1937).

In *Melton*, this Court declared a statute that authorized the prosecuting attorney to appoint investigators, who would be imbued with “the same authority as the sheriff of the county,” unconstitutional. This Court held that the legislature, by statute, cannot transfer the duties of one elected officer to other elected officers:

The act under construction expressly provides that, in each county of the state, important powers and functions, which belonged to the sheriff at the time our constitution was adopted and “from time immemorial,” may be exercised by persons not elected by the people but appointed by the prosecuting attorney. If the legislature has the power to do that, it can, by a similar law, provide that some other official may appoint persons to operate the county jail. It could also provide that the sheriff should appoint persons with “the same authority as” the prosecuting attorney to prosecute criminals “anywhere in the county,” and such enactments might be multiplied until a condition was brought about where the greater part of the governmental functions of the county would be executed by appointees. This cannot be done. The people have the constitutional right to elect the persons who shall perform the county governmental functions.

Melton, 192 Wash. at 389.

This Court reached a similar conclusion in *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935). *Gattavara*, a case that predated RCW 43.10.067¹⁸ by six years, involved an action brought in the name of the State,

¹⁸RCW 43.10.067, which was initially enacted by Laws of 1941, ch. 50, sec. 4, currently provides that:

No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general, except where it is provided by law to be the duty of the judge of any court or the prosecuting attorney of any county to employ or appoint such persons; PROVIDED, That RCW 43.10.040, and 43.10.065 through 43.10.080 shall not apply to the administration of the commission on judicial conduct, the state law library, the law school of the state

on behalf of a state agency, to collect industrial insurance and medical aid delinquent premiums and statutory penalties from the employers. The employers filed a motion to quash the summons and dismiss the action because it was brought by an attorney who was employed by the Director of Labor and Industries rather than by the attorney general. *Gattavara*, 182 Wash. at 326. Although Laws of 1933, chapter 193, p. 909,¹⁹ specifically empowered the director of labor and industries to retain a lawyer other than the attorney general, this Court held that an attorney retained pursuant to the statute could not institute suit without the express prior consent of the attorney general. *Gattavara*, 182 Wash. at 332-33. This conclusion was mandated by the Washington Constitution's creation of the office of attorney general to serve as a check on other branches of government. *Id.*

While *Melton* dealt with a statute that disenfranchised the voters with respect to the sheriff and *Gattavara* dealt with a statute that disenfranchised the voters with respect to the attorney general, other jurisdictions have considered similar statutes that allowed the county legislative branch to hire private attorneys to perform some of the functions of the prosecuting attorney. The North Dakota Supreme Court addressed the constitutionality

university, the administration of the state bar act by the Washington State Bar Association, or the representation of an estate administered by the director of the department of revenue or the director's designee pursuant to chapter 11.28 RCW.

The authority granted by chapter 1.08 RCW, RCW 44.28.065, and 47.01.061 shall not be affected hereby.

¹⁹Laws of 1933, chapter 193, p. 909, provided, in pertinent part, that:

The director of labor and industries shall have power to authorize any employee of the department who is an attorney admitted to practice law in the state of Washington to appear for the department in any action instituted for the purpose of collecting industrial insurance premiums.

of a statute that allowed the governor to appoint an attorney to serve as a deputy enforcement commissioner to enforce the state's prohibition laws. The deputy enforcement commissioner had the power to perform the duties of the county attorney. *Ex Parte Corliss*, 16 N.D. 470, 114 N.W. 962, 963 (1907). The statute was held unconstitutional as a violation of

those provisions of our constitution by which the people reserved the right to have the public functions which are attempted to be conferred upon the officers created by such act discharged by officers of their own selection. In other words, the people in framing the constitution, were careful to safeguard this right in unmistakable language by providing, in effect, that certain public duties should be performed by persons elected by them; and among the public duties to be only thus performed are those pertaining to the offices of state's attorneys and sheriffs.

Corliss. 114 Wn.2d at 963.

The *Corliss* court held that the legislative assembly's clear intention in enacting the statute at issue was to displace the regularly elected state's attorney. *Id.* at 964. Despite the North Dakota Constitution's provision that stated the duties of the elected county officers shall be prescribed by the legislature,²⁰ the court rejected the argument that the legislative assembly

²⁰North Dakota Constitution 1889, art. X, sec. 173, was substantially similar to Washington Constitution art. XI, sec. 5. Section 173 of the North Dakota Constitution that was in effect when the *Corliss* decision was issued stated as follows:

Section 173 of the Constitution: "At the first general election held after the adoption of this Constitution, and every two years thereafter, there shall be elected in each organized county in the state, a county judge, clerk of court, register of deeds, county auditor, treasurer, sheriff and state's attorney, who shall be electors of the county in which they are elected, and who shall hold their offices until their successors are elected and qualified.

"The legislative assembly shall provide by law for such other county, township and district officers as may be deemed necessary, and shall prescribe the duties and compensation of all county, township and district officers.

"The sheriff and treasurer of any county shall not hold their respective

may take away a portion of the officer's duties and confer them upon other officers not elected by the people. *Corliss*, 114 N.W. at 965. While acknowledging that the legislature may change the duties of the enumerated officers as the public welfare may demand, the legislature lacks the "power to strip such offices, even temporarily of a portion of their inherent functions and transfer them to officers appointed by central authority." *Id.* The *Corliss* opinion supports its conclusion with a comprehensive summary of cases from other jurisdictions in which statutes were declared unconstitutional because they allowed a person, who had not been elected to the position named in the constitution, to perform some of the functions essentially and inherently connected with the office. *Id.*

F. Other states expressly prohibit a county legislative authority from displacing the separately elected county attorney by hiring a private counsel to perform the county attorney's duties.

The North Dakota Supreme Court's opinion in *Corliss* is consistent with the decisions of seven additional sister states. The Arizona courts have considered the scope of the county legislative authority's inherent power to replace the duly elected county attorney with a private attorney. The Arizona cases are persuasive authority as their county attorney is a constitutionally created elected office. *See* Arizona Const. art. XII, sec. 3.²¹ The core

offices for more than four years in succession."

Daly v. Beery, 45 N.D. 287, 178 N.W. 104, 109 (1920) (quoting the North Dakota Constitution of 1889).

²¹The Arizona Constitution art. XII, sec. 3, currently states, in pertinent part, that "[t]here are hereby created in and for each organized County of the State the following officers who shall be elected by the qualified electors thereof: a Sheriff, a County Attorney, a Recorder, a Treasurer, an Assessor, a Superintendent of Schools and at least three Supervisors, each of whom shall be elected . . ."

functions of the Arizona county attorney are similar to the core functions of the Washington prosecuting attorney. *Compare* A. R. S. § 11-532²² with RCW 36.27.020. The Arizona board of supervisors has the same power to control litigation as does the Washington board of county commissioners. *Compare* A.R.S. § 11-251(14) (“Direct and control the prosecution and defense of all actions to which the county is a party, and compromise them.”), with RCW 36.32.120(6).

The Arizona Supreme Court held that the board of supervisors generally does not have the authority to employ private counsel to advise the board and other county officers or employees. *Board of Supervisors of Maricopa County v. Woodall*, 120 Ariz. 379, 586 P.2d 628, 631 (1978). In an opinion that surveys decisions from a number of other jurisdictions, the court based its decision on the creation of the “Office of County Attorney” in the Arizona Constitution and the existence of a statute, A.R.S. § 11-532(A)(7), that is substantially similar to RCW 36.27.020. *Woodall*, 586 P.2d at 631. The Arizona Supreme Court recognized a single exception to this rule, permitting a county board to hire outside counsel to provide legal advice if the county attorney refuses to act, is incapable of acting, or is otherwise unavailable. *Id.* at 382. *See also Romley v. Daughton*, 252 Ariz. 521, 241 P.3d 518, 521 (Ariz. App. 2010) (private counsel may be employed to provide advice to the board when the county attorney has a conflict of interest). In other words, outside counsel may be retained under the same circumstances as will allow for the appointment of a special prosecutor

²²Arizona Revised Statute § 11-532 is reproduced in appendix D.

pursuant to RCW 36.27.030. *See, e.g., Osborn v. Grant County*, 130 Wn.2d 615, 629, 926 P.2d 911 (1996) (county clerk is entitled to funds to pay private counsel who provided legal advice when prosecuting attorney was unable to do so due to a conflict of interest and the prosecutor did not appoint a special or temporary deputy under RCW 36.27.040 to provide legal advise to the clerk).

With respect to litigation, the Arizona courts allow the board of supervisors to retain outside litigation counsel without the consent of the county attorney. *Woodall*, 586 P.2d at 631-32; *Pima County v. Grossetta*, 54 Ariz. 530, 97 P.2d 538, 542 (1939). A board of supervisors, however, may not substantially displace the county attorney or disregard or supersede the county attorney as the law officer of the county by the wholesale transfer of litigation matters to private counsel. *Romley*, 241 P.3d at 523. Hiring outside counsel for litigation matters requires a case-by-case determination as to whether the county attorney is unavailable, or whether there is sufficient disagreement about legal strategy to justify hiring outside counsel. Litigation may not be referred to outside counsel due to “some general disharmony in the personal relationship between the County Attorney on one hand and members of the Board on the other.” *Id.*

California’s courts placed the same limits upon a county legislative authority’s retention of private counsel in the years preceding the adoption of the Washington Constitution and in the decade following the adoption of the Washington Constitution. These California cases are persuasive authority in Washington as the Washington Constitution borrowed heavily

from the California Constitution.²³ See, e.g., *Rice*, 174 Wn.2d at 904; Charles M. Gates, *Foreword to The Journal of the Washington State Constitutional Convention 1889*, at v (Beverly Paulik Rosenow ed., 1962) (Washington convention tended to copy the constitutions of other states); *The Journal of the Washington State Constitutional Convention 1889*, at 716 n. 8 (“Systems of County Government: Cal. Const. (1879), Art. 11, sec. 4. [Identical.]”²⁴); *Id.*, at 718 n. 10 (“County Officers, Compensation of: Cal. Const. (1879), art. 11, sec. 5. [Identical except for slight word change.]”²⁵).

In California, the county board was allowed to engage outside counsel for purposes of litigation. This power arose from implication from the county board’s power to control litigation to which the county is a party. See generally *Lassen County v. Shinn*, 88 Cal. 510, 26 P. 365 (1891); *Hornblower v. Duden*, 35 Cal. 664, 670-71 (1868). The county board could not, however, retain outside counsel to provide legal advice. See generally *Merriam v. Barnum*, 116 Cal. 619, 48 P. 727, 727-28 (1897) (board of

²³California’s second constitution, which was adopted in 1879, was the version in effect when Washington’s Constitutional Convention met. The 1879 California Constitution was adopted, in part, to reduce the state legislature’s interference in local affairs. See generally Jared Eigerman, *California Counties: Second-Rate Localities or Ready-Made Regional Governments?*, 26 Hastings Const. L.Q. 621, 639 (1999). The 1879 California Constitution has been amended multiple times. See *Strauss v. Horton*, 46 Cal. 4th 364, 386, 207 P.3d 48 (2009) (stating that “more than 500 amendments to the California Constitution have been adopted since ratification of California’s current Constitution in 1879”). The persuasive value of California opinions is dependent upon the actual language of the relevant constitutional provision on the day the opinion was issued.

²⁴This provision of California’s 1879 constitution was repealed June 27, 1933. Cases decided prior to the repeal are no longer followed by California courts. See, e.g., *Ogle v. Eckel*, 49 Cal. App. 2d 599, 122 P.2d 67 (1942) (after the 1933 repeal of former California Const. art. XI, section 4, the legislature was free to establish the office of county counsel and to allow the board of supervisors to appoint a county counsel).

²⁵This section of California’s 1879 constitution was amended November 3, 1908, November 6, 1928, June 27, 1933, November 7, 1944, November 6, 1962, and repealed June 2, 1970.

supervisors did not have the power to employ a special counsel “to attend [the] board on all matters pertaining to the reconstruction of the courthouse, insurance matters, etc.” as “the district attorney, and no one else, shall be and act as the legal adviser of the board, with power to the board, however, to employ additional and special counsel to assist the district attorney in the prosecution or defense of suits to which the county may be a party”).

The Idaho constitution created the office of district attorney and provided that the district attorney serve as legal counsel to the boards of county commissioners. Idaho Const. art. V, sec. 18; Idaho Laws 1891-92, p. 47. The Idaho constitution, unlike the Washington constitution, specifically allows a board of county commissioners to employ counsel. *See* Former Idaho Const. art. XVIII, sec. 6 (“The county commissioners may employ counsel when necessary.”). Despite this affirmative grant of authority to the board of county commissioners, the Idaho Supreme Court declared a contract that retained a private attorney to “act as attorney and legal adviser for [the board] for the term of two years,” to be “unauthorized, illegal and void.” *Meller*, 35 P. at 713.

The court, citing to Cooley’s Constitutional Limitations, found the contract to be unlawful due to its assigning acts and duties to be performed by the constitutionally created officers of district attorney and attorney general to the private counsel. *Id.* at 715. In rejecting the arguments asserted by the board in defense of the contract, the court stated as follows:

In the contract under consideration, the board of commissioners have not only provided for the performance by their employee of the duties of the district attorney, but they have gone further, and invested him with the functions, and imposed upon him the duties, which the law assigns to

the attorney general. Are boards of county commissioners within the law, and amenable to its provisions, or are they, as would almost seem to be assumed by some of them, at least, "a law unto themselves"? The system of district attorneys, as contradistinguished from county attorneys, had existed from the organization of the territory to 1883, and, while the authority of the board of county commissioners to employ counsel, whenever a necessity therefor arose, was never questioned, it was never assumed or claimed that such board had the power to employ an attorney generally, and pay him such compensation as they saw fit. . . . The contention of counsel for plaintiff in error, that the exercise of discretion by the board of county commissioners is not reviewable by the courts, is not only unmaintainable; it is directly opposed to the plain provisions of the statute. (Rev. Stats., sec. 1776.) The recognition of such a rule would leave the people of the state entirely in the hands of the boards of county commissioners. While we recognize the right of the board of county commissioners, as expressed in the constitution, "to employ counsel when necessary," we do not assent to the construction of that provision claimed by the plaintiff in error—that it gives to the boards unbridled license to establish a new office, and to devolve upon an officer unknown to the constitution and the statutes the functions and duties which the law has already affixed to another officer or office. The board of county commissioners may, when the necessity exists, employ counsel, but that necessity must be apparent, and the action of the board in each case is subject to review by the courts. To hold otherwise would, as we have already stated, be to leave the taxpayers of the state at the mercy of the boards of county commissioners, without remedy. The judgment of the district court is affirmed, with costs.

Meller, 35 P. at 715 (citations omitted).

Ultimately, the Idaho Supreme Court reached the same balance with respect to a board hiring private counsel as the California Supreme Court reached. A board could lawfully hire private counsel to assist in discrete civil actions. A board could not hire private counsel to furnish general legal advice. Compare *Meller v. Board of Commissioners of Logan County*, *supra* (illegal for board to employ an attorney to act by the year as legal adviser for the county), with *Barnard v. Young*, 43 Idaho 382, 251 P.1054 (1926) (lawful

to hire attorneys to aid prosecution of certain county suits).

Kansas, another state with a county attorney whose duties are similar to those of Washington prosecuting attorneys, generally prohibits county commissioners from employing a private counsel to perform the duties of the county attorney without the county attorney's consent. *See Clough & Wheat v. Hart*, 8 Kan. 487, 493-95 (1871). The restrictions on the retention of private counsel stems from the status of the county attorney as an elected officer:

The county attorney is elected by the people of the county and for the county: Gen. Stat., 283, § 135. He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by the law put into the hands of the county commissioners, but is put into the hands of the people themselves. The county attorney derives his authority from as high a source as the county commissioners do theirs, and it would be about as reasonable to say that the county attorney could employ another board of commissioners to transact the ordinary business of the county as it is to say that the county commissioners can employ another attorney to transact the ordinary legal business of the county. Both would be absurd. It is the duty of the county attorney to give legal advice to the county commissioners, and not theirs to furnish legal advice to or for him.

Clough & Wheat, 8 Kan. at 494.

Maryland addressed a statute that created the office of state prosecutor as an independent unit in the executive branch that was, for administrative purposes only, placed within the office of the attorney general. *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837, 838 (1975). The new officer, who was selected by a special committee, was assigned the responsibility for investigating and prosecuting criminal offenses under the state election laws and conflict of interest laws. *Id.*

The act creating the office of state prosecutor was declared unconstitutional on two grounds. First, the act was improper in that it transferred duties of the constitutional offices of State's Attorney and of attorney general to the legislatively created position of state prosecutor. *Murphy*, 348 A.2d at 844-46. Second, the act transferred the power from what has traditionally been an elected official to an appointed official. *Id.*, at 848. Ultimately, the court concluded that "[p]raiseworthy though the purpose of the General Assembly might have been in enacting the legislation, the result can only be validly achieved by a constitutional amendment."²⁶ *Id.*

Ohio applied the rule that an appointed individual cannot perform the duties assigned to an elected official in a quo warranto case that saw the ouster of three attorneys from the position of legal counsel and assistant legal counsel. *See State ex rel. Cline*, 21 Ohio C.D. 236, 31 Ohio C.C. 236, 12 Ohio C.C. (n.s.) 103 (1909). The three attorneys were employed by the board of county commissioners to serve as legal counsel for a term of three years. *Id.*, at 104. The contracts were entered into pursuant to a statute which provided that

"Whenever, upon the written request of the prosecuting attorney, the board of county commissioners of any county deem it advisable, it may employ legal counsel and the necessary assistants upon such terms as it may deem for the best interests of the county, for the performance of the duties herein enumerated. Such counsel shall be the legal adviser of the board of county commissioners, and of all other county officers, of the annual county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him

²⁶The Maryland Constitution was amended in the wake of the *Murphy* opinion, thereby permitting the creation of a State Prosecutor by act of the General Assembly. *See In re Special Investigation No. 244*, 296 Md. 80, 459 A.2d 1111, 1114 (1983).

written opinions, or instructions in any matters connected with their official duties. He shall prosecute and defend all suits and actions, which any of the boards above may be a party, and shall also perform such duties and services as are now required to be performed by the prosecuting attorneys under Sections 799, 1274, 1277, 1278a and 3977 of the Revised Statutes, and as may at any time be required by said board of county commissioners. . .

Cline, 12 Ohio C.C. (n.s.) at 105 (quoting Section 845 of the Revised Statutes of Ohio).

The court declared that the statute ran afoul of the Ohio Constitutional provision that required the election of all county officers. *Id.* The statute purported to make the three attorneys “officers” by authorizing the attorneys to perform duties and services assigned to the prosecuting attorney. *Id.*, at 106-108. The court determined that a quo warranto proceeding was the proper method of ousting them from their “office” because their appointments were invalid due to the unconstitutionality of the statute. *Cline*, 12 Ohio C.C. (n.s.) at 108.

Utah also holds that a County “Commission cannot hire independent counsel to serve in an advisory capacity.” *Short*, 985 P.2d at 910. In Utah, as in Washington, a statute provides that the separately elected county attorney is the legal advisor to the county. *Short*, 985 P.2d at 905. In Utah, as in Washington, the commission “is mandated to govern the County, as both the legislative and executive branches of government.” *Short*, 985 P.2d at 906. In *Short*, as in the present case, a dispute arose between the county attorney and the county commission as to their respective roles and as to whether the county commission could hire independent counsel. The Utah Supreme Court ultimately resolved the issue in a manner that is consistent

with this Court's cases:

Although this is a question of first impression for this court, we recognize the generally-held rule that, "where a statute authorizes legal counsel charged with the duty of conducting the legal business of a governmental agency, contracts with other attorneys for legal services are void." *Board of Supervisors of Maricopa County v. Woodall*, 120 Ariz. 379, 586 P.2d 628, 630 (Ariz. 1978); *see also* 10 McQuillan, *Municipal Corporations* § 29.12 (3d ed. 1999). Where the public elects an officer who is to perform all duties of an attorney for a governmental entity, they expect that that person will perform all duties within the scope of that office unless disabled from doing so by some ethical or legal rule. This rule prevents those who are agents of the governmental entity, as, for example, county commissioners, from going around the elected attorney when they may not like the legal advice given, or are dissatisfied with the skills of the county attorney.

But there are situations where the county attorney is unwilling or unable to perform his or her duties, and the county cannot be left without representation. An example of such a situation is in *Carbon County v. Hamilton*, 48 Utah 503, 160 P. 765 (Utah 1916). There, the county commission hired independent counsel to prosecute the county attorney for not faithfully performing his duties. We held that when "the county attorney is the accused party, *or is otherwise disqualified*, why may not such commissioners employ other counsel and allow them reasonable compensation for their services? If they may not do that, then they cannot discharge the duties imposed on them." 160 P. at 768 (emphasis added). Although Carbon County established that it is proper for a county commission to hire independent counsel, it did not spell out when the county attorney could be considered "disqualified." Cases in other jurisdictions provide some guidance as to when a governmental entity or official is free to hire counsel other than the elected one designated by statute. The facts of these cases add little to our discussion, but a fair summary of the cases seems to be that the right to hire outside counsel for any purpose, whether for advice or litigation, arises only when the public attorney "refuses to act or is incapable of acting or is unavailable for some other reason." *Woodall*, 586 P.2d at 631 (citing *Cahn v. Town of Huntington*, 29 N.Y.2d 451, 278 N.E.2d 908, 910, 328 N.Y.S.2d 672 (N.Y. 1972)). A conflict of interest is sufficient to make a public attorney "unavailable" or "disqualified." *See Gesmonde, Pietrosimone, Sgrignari, Pinkus and Sachs v. City of Waterbury*, 231 Conn. 745, 651 A.2d 1273, 1276 (Conn.

1995). We think that these are reasonable iterations of the general rule applied in our Carbon County case.

Returning to the present case, section 17-18-2 of the Code makes the County Attorney the legal adviser of the County. If that designation is to mean anything, then the County must be represented by the elected attorney in all matters falling within the scope of the attorney-client relationship unless that person cannot act, either because of a refusal to do so, an incapacity, or a disqualification, as by a conflict of interest. That means that the Commission cannot hire outside counsel to advise it when it disagrees with the advice of the elected attorney, or when it does not like the manner in which that person performs the duties of the office. On the other hand, as in Carbon County, if the elected attorney cannot or will not fulfill the role assigned by statute as attorney to the governmental entity, then the agents of the entity may retain outside counsel to perform those duties that the elected attorney cannot or will not perform.

The determination of whether an elected attorney “refuses to act, is incapable of acting, or is unavailable for some other reason” obviously is a critical and fact-intensive issue. Leaving this determination in the hands of either party can lead to untoward results. For example, the Commission may want to make a determination that the County Attorney is unable or unwilling to act when the attorney finds the Commission's proposed course of action to be unlawful. On the other hand, the County Attorney may never admit he is unable or unwilling to perform his duties, thereby paralyzing county government. . . .

It is certain that county attorneys and county commissions will occasionally disagree about whether a county attorney has refused to, is incapable of, or is otherwise unavailable to act as legal counsel for the commission. There are several options for resolving such conflicts. But we want to make it clear that the conflict must be resolved before the Commission may hire independent counsel to fill any void. The County Attorney is the legal representative for the County and cannot be displaced by the Commission without the agreement of the attorney or a formal declaration by an appropriate authority that the attorney is unavailable to act in that capacity.

Short, 985 P.2d at 907-908.

G. The Board's utilization of RCW 36.32.200 to hire Ms. Drummond violates the Washington Constitution.

The contract between Ms. Drummond and the Board represents an unconstitutional use of RCW 36.32.200. The State consistently presented this “as applied” challenge to the Board’s attempt to grant Ms. Drummond a de jure right to perform the duties contained in Resolution C-48-15. The trial court, however, failed to address the “as applied” challenge in its decision granting Ms. Drummond and the Board’s summary judgment motions. *See* RP 3 (“I’ll find that I don’t believe that the statute has been shown to be clearly erroneous or unconstitutional on its face beyond a reasonable doubt”).

The State is not seeking a ruling declaring RCW 36.32.200 is facially unconstitutional.²⁷ Such a challenge would be properly rejected as there are some circumstances in which RCW 36.32.200 can be applied constitutionally. However, a facially constitutional statute may not be utilized or applied in an unconstitutional manner.

The difference between an “as applied” challenge and a “facial” challenge is explained by this Court as follows:

An “as applied” challenge occurs where a plaintiff contends that a statute's application in the context of the plaintiff's actions or proposed actions is unconstitutional. If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative. A statute is rendered completely inoperative if it is declared facially unconstitutional. However, a facial challenge must be

²⁷Nonetheless, the State, in an abundance of caution, served the attorney general with a copy of the information in this matter and with a copy of the notice of appeal. *See generally* RCW 7.24.110 (“In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.”). The attorney general’s office elected to not participate in this matter at the trial court level. *See* CP 471, 474.

rejected if there are any circumstances where the statute can constitutionally be applied.

Wash. State Republican Party v. Pub. Disclosure Comm'n, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000) (citing *In re Det. of Turay*, 139 Wn.2d 379, 417 n.28, 986 P.2d 790 (1999)).

The State acknowledges that a court presumes that a statute is constitutional, and the party challenging the statute as applied bears the burden of proving its unconstitutionality beyond a reasonable doubt. *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007) (quoting *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005)). The “beyond a reasonable doubt” standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.” *Island County v. State*, 135 Wn. 2d 141, 147, 955 P.2d 377 (1998). The “beyond a reasonable doubt” standard is not insurmountable. *See, e.g., Island County*, at 147 (“Even with this demanding standard of review in mind, we find that the County has borne its burden to convince us that the community council act violates our state constitution.”).

The argument and research offered by the State in sections V. B. through V. G. of this brief establishes, beyond a reasonable doubt, that the Board violated the Washington Constitution when it utilized RCW 36.32.200 to authorize Ms. Drummond to perform the duties identified in Resolution C-48-15.

The procedure by which a private attorney is employed to perform duties of the prosecuting attorney is set forth in RCW 36.32.200. This statute provides that:

It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

Any contract written pursuant to this section shall be limited to two years in duration.

RCW 36.32.200.

This statute is not a grant of authority to the county commissioners—it is a limitation. The statute does not state “it shall be lawful to employ” with the approval of the presiding judge. RCW 36.32.200 does not provide any authority to contract. The statute presumes that the authority to contract exists elsewhere, and limits the manner in which that authority can be exercised. This statute does not make an otherwise unauthorized appointment, lawful.

RCW 36.32.200 may be lawfully utilized in three circumstances. First, the board of county commissioners may retain a special attorney when the office of prosecuting attorney is vacant. *See* AGO 1891-92, p. 186-87 (1891) (statute that allowed county commissioners to employ a private attorney was sufficient to allow the private attorney to perform the duties of the prosecuting attorney when the office of prosecuting attorney was vacant

due to no lawyers residing within Island County).²⁸

Second, RCW 36.32.200 provides the mechanism for paying an attorney to perform the functions of the prosecuting attorney when the prosecuting attorney is temporarily disqualified or unable to perform the duties of his office. *See Hoppe*, 95 Wn.2d at 340. This ground for contracting with a private attorney requires a prior superior court finding of disability pursuant to RCW 36.27.030. The superior court's authority to enter such a finding is extremely limited since the authority of both the superior court judge and the prosecuting attorney stems from the same source. *Heaton*, 21 Wash. at 62. In order for a special prosecutor to be appointed, the prosecuting attorney must be unable to perform a duty of his office. *Hoppe*, 95 Wn.2d at 339. A mere disagreement between a prosecuting attorney and his client is insufficient to permit public funds to require the taxpayers to pay for a different attorney. *Id.* at 340.

Third, RCW 36.32.200 allows a board of county commissioners, with the prosecuting attorney's consent, to retain a private attorney to assist the prosecuting attorney in the exercise of his or her duties. *See, e.g., Reed v. Gormley*, 47 Wash. 355, 356, 91 P. 1093 (1907) (prosecuting attorney approved the hiring of private counsel in writing); AGO 1937-38, p. 84 (1937) (attorney general declining to answer a question from a county official because the prosecuting attorney did not authorize the attorney general to provide a legal opinion); AGO 1907-08, p. 113 (attorney general

²⁸The lack of a resident lawyer to serve as prosecuting attorney is not a condition limited to early statehood. *See Young v. Konz*, 91 Wn.2d 532, 540, 588 P.2d 1360 (1979) (noting that only two attorneys resided in Ferry County in 1979).

responding to a question from the Whatcom County assessor with the permission of the Whatcom County prosecuting attorney). *Accord State ex rel. Dysart v Gage*, 107 Wash. 282, 285, 181 P. 855 (1919) (private attorney employed by the school district upon the advice of the prosecuting attorney was entitled to payment); *See also* RCW 36.27.040 (prosecuting attorney may appoint temporary or special deputies who are not subject to RCW 36.27.060's prohibition upon private practice). The prosecuting attorney's consent is usually, but not always, accompanied by an RCW 36.27.040 special deputy appointment. *See generally* CP 284-293, 642-676.

In the instant case, none of these three narrow circumstances exist. The Office of Island County Prosecuting Attorney is filled by a duly elected and qualified individual—Gregory Banks. Prosecutor Banks was, at all times, willing to perform the duties identified in Resolution C-48-15.²⁹ *See, e.g.*, CP 400. Prosecutor Banks did not consent to Ms. Drummond performing any of the duties of his office.

No court of competent jurisdiction determined, pursuant to RCW 36.77.030, that Prosecutor Banks was or is temporarily unable to perform the duties listed in Resolution C-48-15.³⁰ The Board and Ms. Drummond are

²⁹While a refusal to perform his duties may provide a basis under RCW 36.27.030 to find a prosecuting attorney is temporarily disabled, the Board has not identified any such refusal. *See* CP 279-81, 1301. Any delays in providing legal services is directly attributable to the Board's decisions regarding allocation of resources to the prosecuting attorney's office. *See generally* CP 112-110 at ¶¶ 9-30, 389-392.

³⁰While both Island County Superior Court Judges approved the contract that is the subject of Resolution C-48-15, the judges did not make a determination that Prosecutor Banks was unable to perform the duties of the Island County Prosecuting. CP 444 ("We are mindful of these statutes[, RCW 36.27.020 and RCW 36.27.030,] and the cases construing them. However, we are not being asked to exercise our authority to appoint a person to discharge the duties of the prosecuting attorney in case of the disability of the prosecutor. Nor are we being asked to appoint a special deputy prosecuting attorney.").

unable to identify a conflict or other disability that would render Prosecutor Banks temporarily unable to perform the duties listed in Resolution C-48-15. *See* CP 627-28, 634.

The reasons identified by the Board as justification for hiring Ms. Drummond to perform core duties of the Island County Prosecuting Attorney are all insufficient, as a matter of law, to disenfranchise the voters. As this Court stated in *Northwestern Improvement Co.*, “[n]ecessity nor convenience” or a desire to perform the work “more cheaply” can justify a contract that deprives the public of its right to be heard and its right to be governed by public officials who are restrained by an oath and held to a fair and impartial performance of duty. *Id.*, 100 Wn.2d at 31, 33- 35.

The Board’s concerns about Prosecutor Banks’s prior legal experience, his congeniality, the quality or competency of his deputies, and the timeliness with which his office performs civil legal tasks are questions for the voters.³¹ *See generally In re Recall of Sandhaus*, 134 Wn.2d 662, 670, 953 P.2d 82 (1998) (“whether [the prosecuting attorney] is doing a satisfactory job of managing his office is a quintessential political issue which is properly brought before the voters at a regular election”);

³¹*See generally Sandhaus*, 134 Wn.2d at 669-70 (a prosecuting attorney who never refused to perform those civil legal tasks requested by the Board of Commissioners, is not subject to recall on the grounds that he placed priority on criminal matters); *Osborn*, 130 Wn.2d at 622 (county commissioners may not determine who a separately elected county official hires to fill a deputy position); *Hoppe*, 95 Wn.2d at 340 (public funds may not be expended on a private attorney merely because a public official disagrees with the judgment of the prosecuting attorney); *Herron v. McClanahan*, 28 Wn. App. 552, 625 P.2d 707 (1981) (prosecuting attorney not subject to recall for assigning an allegedly unqualified deputy prosecuting attorney to advise the Pierce County Planning Commission on land use matters because the deputy prosecutor was deemed qualified by the Washington Supreme Court to practice law in this state and is thus deemed qualified to advise on all areas of Washington law). *See also Romley*, 241 P.3d at 523 (general disharmony between county commissioners and county attorney does not allow the county commissioners to retain outside counsel).

Northwestern Improvement Co., 100 Wash. at 31 (elected officials are presumed competent to perform their duties when the presumption is proved false the situation may call for “the election of others having the necessary qualifications” but does not furnish a legal basis for contracting away the officials’ duties).

The trial court, therefore, erred by denying the State’s motion for summary judgment and motion for entry of an order ousting Ms. Drummond from the office of the Island County Prosecuting Attorney.

H. An employment contract with a lawyer that violates the Washington Constitution is ultra vires.

The State’s quo warranto action did not challenge the validity of Resolution C-48-15. The Board, however, brought a counterclaim for declaratory judgment seeking a declaration that Resolution C-48-15 is lawful and valid. *See* CP 556 at ¶ 8.9. The trial court erroneously granted declaratory relief to the Board. CP 1.

As established *supra*, the Board could not lawfully employ Ms. Drummond to perform the duties of Prosecutor Banks. The contract, therefore, is ultra vires and void. *See, e.g., Woodall*, 586 P.2d at 630-631 (contracts with private attorneys to advise the board and other county officers are ultra vires and void when the county attorney does not refuse to act, is not incapable of acting, or is not unavailable for some other reason); *Ashton v. Cook County*, 384 Ill. 287, 51 N.E.2d 161 (1943) (contracts between private attorneys and the county commissioners for legal work were ultra vires where the law imposed the duty to perform the services upon the State’s attorney); *Board of Commissioners v. King*, 1930 OK 529, 294 P. 101, 102

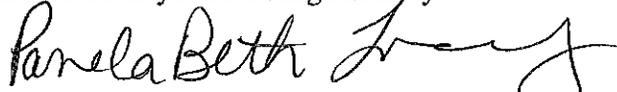
(1930) (a contract with an attorney for legal services, to be performed independently of the county attorney, is ultra vires and void).

VII. CONCLUSION

The Board's contract with Ms. Drummond to perform duties assigned to the Island County Prosecuting Attorney disenfranchised the voters and unconstitutionally expended public funds. The State respectfully requests that this Court reverse the trial court's orders and remand with directions to enter an RCW 7.56.100 judgment of ouster against Ms. Drummond and with directions to declare Resolution C-48-15 ultra vires and void.

Respectfully submitted this 18th day of February, 2016.

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PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

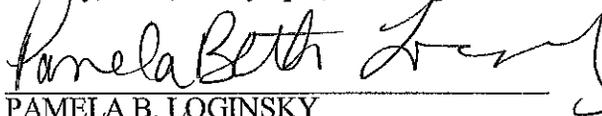
On the 18th day of February, 2016, I served copies of the document upon which this proof of service appears, by e-mail, pursuant to the prior agreement of counsel to

Robert Gould, Counsel for Defendants, at rbgould@nwlegalmal.com and at Lphelan@nwlegalmal.com

Scott Missall and Athan E. Tramountanas, Counsel for the Island County Board of Commissioners at smissall@scblaw.com and at athant@scblaw.com and at tbackus@scblaw.com and at nthomas@scblaw.com and at lfsutton@scblaw.com

Jeff Even, Deputy Solicitor General at JeffE@ATG.WA.GOV

Signed under the penalty of perjury under the laws of the state of Washington this 18th day of February, 2016, at Olympia, Washington.



PAMELA B. LOGINSKY
WSBA No. 18096
Special Deputy Prosecuting Attorney

Appendix A
Island County Board of Commissioners
Resolution C-48-15

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF ISLAND COUNTY, WASHINGTON**

IN THE MATTER OF EMPLOYING)
SPECIAL COUNSEL TO ASSIST IN)
THE DEVELOPMENT AND ADOPTION) RESOLUTION C-48-15
OF THE COUNTY'S GROWTH)
MANAGEMENT ACT COMPREHENSIVE)
PLAN, DEVELOPMENT REGULATIONS,)
AND SUCH OTHER ACTIONS DEEMED)
APPROPRIATE TO ADDRESS THE GMA)

WHEREAS, the Board of County Commissioners of Island County is responsible for adopting the County's Growth Management Act required Comprehensive Plan and Development Regulations, and related legislation, pursuant to various state laws, including Wash. Const. Art. XI, § 11, Ch. 36.70A RCW, and Ch. 36.70 RCW; and,

WHEREAS, following the public review process, the Board of County Commissioners makes the final decision on whether to adopt revisions to the County's Comprehensive Plan and Development Regulations that serve the best interests of Island County citizens; and,

WHEREAS, recognizing this responsibility, the Board of County Commissioners desires successful, coherent, integrated and legally defensible GMA Comprehensive Plan policies and Development Regulations that serve the best interests of Island County citizens; and,

WHEREAS, since GMA's enactment, Island County has been involved in an unprecedented amount of litigation, particularly over GMA environmental and resource land issues; and,

WHEREAS, Island County desires an approach to GMA which, over the long term, not only results in the successful defense of County legislation, but ultimately reduces the litigious nature of such planning within the County, and serves the public's best interest, consistent with relevant legal requirements; and,

WHEREAS, in order to achieve these objectives, the Board of County Commissioners has a need for proactive legal strategy, advice, and assistance during the GMA update process to guide decisions and actions in the development and adoption of the County's Comprehensive Plan, Development Regulations, and other actions deemed appropriate to address the GMA; and,

WHEREAS, the County requires further assistance with proactively planning to address these challenges so that the Board of County Commissioners is fully informed as to the planning and legal challenges the County is facing; and,

ATTACHMENT Event Date: Tue Apr 28 00:00:00 PDT 2015
Page 2 of 8 Tue Apr 28 00:00:00 PDT 2015

WHEREAS, in land use matters, in which a county is planning not just for the moment but over the long term, through a twenty-year planning period, it is critical that policies and requirements be strategically developed in concert with sound legal input; and,

WHEREAS, the County wishes to avoid "crises-based" decision making, and instead engage in the methodical development of legislation to address future challenges; and,

WHEREAS, for long term policies and requirements to be soundly developed, those making the final policy decisions must be fully informed as to how proposed legislation fits within the relevant legal structure; and,

WHEREAS, developing a proactive approach, centered on the strategic development of a long range plan, will take significant up front resources and experience to address, particularly given the controversial and contested nature of the land use issues facing the County; and,

WHEREAS, the Board of County Commissioners has consulted extensively with the Prosecuting Attorney as to these objectives and the need for extensive and experienced legal support; and,

WHEREAS, at present, the Prosecuting Attorney's office is unable to provide said comprehensive and proactive legal strategy, advice and assistance. There are currently conflicts, resource constraints, and communication issues to resolve, as reflected in meetings between the Prosecuting Attorney and Board of County Commissioners; and,

WHEREAS, immediate assistance is required due to GMA's upcoming update deadline, and it is deemed necessary and advisable that legal counsel experienced in GMA and land use planning related matters be employed as special counsel; and,

WHEREAS, the County has identified special counsel (Law Offices of Susan Elizabeth Drummond, PLLC), a firm with significant experience in the field of GMA and with advising a variety of local jurisdictions throughout the state on the range of options available for developing a long term legal strategy on legislative land use matters; and,

WHEREAS, the Board of County Commissioners desires to resolve outstanding concerns and establish a cooperative working relationship with the Prosecutor's Office, the Planning and Community Development Department, along with special counsel, as that will best serve the public interest; and,

WHEREAS, to address its pressing need for assistance, RCW 36.32.200 authorizes the County's legislative body to employ experienced counsel on approval by the Superior Court Judge; and,

WHEREAS, the Board of County Commissioners in its budgeting authority has designated a fund balance in the Island County General Fund to support its state-



mandated 2016 Comprehensive Plan update, and a portion of this designated fund balance is available to fund special counsel and land use planning assistance; and,

WHEREAS, ICC 2.29.030(B)(12) allows a waiver from competitive bidding for service contracts on a case by case basis; and,

NOW, THEREFORE, BE IT HEREBY RESOLVED by the Board of County Commissioners of Island County, Washington, as follows:

Section 1. Special Counsel for GMA Legislation. The Law Offices of Susan Elizabeth Drummond, PLLC, shall be employed as special counsel to advise on GMA related legislative issues for up to a maximum period of two (2) years, and to perform the services identified as set forth in the attached terms of engagement. Per ICC 2.29.030(B)(12), the Board of County Commissioners waives competitive bidding. Compensation shall not exceed the maximum set forth in the Exhibit A – Terms of Engagement, unless approved in writing by the Board of County Commissioners and Presiding Judge of the Island County Superior Court.

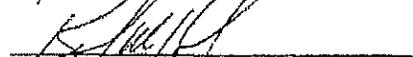
Section 2. Terms of Engagement. The terms of engagement are set forth in Exhibit A and are hereby approved.

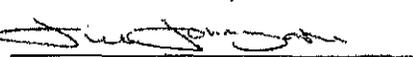
Section 3. Effective Date. This Resolution shall take effect on the last date signed below and following Superior Court approval.

ADOPTED by the Board of County Commissioners of Island County, Washington, on April 28, 2015.

BOARD OF COUNTY COMMISSIONERS
ISLAND COUNTY, WASHINGTON

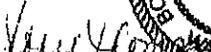

Helen Price Johnson, Chair


Richard M. Hannold, Member


Jill Johnson, Member

ATTEST:




Debbie Thompson
Clerk of the Board

Approved this 28th day of April, 2015.


Vickie I. Churchill, Presiding Judge of the Superior Court of the State of Washington in and for the County of Island.

EXHIBIT A - TERMS OF ENGAGEMENT

These terms of engagement for professional services addresses legal services to be provided to Island County, Washington (County) by the Law Offices of Susan Elizabeth Drummond, PLLC (Service Provider).

SECTION 1 EFFECTIVE DATE AND TERM

This engagement will be effective upon approval in writing by the Island County Presiding Superior Court Judge, pursuant to RCW 36.32.200, and once all parties have signed this document. Any revision must be approved in writing by both the Board of County Commissioners and the Superior Court Judge.

The engagement shall terminate two (2) years from the effective date. The Board of Island County Commissioners may at any time terminate this engagement before its expiration with or without cause. Service Provider may terminate the engagement with sixty (60) days notice and compliance with the Rules of Professional Conduct.

SECTION 2 SERVICES TO BE PROVIDED

The Board of County Commissioners requires immediate legal input on developing a coherent strategy for planning for growth over its 20-year planning period. Land use issues have been heavily litigated in the County, and the County requires strategic assistance in developing an approach which can reduce litigation over the long term, while complying with relevant legal requirements, including Ch. 36.70A RCW, and serving the best interests of the public.

To accomplish these objectives, Service Provider shall provide legal services to the County in connection with development and adoption of the County's Growth Management Act Comprehensive Plan, Development Regulations, and such other legislative actions determined appropriate to address the GMA. Services shall include:

1. Advising the Board of County Commissioners on long-term legal strategy, relevant legal requirements, and the GMA framework for planning.
2. Coordinating and consulting with relevant County Departments on development of proposed legislation.
3. Advising on the anticipated review process and structure for considering proposed legislation.
4. Reviewing and advising on proposed legislation.
5. Defending adopted legislation or resolving disputes through other means, such as settlement, as directed.

Service Provider shall provide legal services in a manner consistent with the accepted practices for other similar services, performed within the time prescribed by, and pursuant to the direction of, the Board of County Commissioners. Service Provider shall coordinate with the County Planning and Community Development Department, the County Public Works Department, and with the County Prosecutor, so as to best assist the County.



SECTION 3 COMPENSATION AND METHOD OF PAYMENT

Payments for services shall be made following performance of such services. No payment shall be made for any services except as identified herein. Service Provider shall submit to the County each month an invoice for services rendered during the previous month. The County shall provide payment approximately thirty (30) days thereafter.

The County shall pay Service Provider for work performed under this engagement based on a \$4,000 per month flat fee plus reimbursable costs. Reimbursable costs incurred for this representation, such as travel, postage, or large copy projects, shall be billed at the actual cost incurred.

The maximum fees and charges in connection with this project shall not exceed \$120,000 without further authorization by the Board of Island County Commissioners and the Island County Superior Court Judge.

SECTION 4 INDEPENDENT CONTRACTOR RELATIONSHIP

Service Provider is an independent contractor with the authority to control and direct the performance of the details of the work; however, the results of the work contemplated herein must meet with County approval and are subject to the County's general rights of inspection to ensure satisfactory completion.

No Service Provider employee or representative shall be deemed to be a County employee or representative for any purpose, and Service Provider employees are not entitled to any benefits the County provides for its employees. Service Provider is solely responsible for its acts and for the acts of its agents or employees during performance of the engagement. As an independent contractor, Service Provider is responsible for the reporting and payment of all applicable local, state, and federal taxes.

SECTION 5 INSURANCE

Service Provider shall procure and maintain, for the duration of the engagement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with performance of the engagement.

Service Provider shall provide a Certificate of Insurance evidencing:

(A) Commercial General Liability insurance written with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage.

(B) Professional Liability insurance with limits of no less than \$1,000,000 per claim and \$1,000,000 policy aggregate limit.

The County shall be named as an additional insured on the commercial insurance policy, in respect to work performed by Service Provider. Any payment of deductible or self-insured retention is the Service Provider's sole responsibility. The County shall be given forty-five (45) days prior written notice of any cancellation, suspension or material change in coverage.

All insurance coverage required to be provided by Service Provider or any subcontractor, is



intended to apply on a primary non-contributing basis in relation to any other insurance or self-insurance available to County.

SECTION 6 INDEMNIFICATION

(A) County agrees to indemnify, defend and hold Service Provider and its officers, employees, and agents harmless from claims and actions (including any costs and attorney fees) filed or authorized to be filed against Service Provider, which raise claims related to the authority which may be provided to the Board of County Commissioners by RCW 36.32.200, and this statute's implementation through this engagement. Should such an event occur, the Board of County Commissioners may elect to retain additional special counsel with Superior Court consent, and/or supplement the flat fee if necessary (with Superior Court consent) to defend such litigation. Paragraph 6(B) does not apply to Paragraph 6(A).

(B) Except as provided in Section 6(A): To the extent of its comparative liability, each party agrees to indemnify, defend and hold the other party, its elected and appointed officials, employees, agents and volunteers, harmless from and against any and all claims, damages, losses and expenses, including but not limited to court costs, attorney's fees and alternative dispute resolution costs, for any personal injury, for any bodily injury, sickness, disease or death and for any damage to or destruction of any property (including the loss of use resulting therefrom) which are caused by a negligent act, error, or omission, of its elected and appointed officials, employees, agents or volunteers, in the implementation of this engagement. In the event of any concurrent negligent act, error, or omission of the parties, each party shall pay its proportionate share of any damages awarded. The parties agree to maintain a consolidated defense to claims made against them and to reserve all indemnity claims against each other until after liability to the claimant and damages, if any, are adjudicated.

(C) The parties agree all indemnity obligations shall survive the completion, expiration or termination of this engagement.

SECTION 7 NONDISCRIMINATION

In performance of this engagement, Service Provider will not discriminate against any employee or applicant for employment on the grounds of race, religion, creed, color, national origin, sex, marital status, disability, sexual orientation, age or other basis prohibited by state or federal law; provided that the prohibition against discrimination in employment because of disability shall not apply if the particular disability prevents the proper performance of the particular work involved.

SECTION 8 ASSIGNMENT/SUBCONTRACTING

Service Provider shall not assign its performance under this engagement.

SECTION 9 JURISDICTION AND VENUE

This engagement shall be governed by laws of the State of Washington, both as to interpretation and performance. Any judicial proceeding related to this engagement shall be instituted and maintained in Island County Superior Court, State of Washington.

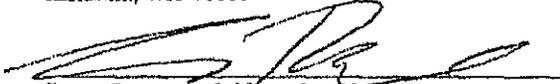
SECTION 10 SEVERABILITY



If any engagement term is held illegal or unenforceable by a court with jurisdiction, the validity of the remaining terms will not be affected, and this engagement shall be interpreted as if it did not contain the invalid provision. Further, if any engagement provision conflicts with Washington laws, said provision which may conflict therewith shall be deemed inoperative or modified to the extent necessary to avert the conflict.

EXECUTION. The parties execute the engagement terms as follows, which may be accomplished in counterparts:

Law Offices of Susan Elizabeth Drummond, PLLC
5400 Carillon Point, Bldg. 5000, Ste. 476
Kirkland, WA 98033

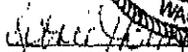


Susan Drummond, Managing Member
Signed, April 22, 2015

ACCEPTED by the Board of County Commissioners of Island County, Washington, on April 23, 2015.

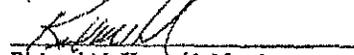


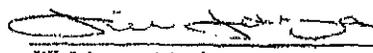
ATTES


Debbie Thompson
Clerk of the Board

BOARD OF COUNTY COMMISSIONERS
ISLAND COUNTY, WASHINGTON


Helen Price Johnson, Chair


Richard M. Hannold, Member


Jill Johnson, Member


Vickie I. Churchill, Presiding Judge of the
Superior Court of the State of Washington
in and for the County of Island

03/10/2015 DRAFT
Filed to Agenda Item 20

SCOPE OF WORK AND SCHEDULE OF COMPENSATION

Susan Elizabeth Drummond and the Law Offices of Susan Elizabeth Drummond, PLLC will provide legal services to the Board of Island County Commissioners in connection with development and adoption of the County's Growth Management Act Comprehensive Plan, Development Regulations, and such other actions determined appropriate to address the GMA.

Estimated fees and costs for performance of work for 2 years \$120,000

2015 authorized fees \$ 4,000 per month retainer/flat fee

In addition to fees, Ms. Drummond will be compensated for actual out-of-pocket expenses such as photocopying, postage, and travel.





ISLAND COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA BILL

MEETING DATE: 4/28/15

#12

CONSENT AGENDA

X REGULAR AGENDA

PUBLIC HEARING/MTG

C-48-15

RESOLUTION/ORDINANCE NO

DEPARTMENT: Commissioners	
DIVISION: (if applicable)	
STAFF CONTACT:	
AGENDA SUBJECT: Resolution C-48-15 Employing Special Counsel to Assist in the Development and Adoption of the County's Growth Management Act Comprehensive Plan and Development Regulations	
BACKGROUND/SUMMARY:	WORK SESSION DATE: (if applicable) 4/8 and 4/15/15
The proposed Resolution employs the Law Offices of Susan Drummond, LLC as special counsel to advise the Board of Commissioners in the development and adoption of the County's Comprehensive Plan, Development Regulations, and other actions deemed appropriate to address the GMA.	
FISCAL IMPACT/FUNDING SOURCE: Shall not exceed \$120,000 – Funded by the GMA Reserve	
RECOMMENDED ACTION:	
<input checked="" type="checkbox"/>	Approve/Adopt
<input type="checkbox"/>	Schedule Public Hearing/Meeting
<input type="checkbox"/>	Continue Public Hearing/Meeting
<input type="checkbox"/>	Information/Discussion
<input type="checkbox"/>	Other (describe) _____
SUGGESTED MOTION:	

[BELOW TO BE COMPLETED BY CLERK OF BOARD]

BOCC ACTION:

- APPROVED
- DENIED
- TABLED/DEFERRED/NO ACTION TAKEN
- CONTINUED TO DATE: ____/____/____ TIME: _____
- OTHER _____



APPENDIX B

Selected Session Laws

Laws of 1855, pg. 417, § 4

Laws of 1860, pg. 334, § 3

Laws of 1863, pg. 408, § 4

Laws of 1877, pg. 246-47, §§ 6-9

Laws of 1879, pg. 93-94, §§ 6-8

Laws of 1883, pg. 73-74, §§ 10-13

Laws of 1885, pg. 61, §§ 5-8

STATUTES

OF THE

TERRITORY OF WASHINGTON:

BEING THE CODE PASSED BY THE

LEGISLATIVE ASSEMBLY,

AT THEIR FIRST SESSION BEGUN AND HELD AT
OLYMPIA, FEBRUARY 27TH, 1854.

ALSO. CONTAINING

THE DECLARATION OF INDEPENDENCE, THE CONSTITUTION OF
THE UNITED STATES, THE ORGANIC ACT OF WASHING-
TON TERRITORY. THE DONATION LAWS, &c., &c.

PUBLISHED BY AUTHORITY.

OLYMPIA:
GEO. B. GOUDY, PUBLIC PRINTER.

1855.

ized to sue, in the name of the territory, for the breach of any such regulations, and for any injuries done to the library, and for any fines and penalties under this act.

SEC. 8. The librarian shall, previous to the close of every session, report to the legislative assembly a true account of all expenses incurred during the session, and since the adjournment of the next preceding session; a list of all books and other property missing from the library, and an account of fines and forfeitures imposed, and those paid, and such other information in relation to the library as he deems expedient.

SEC. 9. The librarian shall receive annually for his services, the sum of three hundred dollars, payable quarterly, by the secretary of the territory, out of the fund appropriated by Congress for the expenses of the legislative assembly.

SEC. 10. This act shall be in force from and after its passage.

AN ACT RELATIVE TO PROSECUTING ATTORNEYS.

- SEC. 1. Prosecuting attorney to be elected.
Form of office.
Proviso.
2. Abstract of votes to be forwarded to secretary of the territory, and certificate to be issued to prosecuting attorney.
3. Prosecuting attorney to take and file an oath.
4. Prosecuting attorney to reside in his district.
His duties.
5. Prosecuting attorney to make reports.
6. In absence of prosecuting attorney, court may appoint.
Governor to fill a vacancy.
7. When prosecuting attorney shall not receive a fee or be engaged as counsel or attorney.
8. Salary of prosecuting.
9. Prosecuting attorney's fees.
10. Prosecuting attorney's compensation in civil suits and per diem.
11. Fees of prosecuting attorney to be paid by the county; how.
12. Fees to be taxed by the district clerk in criminal cases, and paid into the county treasury.
13. Magistrate who commits a person to make out and transmit to the prosecuting attorney, a transcript of certain papers.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That at the first annual election, and every two years thereafter, there shall be elected by the qualified voters of each judicial district, a prosecuting attorney, who shall be an attorney at law, and have the

qualifications of a voter, who shall continue in office for the term of two years, and until his successor is elected and qualified: *Provided*, That the legislative assembly, at its present session, shall elect, on joint ballot, prosecuting attorneys for the several districts, who shall hold their office until the next general election, or until their successors are duly elected and qualified.

SEC. 2. The clerks of the boards of county commissioners shall make out an abstract of the votes given in their respective counties for prosecuting attorney, and transmit the same to the secretary of the territory; and said votes shall be canvassed, and a certificate issued, in the same manner as in the election of delegate to congress.

SEC. 3. Every prosecuting attorney, before entering upon the duties of his office, shall take and subscribe an oath, faithfully to discharge the duties of his office as prosecuting attorney; such oath shall be endorsed on the back of the certificate, and a copy thereof, certified to by the officer before whom the oath shall have been taken, shall be filed in the office of the secretary of the territory.

SEC. 4. He shall reside in his district during his continuance in office, shall commence and prosecute all civil and criminal actions in which the territory or any county in his district may be a party, defend all suits brought against the territory or any county in his district, and prosecute all forfeited recognizances, and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the territory or any county in his district. He shall appear on behalf of the territory in the supreme court in all appeals or writs of error, taken from any county in his district.

SEC. 5. The several prosecuting attorneys shall annually, in the month of December, make to the secretary of the territory, a report of the amount and kind of official business by them done respectively, in the preceding year, the number of persons prosecuted, the offenses for which such prosecutions were had, the results thereof, and the punishment awarded in each case, with such particular statements and suggestions as he may deem interesting and useful.

SEC. 6. If the prosecuting attorney of any district shall not attend at any term of the district court, or shall, from any cause, be unable to attend to the discharge of his duties at such term, the court may appoint some qualified person to discharge the duties of prosecuting attorney, who shall receive the usual fees therefor; and in case of a vacancy in the office of prosecuting attorney, the governor may appoint some qualified person to discharge the duties of the office until the next annual election, who shall receive the salary and usual fees therefor.

SEC. 7. No prosecuting attorney shall receive any fee or reward from, or on behalf of, any prosecutor, for any of his official services, or, during

the pendency of any such prosecution, be engaged as counsel or attorney, for either party, in any civil action depending essentially upon the same facts.

Sec. 8. Each prosecuting attorney shall be entitled to receive a salary, in semi-annual payments, on the first day of July and January in each year, at the annual rate of two hundred dollars, to be paid from the territorial treasury.

Sec. 9. Each prosecuting attorney shall receive the following fees: In all criminal prosecutions, where the punishment is death, or imprisonment for life, where the prisoner is convicted, twenty-five dollars; where the prisoner is acquitted, twelve dollars. In all criminal prosecutions where the punishment is imprisonment in the penitentiary for any less term than for life, where the prisoner is convicted, fifteen dollars; where the prisoner is acquitted, seven dollars. In all criminal prosecutions where the punishment is imprisonment in the county jail, or not particularly specified in this section, where the prisoner is convicted, ten dollars; where the prisoner is acquitted, five dollars.

Sec. 10. Each prosecuting attorney shall receive, for the prosecution of all forfeited recognizances, debts, fines, and forfeitures accruing to the territory or any county in his district, ten per cent. upon the amount recovered. For each civil suit that he may defend or prosecute on behalf of any county in his district, twenty-five dollars. For each day's attendance upon the district court, during the sitting of the grand jury, in any county in this district, five dollars.

Sec. 11. The fees of prosecuting attorneys, provided for in the ninth and tenth sections of this act, shall be paid, by the county where or to which the service was rendered. It shall be the duty of the district clerk, at the close of each term of the district court in this county, to tax the fees of the prosecuting attorney for that term, which bill of fees shall be approved by the judge of the district court. Upon presentation of said bill of fees to the county auditor, it shall be his duty to draw a warrant upon the county treasury for the amount of said bill in favor of the prosecuting attorney.

Sec. 12. It shall be the duty of the district clerk, in all criminal prosecutions, where the prisoner is convicted, to tax and collect, as costs against such prisoner, for the use of the county, an amount in each case equal to the fees allowed the prosecuting attorney by the tenth section of this act. Said district clerk shall pay said fees, when collected, semi-annually into the county treasury, taking duplicate receipts from the county treasury therefor, one to be retained by himself, and the other to be filed in the office of the county auditor, which receipt, when so filed, shall be sufficient to charge the county treasurer with the receipt of said fees.

Sec. 18. Each magistrate who shall commit or hold to bail any person charged with crime against the laws of this territory, shall immediately make out and transmit, under seal, by mail or other safe conveyance, to the prosecuting attorney of the proper district, a copy of the original affidavit, the statements of the prisoner, and depositions of all the witnesses examined on the part of the territory.

AN ACT CREATING THE BOARD OF COUNTY COMMISSIONERS AND
DEFINING THEIR DUTIES.

- Sec. 1. Commissioners to be elected.
Two to constitute a quorum.
Their term of office.
2. The first commissioners to be elected for one, two and three years, and one annually thereafter.
Proviso.
3. Persons elected to vacancies to fill the unexpired term.
4. Each commissioner to take and file an oath.
5. Of the sessions of the commissioners.
6. County auditor to be clerk of the board of county commissioners.
7. Extra sessions may be held.
Notice thereof.
Proviso.
8. Compensation of county commissioners
9. When two commissioners disagree, the question to be postponed.
10. Commissioners to have a seal.
The seal to be evidence.
Private seal of chairman of the board to be considered a seal; when.
11. Duties of the county commissioners.
12. How real estate of a county may be sold.
13. Record of the proceedings of the commissioners to be kept.
14. Commissioners to elect a chairman.
His duties and powers.
Proviso.
15. Certain officers to be provided by the commissioners.
16. At the July session the commissioners to examine the accounts of the treasurer and auditor.
17. At the July term to examine and receive the assessment roll and cause it to be filed.
18. Commissioners to divide the county into precincts and create new precincts and appoint judges of the election.
19. Commissioners to have the superintendance of the poor.
20. When commissioners may compound a debt of their county.
21. No commissioner to be interested in a contract with the county under penalty.
22. Commissioners may administer oaths.
23. Commissioners to provide a place for holding courts.
24. Appeals from the decisions of the board of commissioners; how taken.

A C T S

OF THE

LEGISLATIVE ASSEMBLY

OF THE

TERRITORY OF WASHINGTON;

CONTAINING, ALSO, THE

MEMORIALS AND RESOLUTIONS

PASSED AT THE SEVENTH REGULAR SESSION, BEGUN AND HELD AT
OLYMPIA, DECEMBER 5, 1860.

~~~~~  
PUBLISHED BY AUTHORITY.  
~~~~~

OLYMPIA:

EDWARD FURSTE, PUBLIC PRINTER.

1860.

in any sum not exceeding fifty dollars, for each offense, and shall forfeit his appointment as inspector.

Sec. 3. No person shall be appointed inspector unless he shall be possessed of sufficient property over and above such as is exempt from execution, to pay all fines under this act, or shall give bond to the commissioners in the sum of five hundred dollars, for the faithful performance of all the requirements of this act.

Sec. 4. If any person in this territory shall sell, in quantities less than one gallon, any spirituous liquors, without first having them inspected and approved by the inspector referred to in the first section of this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be imprisoned in the county jail not more than six months, and may be fined not more than five hundred dollars, according to the verdict of the jury.

Sec. 5. The inspector shall be entitled to fifty cents per barrel for all liquors inspected in barrels, and twelve and a half cents per dozen for all liquors bottled, to be paid by the owners of the liquors.

Sec. 6. All wines, champagnes and cider, shall be comprehended within the term liquors for the purposes of this act.

Sec. 7. This act shall take effect on the first day of June, A. D., 1860.

Passed February 1st, 1860.

AN ACT

IN RELATION TO PROSECUTING ATTORNEYS.

- Sec. 1. Prosecuting attorney to be elected in each judicial district.
His qualifications, and term of office.
2. Clerks of county commissioners to transmit to secretary of territory abstract of votes for prosecuting attorney.
Votes to be canvassed.
Certificate to issue.
Governor to commission.
3. Oath and bond of prosecuting attorney.
Duty of prosecuting attorneys.
Attorney for second district to appear in supreme court, on behalf of territory and districts, in all appeals, &c.
4. To report annually to secretary of territory.

- SEC. 5. In case attorney fails, from sickness, &c., or is unable to attend at term, district court to appoint.
Fees of person appointed to act.
6. Vacancy to be filled by Governor, until ensu'ng election.
Qualification and emoluments of person so appointed.
7. Not to receive fee or reward, or practice as attorney in certain cases.
8. To receive a salary.
Salary by whom and how paid.
9. Fees of prosecuting attorney.
10. Fees of attorney for second district, for attending to appeals, &c., on behalf of other districts.
Ib., how paid.
11. Fees to be paid by county for which service rendered.
Prosecuting attorney to tax his fees.
Bill of fees to be submitted to judge.
Auditor to draw warrant for amount.
12. Fees to be taxed by clerk in criminal cases, when.
To be applied to court fund.
13. Justices of the peace who commit or hold to bail in criminal cases, to forward transcript, &c., to prosecuting attorney.
14. To be but three districts.
Where court held under special act, county where held to compose part of district.
15. Conflicting acts repealed.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That at the next annual election, and every two years thereafter, there shall be elected by the qualified voters of the several counties in each judicial district of this territory, one prosecuting attorney, who shall be a practicing attorney at law, and have the qualifications of an elector, and shall reside in and be an inhabitant of the district for which he is elected, who shall continue in office for the term of two years, and until his successor is elected and qualified.

SEC. 2. The clerks of the boards of county commissioners of the several counties shall make out an abstract of the votes given in their respective counties for prosecuting attorney, and transmit the same to the secretary of the territory, and said votes shall be canvassed, and a certificate issue to the person receiving the highest number of votes in such judicial district, and the person receiving the highest number of votes shall be duly elected and commissioned by the governor.

SEC. 3. Every prosecuting attorney, before entering upon the duties of his office, shall take and subscribe an oath, faithfully to discharge the duties of his office as prosecuting attorney for the district for which he was elected; such oath shall be indorsed on the back of the certificate, and a copy thereof, certified to by the officer before whom the oath shall have been taken, and shall by him be forwarded to the secretary of the territory; and moreover, shall give to the Territory of Washington a bond in the sum of one thousand dollars, with good and sufficient surety, condi-

tioned that he will faithfully discharge the duties of his office, according to law, which bond shall be approved by the judge of the district for which he was elected, and filed with the clerk of the district court of such district.

Sec. 3. Each prosecuting attorney shall prosecute all criminal and civil actions in which the territory or any county within their respective districts may be a party; defend all suits brought against the territory, or any county composing their respective districts, and prosecute all forfeited recognizances, and actions for the recovery of debts, fines, penalties and forfeitures accruing to the territory or any county within the district; and it is hereby made the duty of the prosecuting attorney of the second judicial district to appear on behalf of the territory and the several districts, in the supreme court in all appeals, or writs of error, taken from any district in the territory.

Sec. 4. Every prosecuting attorney shall, in the month of January in each year, make to the Secretary of the Territory a report, setting forth the amount and the nature of business transacted by them in the preceding year, with other statements and suggestions he may deem useful.

Sec. 5. When the prosecuting attorney fails, from sickness or other cause, to attend at a term of the district court of the district for which he was elected, or is unable to attend or to perform his duties at such term; the court may appoint some qualified person to discharge the duties for such term, and the person so appointed shall receive the same fees as the regular prosecuting attorney would be entitled to for the same and similar services.

Sec. 6. When a vacancy occurs in the office of prosecuting attorney, in any district in the territory, it shall be the duty of the Governor to appoint some qualified person to discharge the duties of the office until the next annual election: *Provided*, such person so appointed shall be an inhabitant and a resident of the district for which he was appointed, and shall qualify in all respects the same as one duly elected by the people, and the person so appointed shall receive the salary and fees of the office for such time as he may serve.

Sec. 7. The prosecuting attorney shall receive no fee or reward from or on behalf of any prosecution for any of his official services, nor shall he be engaged as counsel for either party in any civil action depending upon the same facts as a criminal prosecution.

Sec. 8. Each prosecuting attorney shall receive a salary in semi-annual payments, at the rate of two hundred dollars per annum, which salary shall be paid by the territorial treasurer, upon the presentation of proper vouchers therefor.

SEC. 9. The fees of prosecuting attorney shall be as follows: In all prosecutions, when the punishment is death or imprisonment for life, when the prisoner is so convicted, fifty dollars. In all criminal prosecutions, when the punishment is imprisonment in the penitentiary for any less time than for life, when the prisoner is convicted, thirty dollars. In all other criminal prosecutions, when the prisoner is convicted, twenty-five dollars. For prosecuting all forfeited recognizances, debts, fines and forfeitures accruing to the territory, or any county therein, upon the amount recovered, twenty per centum on all sums under one hundred dollars. For each day's attendance upon the district court, during the session of the grand jury, five dollars.

SEC. 10. In case of failure to attend to by the attorney of the first and second districts, the prosecuting attorney of the second judicial district shall receive the following fees for services rendered in the supreme court on behalf of the several districts in the territory: For the prosecuting each case upon appeal or writ of errors, fifteen dollars, to be taxed to the district in which the case arises, to be paid out of the court fund of such district upon the certificate of the judge of such district.

SEC. 11. The fees of prosecuting attorney provided for in section nine (9) of this act, shall be paid by the county for which such services are rendered, and it shall be the duty of the prosecuting attorney to tax his fees at the close of each term of the district court, specifying how much, and for what the service is chargeable to each county, which account of fees must be approved by the judge of the district court, which account shall be submitted to the judge of the district, [*] and upon the presentation of such account or bill of fees to the county auditor, it shall be the duty of such auditor to draw a warrant upon the county treasurer for the amount of said bill in favor of the prosecuting attorney.

SEC. 12. It shall be the duty of the clerks of the several district courts in this territory, in all criminal prosecutions, when the prisoner is convicted, to tax and collect as costs against such prisoner, an amount in each case equal to the fees allowed the prosecuting attorney by the ninth section of this act, which cost, when so collected, shall be applied to the court fund.

SEC. 13. It shall be the duty of every justice of the peace, before whom a criminal examination is held, when the defendant is committed or held to bail, to make out and forward to the prosecuting attorney a transcript of the proceedings had before such justice, together with a copy of all such pleadings and testimony in the case.

[*] Evidently intended to read: "which account shall be submitted to and approved by the judge of the district court," &c.—PUB. PRINTER.

SEC. 14. For the purposes of this act, there shall be but three districts, and in all cases where a district court is held under special acts in counties within a district, said counties shall compose a part of the district to which it belongs for judicial purposes.

SEC. 15. All acts and parts of acts in conflict with this act, be and the same are hereby repealed.

Passed February 1st, 1860.

AN ACT

TO AMEND AN ACT, ENTITLED AN ACT, RELATIVE TO ESTRAYS AND OTHER UNCLAIMED PROPERTY.

- SEC. 1. Person taking up stray animal, to notify owner.
 2. When estray may be taken up.
 3. If owner unknown, notice, how given.
 4. Appraisal of estray, when and how made.
It. to be returned to county auditor.
 County auditor to record, &c.
 5. Owner may have stray restored within one year, on paying charges.
 6. If owner and taker up cannot agree upon amount of charges, a justice shall settle same.
 Appeal from justice.
 7. Sale of estray.
 Notice of sale.
 Taker-up may bid thereat.
 Fees of constable selling.
 One-half of remaining proceeds to go to school fund;
 The other to taker-up.
 8. Penalty for taking stray without consent of, or paying, taker-up.
 9. Penalty for removing stray out of county where taken up, and for neglect to perform duties required by this act.
 10. Conflicting acts repealed.
 11. Act, when to take effect.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That any person taking up any stray animal, shall, within ten days thereafter, notify the owner thereof, if to him known, and request such owner to pay all reasonable charges and take such stray away.

SEC. 2. Any person finding an animal, known to be an estray, upon the lands owned or occupied by such person, may, after three months, take up such animal as an estray, or any animal in such a condition as to require feed to preserve its life, may be taken up at any time.

S T A T U T E S

OF

WASHINGTON TERRITORY,

TENTH ANNUAL SESSION ;

HELD AT OLYMPIA, DECEMBER FIRST, 1862.

ALSO, CONTAINING THE

TERRITORIAL ORGANIC ACT,

**THE DECLARATION OF INDEPENDENCE, THE FEDERAL CON-
STITUTION, THE DONATION AND PRE-EMPTION
LAWS, &C., &C., &C.**

OLYMPIA :

GEORGE A. BARNES, TERRITORIAL PRINTER.

1863.

upon the information of another, and in either case the party shall have the privilege of making his defense.

SEC. 17. Such proceedings shall be by motion and answer, and evidence may be examined on either side.

SEC. 18. No person shall practice in any court of record except a party or his regularly authorized attorney and counsellor at law; *Provided*, That nothing herein contained shall be so construed as to prevent a party from employing any person to assist him in the preparation of his papers in the case before the time of trial, nor so as to prevent any person from trying any particular cause in court; leave of court being first had and obtained, and entered of record.

PASSED, January 24th, 1863.

AN ACT

IN RELATION TO PROSECUTING ATTORNEYS.

- SECTION 1. Prosecuting attorney to be elected in each judicial district.
His qualifications, and term of office.
- " 2. Clerks of county commissioners to transmit to secretary of territory abstract of votes for prosecuting attorney.
Votes to be canvassed.
Certificate to issue.
Governor to commission.
- " 3. Oath and bond of prosecuting attorney.
Duty of prosecuting attorneys.
Attorney for second district to appear in supreme court, on behalf of territory and districts, in all appeals, &c.
- " 4. To report annually to secretary of territory.
- " 5. In case attorney fails, from sickness, &c., or is unable to attend at term, district to appoint.
Fees of person appointed to act.
- " 6. Vacancy to be filled by Governor until ensuing election.
Qualification and emoluments of person so appointed.
- " 7. Not to receive fee or reward, or practice as attorney in certain cases
- " 8. To receive a salary.
Salary to whom and how paid.
- " 9. Fees of prosecuting attorney.
- " 10. Fees of attorney for second district, for attending to appeals, &c., on behalf of other districts.
Id., how paid.
- " 11. Fees to be paid by county for which service rendered.
Prosecuting attorney to tax his fees.
Bill of fees to be submitted to judge.

PROSECUTING ATTORNEYS.

- SECTION 11. Auditor to draw warrant for amount.
- " 12. Fees to be taxed by clerk in criminal cases, when.
To be applied to court fund.
- " 13. Justices of the peace who commit or hold to bail in criminal cases,
to forward transcript, &c., to prosecuting attorney.
- " 14. To be but three districts.
Where court held under special act, county where held to compose
part of district.
- " 15. Conflicting acts repealed.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That at the general election in 1864, and every two years thereafter, there shall be elected by the qualified voters of the several counties in each judicial district of this territory, one prosecuting attorney, who shall be a practicing attorney at law, and have the qualifications of an elector, and shall reside in and be an inhabitant of the district for which he is elected, who shall continue in office for the term of two years, and until his successor is elected and qualified.

SEC. 2. The clerks of the boards of county commissioners of the several counties shall make out an abstract of the votes given in their respective counties for prosecuting attorney, and transmit the same to the secretary of the territory, and said votes shall be canvassed, and a certificate issue to the person receiving the highest number of votes in such judicial district, and the person receiving the highest number of votes shall be duly elected and commissioned by the governor.

SEC. 3. Every prosecuting attorney, before entering upon the duties of his office, shall take and subscribe an oath, faithfully to discharge the duties of his office as prosecuting attorney for the district for which he was elected; such oath shall be indorsed on the back of the certificate, and a copy thereof, certified to by the officer before whom the oath shall have been taken, and shall by him be forwarded to the secretary of the territory; and moreover, shall give to the territory of Washington a bond in the sum of one thousand dollars, with good and sufficient surety, conditioned that he will faithfully discharge the duties of his office, according to law, which bond shall be approved by the judge of the district for which he was elected, and filed with the clerk of the district court of such district.

SEC. 4. Each prosecuting attorney shall prosecute all criminal and civil actions in which the territory or any county within their respective districts may be a party; defend all suits brought against the territory, or any county composing their respective districts, and prosecute all forfeited recognizances, and actions for the recovery of debts, fines, penal-

ties and forfeitures accruing to the territory or any county within the district; and it is hereby made the duty of the prosecuting attorney of the second judicial district to appear on behalf of the territory and the several districts, in the supreme court in all appeals, or writs of error, taken from any district in the territory.

SEC. 5. Every prosecuting attorney shall, in the month of January in each year, make to the secretary of the territory a report, setting forth the amount and the nature of business transacted by them in the preceding year, with such other statements and suggestions as he may deem useful.

SEC. 6. When the prosecuting attorney fails, from sickness or other cause, to attend at a term of the district court of the district for which he was elected, or is unable to attend or to perform his duties at such term, the court may appoint some qualified person to discharge the duties for such term, and the person so appointed shall receive the same fees as the regular prosecuting attorney would be entitled to for the same and similar services.

SEC. 7. When a vacancy occurs in the office of prosecuting attorney, in any district in the territory, it shall be the duty of the governor to appoint some qualified person to discharge the duties of the office until the next annual election: *Provided*, such person so appointed shall be an inhabitant and a resident of the district for which he was appointed, and shall qualify in all respects the same as one duly elected by the people, and the person so appointed shall receive the salary and fees of the office for such time as he may serve.

SEC. 8. The prosecuting attorney shall receive no fee or reward from or on behalf of any prosecution for any of his official services, nor shall he be engaged as counsel for either party in any civil action depending upon the same facts as a criminal prosecution.

SEC. 9. Each prosecuting attorney shall receive a salary in semi-annual payments, at the rate of two hundred dollars per annum, which salary shall be paid by the territorial treasurer, upon the presentation of proper vouchers therefor.

SEC. 10. The fees of prosecuting attorney shall be as follows: In all prosecutions, when the punishment is death or imprisonment for life, when the prisoner is so convicted, fifty dollars; and when acquitted, twenty dollars; in all criminal prosecutions, when the punishment is imprisonment in the penitentiary for any less term than for life, when the prisoner is convicted, thirty dollars, and when acquitted twelve dollars. In all other criminal prosecutions, when the prisoner is convicted,

twenty-five dollars, and when acquitted, five dollars. For prosecuting all forfeited recognizances, debts, fines and forfeitures accruing to the territory, or any county therein, upon the amount recovered, twenty per centum on all sums under one hundred dollars. For each days' attendance upon the district court during the session of the grand jury, five dollars. In case of failure to attend to by the attorney of the first and second districts, the prosecuting attorney of the third judicial district shall receive the following fees for services rendered in the supreme court on behalf of the several districts in the territory: For the prosecuting each case upon appeal or writ of errors, fifteen dollars, to be taxed to the district in which the case arises, to be paid out of the court fund of such district, upon the certificate of the judge of such district.

SEC. 11. The fees of prosecuting attorney provided for in section ten (10) of this act, shall be paid by the county for which such services are rendered, and it shall be the duty of the prosecuting attorney to tax his fees at the close of each term of the district court, specifying how much, and for what the service is chargeable to each county, which account of fees must be approved by the judge of the district court, which account shall be submitted to the judge of the district, and upon the presentation of such account or bill of fees to the county auditor, it shall be the duty of such auditor to draw a warrant upon the county treasurer for the amount of said bill in favor of the prosecuting attorney.

SEC. 12. It shall be the duty of the clerks of the several district courts in this territory, in all criminal prosecutions, when the prisoner is convicted, to tax and collect as costs against such prisoner, an amount in each case equal to the fees allowed the prosecuting attorney by the tenth section of this act, which cost, when so collected, shall be applied to the court fund.

SEC. 13. It shall be the duty of every justice of the peace, before whom a criminal examination is held, when the defendant is committed or held to bail, to make out and forward to the prosecuting attorney a transcript of the proceedings had before such justice, together with a copy of all such pleadings and testimony in the case.

SEC. 14. For the purposes of this act, there shall be but three districts, and in all cases where a district court is held under special acts in counties within a district, said counties shall compose a part of the district to which it belongs for judicial purposes.

SEC. 15. All acts and parts of acts in conflict with this act, be and the same are hereby repealed.

PASSED, January 19, 1863.

L A W S

OF THE

TERRITORY OF WASHINGTON

ENACTED BY THE

LEGISLATIVE ASSEMBLY,

IN THE YEAR 1877.

Published by Authority.

OLYMPIA:

C. B. BAGLEY, PUBLIC PRINTER.

1877.

each member of the Territorial Legislature with one copy—during the sessions of the Legislative Assembly.

SECTION 4. All reports distributed to the Territorial, district, and other officers in this Territory shall be for the use of the respective offices, and shall be by the person receiving the same turned over to his successor in office or returned to the clerk of said supreme court who shall give proper receipts for the same.

SECTION 5. Any officer receiving a copy of said reports and failing to turn the same over to his successor in office or return the same to the said clerk, shall be liable to a penalty of twenty dollars to be secured [recovered] from such persons in an action begun in the name of the Territory of Washington. And all monies so collected shall be expended by said clerk for books for the Territorial library under the direction of the said judges of the supreme court.

SECTION 6. This act shall take effect and be in force from and after its passage.

Approved, November 9th, 1877.

AN ACT

IN RELATION TO PROSECUTING ATTORNEYS DEFINING THEIR DUTIES AND FIXING THEIR COMPENSATION.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That at the general election in one thousand eight hundred and seventy-eight for delegate to Congress, and every two years thereafter, there shall be elected by the qualified voters of the several counties in each judicial district of this Territory, one prosecuting attorney who shall be a practicing attorney-at-law, and have the qualifications of an elector, and shall reside in and be an inhabitant of the district for which he is elected.

SECTION 2. Such prosecuting attorney shall continue in office for the term of two years from and after January first one thousand eight hundred and seventy-nine and until his successor is elected and qualified.

SECTION 3. Prosecuting attorneys heretofore elected and

now exercising the duties of their offices in each of the judicial districts of this Territory shall continue in office until the first day of January one thousand eight hundred and seventy-nine and until their successors are elected and qualified, and they shall be governed by, and compensated as in this act provided.

SECTION 4. The county auditors of the several counties shall make out under their hand and the seal of their office, a certificate showing the number of votes given in their respective counties, for each person for prosecuting attorney, and transmit the same to the secretary of the Territory, and said votes shall be canvassed by said secretary, and he shall issue a certificate to the person receiving the highest number of votes in each judicial district, and the person so receiving the highest number of votes in a judicial district shall be the prosecuting attorney of said district and he shall be commissioned by the governor. The county auditor shall transmit the certificate of the votes herein required, to said secretary within four weeks after said election.

SECTION 5. Every prosecuting attorney before entering upon the duties of his office, shall take and subscribe an oath faithfully to discharge the duties of his office as prosecuting attorney for the district, for which he was elected; such oath shall be in writing, certified by an officer authorized to administer oaths, and it shall be filed in the office of the secretary of the Territory, and moreover, said prosecuting attorney shall give to the Territory of Washington a bond in the sum of two thousand dollars with good and sufficient surety, conditioned that he will faithfully discharge the duties of his office according to law, which bond shall be approved by the judge of the district, for which he was elected, and filed in the office of the secretary of this Territory with said oath of office.

SECTION 6. Each prosecuting attorney shall be the legal adviser of the boards of county commissioners of the several counties in his judicial district; he shall also prosecute all criminal and civil actions, in which the Territory or any county within his district may be a party; defend all suits brought against the Territory or any county composing his district, and prosecute all forfeited recognizances bonds and actions for the recovery of debts, fines, penalties and forfeitures accruing [accrning] to the Territory or any county within his district.

SECTION 7. The prosecuting attorney of any judicial district from which an appeal or writ of error is taken to the supreme court shall appear on behalf of the Territory or county in supreme court in all cases in which the Territory or any county in his district is interested, and prosecute or defend the same as the case may be.

SECTION 8. Each prosecuting attorney shall, when required by the board of county commissioners of any county in his district, or by the president of such board, give to such board of county commissioners, in writing, if so required, his legal opinion touching any subject, which such board of county commissioners may be called or required to act upon, relating to the management of county affairs.

SECTION 9. The prosecuting attorney in each judicial district is hereby required to give legal advise when requested, to all county and precinct officers and directors and superintendents of common schools, in all matters relating their official business; and when so required, he shall draw up in writing all contracts, obligations, and like instruments of an official nature, for the use of said officers.

SECTION 10. It shall be the duty of the prosecuting attorney to visit once in each year the offices of the county auditors of the several counties in his district; and he shall then examine the official bonds of all county and precinct officers, on file in such offices, and it is made his duty to report to the board of county commissioners of their respective counties any defect in the bonds of any public officer in such county. He shall also once in each year examine the public records and books of the auditor, assessor, treasurer, superintendent of common schools, and sheriff of each county in his district and report to the board of commissioners of their respective counties any failure, refusal, omission or neglect, of such officers to keep such records and books as required by law. He shall also report to the grand jury having been selected in whole or in part from such county, any failure, refusal, omission, or neglect, of any auditor, treasurer, assessor, superintendent of common schools, or sheriff, to keep the records and books required by law.

SECTION 11. Whenever a petition for divorce remains undefended, it shall be the duty of the prosecuting attorney to resist such petition; but no such petition shall be heard by the court, nor shall said prosecuting attorney be required to appear and defend the same, until the sum of fifteen dollars be deposited by the plaintiff in such petition with the clerk of the court, as the fee of such prosecuting attorney.

SECTION 12. No prosecuting attorney shall be employed in, or allowed to conduct any suit for a divorce on the part of the petitioner or applicant, in the courts of this Territory nor shall any prosecuting attorney be allowed to resist a petition for a divorce in any case remaining undefended, if the attorney for the petitioner is a partner in the practice of law or keeps his office with such prosecuting attorney; but in all such cases the court, or judge before whom the case is to be heard, shall appoint

an attorney to resist the petition who shall be entitled to the compensation allowed by law to prosecuting attorneys in such cases.

SECTION 13. No prosecuting attorney shall receive any fee or reward from any person or persons on behalf of any prosecution for any of his official services, except as provided in this act. Nor shall he be engaged as counsel for a party in any civil action depending upon the same facts as a criminal prosecution.

SECTION 14. Each prosecuting attorney shall on the thirty-first day of December in each year, make to the governor of the Territory a report setting forth the amount and the nature of business transacted by him in that year with such other statements and suggestions as he may deem useful.

SECTION 15. When any prosecuting attorney fails, from sickness or other cause, to attend a term of the district court of the district, for which he was elected, or is unable to perform his duties at such term, the court or judge may appoint some qualified person to discharge the duties for such term; and the person so appointed shall receive a compensation to be fixed by the court to be deducted out of the Territorial salary of such prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of such prosecuting attorney.

SECTION 16. When a vacancy occurs in the office of prosecuting attorney in any district in the Territory, it shall be the duty of the governor to appoint some qualified person to discharge the duties of the office, until the next general election, for delegate to Congress and until another prosecuting attorney shall be elected and qualified: *Provided*, That the person so appointed shall be duly qualified as provided in section one of this act.

SECTION 17. Each prosecuting attorney shall receive a salary for his services in prosecuting and defending criminal and civil actions in which the Territory is a party at the rate of fifteen hundred dollars per annum, to be paid out of the Territorial treasury quarterly, out of any funds in the treasury not otherwise appropriated, upon the presentation to the Territorial treasurer of the proper warrant therefor, which warrant shall be paid in its regular numerical order.

SECTION 18. Each prosecuting attorney shall receive for his services in prosecuting and defending civil actions for any county within his district and for legal advice to boards of county commissioners and county and precinct officers and for such other duties as may be required in sections nine and ten of this act; and any other duties imposed by law, the following sums annually to be paid out of the county treasury of such

county within his district on the order of the board of county commissioners of any such county, that is to say: in counties where the population is one thousand, or less the sum of fifty dollars, and for any additional number of inhabitants above one thousand at the rate of twenty-five dollars per thousand out of any moneys in the general fund of the county not otherwise appropriated.

SECTION 19. No other or greater fees or salary than herein provided, shall be allowed or paid to any prosecuting attorney in this Territory.

SECTION 20. For the purposes of this act, there shall be but three districts; and in all cases where a district court is or shall be held under a special act in counties within a district, said counties shall compose a part of the district to which it belongs for judicial purposes.

SECTION 21. All acts and parts of acts in any manner conflicting with the provisions of this act, be and the same are hereby repealed: *Provided however*, That nothing herein contained, shall be construed as repealing any act or part of an act imposing other and additional duties on any prosecuting attorney.

SECTION 22. This act shall take effect, and be in force from and after its passage.

Approved, October 31st, 1877.

AN ACT

PROVIDING FOR THE PROPER CONFINEMENT OF TERRITORIAL CONVICTS.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington*, That the governor be and he is hereby authorized for and in behalf of the Territory to enter into a contract with William Billings sheriff of Thurston county for the confinement, custody and maintenance of all Territorial convicts under such restriction and limitations as are hereinafter stated.

SECTION 2. Such contract shall be in force for the term of

LAWS

OF

WASHINGTON TERRITORY,

ENACTED BY THE

LEGISLATIVE ASSEMBLY

IN THE YEAR 1879.

Published by Authority.

OLYMPIA:

C. B. BAGLEY, PUBLIC PRINTER.

1879.

this act, the code commissioner shall take and subscribe to an oath before the secretary, faithfully to perform the duties and obligations of said code commissioner. Should any vacancy occur in the office of commissioner, from any cause, and before the commissioner shall have completed his labors, the governor of this territory is hereby authorized to fill such vacancy by appointment, and the person so appointed shall have full power and authority to act in fulfillment of the provisions of this act, and shall be subject to all the obligations and requirements herein imposed.

SEC. 9. This act to take effect and be in force from and after its passage.

Approved, November 14, 1879.

AN ACT

IN RELATION TO PROSECUTING ATTORNEYS, DEFINING THEIR DUTIES AND FIXING THEIR COMPENSATION IN THE COUNTIES OF WALLA WALLA, COLUMBIA, WHITMAN, YAKIMA, SPOKANE AND STEVENS.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That, at the general election in one thousand eight hundred and eighty, for delegate to congress, and every two years thereafter, there shall be elected by the qualified voters of the counties of Walla Walla, Columbia, Whitman, Yakima, Spokane and Stevens, one prosecuting attorney for each of said counties, except the counties of Spokane and Stevens, who shall have one prosecuting attorney jointly, who shall be a practicing attorney-at-law, and have the qualifications of an elector, and shall reside and be an inhabitant of the county or district for which he is elected.

SEC. 2. Each of the said prosecuting attorneys shall continue in office for the term of two years from and after January first, one thousand eight hundred and eighty-one, and until his successor is elected and qualified.

SEC. 3. The prosecuting attorney, heretofore elected in and for the first judicial district, and now exercising the duties of his office as prosecuting attorney under an act entitled "An act

in relation to prosecuting attorneys, defining their duties and fixing their compensation," approved October 31, 1877, shall continue in office until the first day of January, one thousand eight hundred and eighty-one and they shall be governed by and compensated as in said act provided.

SEC. 4. The county auditors, of the said several counties, shall make out under their hand and the seal of their office, a certificate showing the number of votes given in their respective counties, for each person for prosecuting attorney, and transmit the same to the secretary of the territory, and said votes shall be canvassed by said secretary, and he shall issue a certificate of election to the person receiving the highest number of votes in each of said counties or district, and the person so receiving the highest number of votes in said counties or district, shall be the prosecuting attorney of said county or district, and he shall be commissioned by the governor. The county auditor shall transmit the certificate of the votes herein required, to said secretary within four weeks after said election.

SEC. 5. Every prosecuting attorney, before entering upon the duties of his office, shall take and subscribe an oath faithfully to discharge the duties of his office as prosecuting attorney for the county or district for which he was elected; such oath shall be in writing, certified by an officer authorized to administer oaths, and it shall be filed in the office of the secretary of the territory, and, moreover, said prosecuting attorney shall give the Territory of Washington a bond in the sum of two thousand dollars, with good and sufficient surety, conditioned that he will faithfully discharge the duties of his office according to law, which bond shall be approved by the judge of the first judicial district of the territory and filed in the office of the secretary of this territory with said oath of office.

SEC. 6. Each prosecuting attorney shall be the legal advisor of the board of county commissioners of his county or district; he shall also prosecute all criminal and civil actions, in which the territory is a party, the jurisdiction of the action being in his county or district, or in which his county or district is a party; defend all suits brought against the territory, the jurisdiction of which is in his county or district; and all suits brought against the county or district in which he was elected. He shall prosecute all forfeited recognizance, bond and action for the recovery of debts, fines, penalties and forfeitures accruing to the territory, the jurisdiction of which is in his county or district or accruing to the county or district in which he is elected.

SEC. 7. Each prosecuting attorney shall, when required by the board of county commissioners of his county or district or

by the president of such board, give to such board of county commissioners, in writing if so required, his legal opinion touching any subject which such board of county commissioners may be called or required to act upon, relating to the management of county affairs.

SEC. 8. Each prosecuting attorney is hereby required to give legal advice, when requested, to all county and precinct officers and directors and superintendents of common schools in his county or district, in all matters relating to their official business; and when so required he shall draw up in writing all contracts, obligations and like instruments of an official nature for the use of said officers.

SEC. 9. It shall be the duty of the prosecuting attorney to visit once, in each year, the offices of the county auditor of his county or district, and he shall then examine the official bonds of all county and precinct officers on file in such office, and it is made his duty to report to the board of county commissioners any defect in the bonds of any public officers in such county or district. He shall also, once in each year, examine the public records and books of the auditor, assessor, treasurer, superintendent of common schools, and sheriff of his county, or district, and report to the board of commissioners of his county or district, any failure, refusal, omission or neglect of such officers to keep such records and books as required by law. He shall also report to the grand jury, having been selected from his county or district, any failure, refusal, omission or neglect of any auditor, treasurer, assessor, superintendant of common schools, or sheriff, to keep the records and books required by law.

SEC. 10. Whenever a petition for divorce remains undefended in his county or district, it shall be the duty of the prosecuting attorney of said county or district to resist such petition.

SEC. 11. No prosecuting attorney shall be employed in, or allowed to conduct any suit for a divorce, on the part of the petitioner or applicant in the courts of this territory, nor shall any prosecuting attorney be allowed to resist a petition for a divorce in any case remaining undefended, if the attorney for the petitioner is a partner in the practice of law, or keeps his office with such prosecuting attorney; but in all such cases, the court, or judge before whom the case is to be heard, shall appoint an attorney to resist the petition, who shall be entitled to a fee of ten dollars, which shall be deducted and paid from the salary of the regular prosecuting attorney.

SEC. 12. No prosecuting attorney of any of said counties or district, shall receive any fee or reward, from any person or

persons, on behalf of any prosecution for any of his official services, except as provided in this act, nor shall he be engaged as counsel for a party in any civil action depending upon the same facts as a criminal prosecution.

Sec. 13. Each prosecuting attorney of said counties or district shall, on the thirty-first day of December in each year, make the governor of the territory a report, setting forth the amount and the nature of business transacted by him in that year, with such other statements and suggestions as he may deem useful.

Sec. 14. When any prosecuting attorney fails, from sickness, or other cause, to attend a term of the district court of the county for which he was elected, or is unable to perform his duties at such term, the court or judge may appoint some qualified person to discharge the duties for such term; and the person so appointed shall receive a compensation to be fixed by the court, to be deducted out of the territorial salary of such prosecuting attorney, not exceeding, however, one fourth of the quarterly salary of such prosecuting attorney.

Sec. 15. When a vacancy occurs in the office of the prosecuting attorney in any of said counties or districts it shall be the duty of the governor to appoint some qualified person to discharge the duties of the office until the next general election for delegate to congress, and until another prosecuting attorney shall be elected and qualified: *Provided*, That the person so appointed shall be duly qualified as provided in section one of this act.

Sec. 16. Each prosecuting attorney, elected under this act, may appoint one or more deputies, not to exceed two, who shall have the same power in all respects as their principal. The appointment shall be in writing, and be signed by the prosecuting attorney, and shall be filed in the office of the auditor of the county where the court is held. He may revoke the appointment of any deputy at will, by writing, filed in the same office. Each deputy, before entering upon his duties, shall take the oath of office, which shall be indorsed on his appointment. The prosecuting attorney may take from each of his deputies a bond with sureties for the faithful performance of his duties; but the prosecuting attorney and the sureties on his bond shall be liable for all the official acts of each deputy: *Provided*, Such deputy shall receive his compensation from his principal, and no additional fees or salary shall be allowed any prosecuting attorney for such purpose.

Sec. 17. The prosecuting attorney in each of said counties shall be the public prosecutor therein. He shall attend the district courts held in his county or district, for the trans-

action of criminal business, and conduct, on behalf of the territory, all prosecutions for public offense.

SEC. 18. The prosecuting attorneys, when not in attendance upon the district court, shall institute proceedings for magistrates, for the arrest of persons charged with, or reasonably suspected of public offences, when he has information that any such offense has been committed; and for that purpose shall attend upon the magistrates in cases of arrest when required by them: *Provided*, That said prosecuting attorney shall not be required to travel over ten miles to attend upon such cases. The prosecuting attorney shall also attend before, and give advice to the grand jury whenever cases are presented to them for their consideration, and shall draw all indictments when required by the grand jury. It shall be the duty of the prosecuting attorneys, created by this act, to carefully tax all cost bills in all criminal cases arising in their respective counties, and they shall take care that no useless witness fees are taxed as part of such cause, and that the officers authorized to execute process, tax no other or greater fees than the fees allowed by law: *Provided*, That, if they are not present at the trial of any criminal cause, before any justice of the peace, and the cost bill in such last cause is lodged with the county commissioners for such payment, the said prosecuting attorney shall have the right to review and retax the same, and it is made his duty so to do, if the board of county commissioners deem the bill exorbitant or improperly taxed.

SEC. 19. Each prosecuting attorney, elected under this act, shall receive a yearly salary of three hundred dollars, to be paid quarterly out of the territorial treasury, out of any funds in the treasury not otherwise appropriated, upon presentation to the territorial treasurer of the proper warrant therefor, which warrant shall be paid in its regular numerical order. He shall also receive the sum of one hundred dollars yearly, payable quarterly, where the population of his county or district is one thousand or less, and for any additional number of inhabitants above one thousand, at the rate of seventy-five dollars per thousand, and every fraction of one thousand over five hundred, to be paid by the county or district out of any money in the county treasury, not otherwise appropriated. He shall also be entitled to receive, for all amounts collected by him for the territory or for his county or district, ten per cent. on the amount collected.

SEC. 20. The fees heretofore allowed district attorneys, under an act entitled "an act in relation to prosecuting attorneys, defining their duties and fixing their compensation," approved, October 31, 1877, shall go to the county treasury of

the several counties or districts named above, when the prosecuting attorney of said counties or district performs the services which heretofore, under said act, were performed by the prosecuting attorney of the first judicial district.

SEC. 21. All acts and parts of acts, heretofore enacted, in any manner conflicting with the provisions of this act, be, and same are, hereby repealed: *Provided, however,* That nothing herein contained shall be construed as affecting or repealing any act or part of an act referring to prosecuting attorneys for the second and the third judicial districts of the territory.

SEC. 22. This act shall take effect and be in force from and after its approval by the governor.

Approved, November 13, 1879.

AN ACT

TO PREVENT AND PUNISH GAMBLING.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That each and every person, who shall deal, play or carry on, open or cause to be opened, or who shall conduct, either as owner, proprietor, employe, whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenet, rondo, vingt-un (or twenty-one), poker, draw poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars (\$500) and shall be imprisoned in the county jail until such fine and costs are paid: *Provided,* That such persons so convicted shall be imprisoned one day for every two dollars of such fine and costs: *And provided further,* That such imprisonment shall not exceed one year: *And still further provided,* That any one who shall carry on any chuck-a-luck, bunko, strap, sling, pannel house or other swindling games shall be deemed guilty of a felony, and, upon conviction, shall be imprisoned in the penitentiary not exceeding five years for such offense.

L A W S

OF THE

TERRITORY OF WASHINGTON,

ENACTED BY THE

LEGISLATIVE ASSEMBLY,

IN THE YEAR 1883.

Printed by Authority.

OLYMPIA:

C. B. BAGLEY, PUBLIC PRINTER.

1883.

of all those who have died, who have been discharged, or who have escaped from said penitentiary, since the said first day of June 1878.

SEC. 3. Should the superintendent or keeper of the territorial penitentiary, neglect or refuse to give the notice to the territorial auditor, as provided in section two (2) of this act, he shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be subject to a fine, in any sum, not exceeding five hundred dollars, in any court of competent jurisdiction, and shall stand committed, until said fine is paid.

SEC. 4. It shall be the duty of the territorial auditor to keep a public record, of all convictions of parties sentenced to the territorial penitentiary; such record to embody the full data of facts, reported to him, under sections one (1) and two (2) of this act.

SEC. 5. This act to take effect and be in force from and after its approval by the governor.

Approved November 28, 1883.

AN ACT

IN RELATIONS TO PROSECUTING ATTORNEYS, DEFINING THEIR DUTIES AND FIXING THEIR COMPENSATION.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington:* That at the general election in the year one thousand and eight hundred and eighty-four, for delegate to congress, and every two years thereafter, there shall be elected in the first judicial district, by the qualified voters of the counties of Walla Walla, Columbia, Garfield, Whitman, Spokane, Stevens, Lincoln and Assotin, one prosecuting attorney, for each of said counties, except the counties of Columbia, Garfield and Assotin, which shall have one prosecuting attorney jointly, and the counties of Spokane, Stevens and Lincoln, which shall have one prosecuting attorney jointly.

SEC. 2. The second judicial district, is divided into three prosecuting attorney districts; and each of said districts shall, on the general election, in the year one thousand eight hundred and eighty-four, and every two years thereafter, elect one prosecuting attorney.

SEC. 3. The counties of Yakima, Klickitat, Skamania and Clark, shall constitute the first prosecuting attorney district.

SEC. 4. The counties of Cowlitz, Wahkiakum, Pacific, Chehalis, Mason and Thurston, shall constitute the second prosecuting attorney district, and the county of Lewis, shall constitute the third prosecuting attorney district.

SEC. 5. The third judicial district be, and the same is hereby divided into three prosecuting attorney districts; and each of said prosecuting attorney districts, shall, at the general election, in the year one thousand eight hundred and eighty-four, and every two years thereafter, elect one prosecuting attorney.

Sec. 6. The county of Pierce shall elect one prosecuting attorney; the counties of King, Kitsap and Snohomish shall elect one prosecuting attorney jointly; the counties of Whatcom, Island, Jefferson, Clallam, San Juan and Skagit shall elect one prosecuting attorney jointly.

Sec. 7. Each prosecuting attorney, elected under this act, shall be a practicing attorney at law, and have the qualifications of an elector, and shall reside in, and be an inhabitant of the county or district for which he is elected, and shall continue in office, for the term of two years, from and after the second Monday of January, after his election and qualification, and until his successor is elected and qualified.

Sec. 8. The county auditors of the several counties shall make out under their hands, and seals of their office, a certificate showing the number votes given in their respective counties, for each person for prosecuting attorneys, and transmit the same to the secretary of the Territory, and said votes shall be canvassed by said secretary, and he shall issue a certificate of election to the person receiving the highest number of votes, in each of said counties or district, and the person so receiving the highest number of votes, in each of said counties or district, shall be the prosecuting attorney of said county or district, and he shall be commissioned by the governor. The county auditor shall transmit the certificate of the votes herein required, to said secretary, within four weeks after said election.

Sec. 9. Every prosecuting attorney, before entering upon the duties of his office, shall take and subscribe an oath, faithfully to discharge the duties of his office, as prosecuting attorney for the district or county which he was elected. Such oath shall be in writing, certified by an officer authorized to administer oaths, and it shall be filed in the office of the secretary of the territory, and moreover, the said prosecuting attorney shall give to the territory of Washington a bond in the sum of two thousand dollars, with good and sufficient surety, conditioned that he will faithfully discharge the duties of his office according to law, which bond shall be approved by the judge of the district for which he was elected, and filed in the office of the secretary of the territory, with said oath of office.

Sec. 10. Each prosecuting attorney shall be the legal adviser of the board of county commissioners for the county or district for which he was elected; he shall also prosecute all criminal and civil actions in which the territory or any county within his district may be a party; defend all suits brought against the territory, or any county composing his district, and prosecute all forfeited recognizances, bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the territory, or any county within his district: *Providing*, The commissioners of any county may employ other attorneys, when they may deem it for the interest of their county.

Sec. 11. The prosecuting attorney of any county or district, from which an appeal, or writ of error, is taken to the supreme court, shall appear in behalf of the territory or county, in the supreme court, in all cases in which the territory or any county in his district is interested, and prosecute or defend the same as the case may be.

Sec. 12. Each prosecuting attorney, when required by the board

of county commissioners of any county in his district, or by the president of such board, shall give to such board of county commissioners, in writing if so required, his legal opinion, touching any subject which such board of county commissioners may be called or required to act upon, relating to the management of county affairs.

SEC. 13. The prosecuting attorney, in each county or district, is hereby required to give legal advice, when required, to all county and precinct officers, and directors and superintendents of common schools, in all matters relating to their official business; and, when so required, he shall draw up, in writing, all contracts, obligations and like instruments of an official nature, for the use of said officers.

SEC. 14. It shall be the duty of the prosecuting attorney to visit, once in each year, the offices of the county auditors of the several counties in his district, and he shall then examine the official bonds of all county and precinct officers on file in such offices; and it is made his duty to report to the board of county commissioners of their respective counties, any defect in the bonds of any public officer in such county. He shall also, once in each year, examine the public records and books of the auditor, assessor, treasurer, superintendent of common schools, and sheriff of each county in his district, and report to the board of county commissioners, of their respective counties, any failure, refusal, omission or neglect of such officers, to keep such records and books as required by law.

SEC. 15. Whenever a petition for divorce remains undefended, it shall be the duty of the prosecuting attorney to resist such petition; but no such petition shall be heard by the court, nor shall said prosecuting attorney be required to appear, and defend the same, until the sum of fifteen dollars be deposited by the plaintiff, with the clerk of the court, as the fee of such prosecuting attorney.

SEC. 16. No prosecuting attorney shall be allowed to conduct any suit for divorce, on the part of the petitioner or applicant, in the courts of this territory, nor shall any partner in the practice of the law, or attorney having his office with the prosecuting attorney of this territory, be allowed to prosecute any suit in behalf of the petitioner or applicant for a divorce in the courts of this territory.

SEC. 17. No prosecuting attorney shall receive any fee, or reward, from any person, on behalf of any prosecution, for any of his official services, except as provided in this act; nor shall he be engaged as counsel for a party in any civil action depending upon the same facts as a criminal prosecution.

SEC. 18. Each prosecuting attorney shall, on the thirty-first day of December in each year, make to the governor of the territory a report setting forth the amount and the nature of business transacted by him in that year, with such other statements and suggestions as he may deem useful.

SEC. 19. When any prosecuting attorney fails, from sickness or other cause, to attend a term of the district court of the district or county for which he was elected, or is unable to perform his duties at such term, the court or judge may appoint some qualified person to

discharge the duties for such term; and the person, so appointed, shall receive a compensation, to be fixed by the court, to be deducted out of the territorial salary of such prosecuting attorney, not exceeding however, one fourth of the quarterly salary of such prosecuting attorney.

SEC. 20. When a vacancy occurs in the office of prosecuting attorney, in any district or county, it shall be the duty of the governor to appoint some qualified person to discharge the duties of the office, until the next general election for delegate to congress, and until another prosecuting attorney shall be elected and qualified: *Provided*, That the person so appointed shall be duly qualified as provided in section seven of this act.

SEC. 21. Each prosecuting attorney, elected under this act, shall receive a yearly salary as follows: The prosecuting attorney for the county of Walla Walla shall receive a salary of five hundred dollars; the prosecuting attorney for the counties of Columbia, Garfield and Asotin shall receive a yearly salary of five hundred dollars; the prosecuting attorney for the county of Whitman shall receive a yearly salary of five hundred dollars; the prosecuting attorney for the counties of Spokane, Lincoln, Douglas and Stevens shall receive a yearly salary of five hundred dollars; the prosecuting attorney for the counties of Clarke, Skamania, Klickitat and Yakima shall receive a yearly salary of nine hundred and fifty dollars; the prosecuting attorney for the counties of Mason, Chehalis, Pacific, Wabkiakum, Cowlitz and Thurston shall receive a yearly salary of seven hundred and fifty dollars; and the prosecuting attorney for the county of Lewis shall receive a salary of three hundred dollars; the prosecuting attorney for the county of Pierce shall receive a yearly salary of five hundred dollars; the prosecuting attorney of the counties of King, Kitsap and Snohomish shall receive a yearly salary of nine hundred dollars; the prosecuting attorney for the counties of Jefferson, Island, Clallam, Skagit, San Juan and Whatcom shall receive a yearly salary of six hundred dollars; said sums to be paid quarterly, out of the territorial treasury, out of any funds in the treasury not otherwise appropriated, upon presentation to the territorial treasurer of the proper warrant therefor, which warrant shall be paid in its regular numerical order.

SEC. 22. Each prosecuting attorney shall receive for his services in prosecuting and defending civil actions, for any county within his district, and for legal advice to board of county commissioners, and county and precinct officers, and for such other duties as may be required in sections twelve and thirteen of this act, and any other duties imposed by law, the following sums annually to be paid out of the county treasury of each county within his county or district, on the warrant of the county auditor of any such county, who shall take said prosecuting attorney's receipt for the amount of said warrant; that is to say, in counties where the population is one thousand or less, the sum of fifty dollars, and for any additional number of inhabitants above one thousand, at the rate of twenty-five dollars per thousand, out of any money in the general fund of the county, not otherwise appropriated; he shall also be entitled to receive for all amounts collected by him for the territory, or for his county or district, ten per cent. on the amount collected:

Provided, That in the counties of Walla Walla, Whitman, Columbia, Garfield, Spokane, Stevens, Lincoln and Asotin the prosecuting attorneys shall receive the sum of seventy-five dollars where the population is one thousand or less, and for any additional number of inhabitants above one thousand at the rate of fifty dollars per thousand.

Sec. 23. Each prosecuting attorney, elected under this act, may appoint one or more deputies, not to exceed two, who shall have the same power in all respects as their principal; the appointment shall be in writing, and shall be signed by the prosecuting attorney, and shall be filed in the auditor's office of the county where the court is held. He may revoke the appointment of any deputy at will, by writing filed in the same office. Each deputy shall be qualified as provided in section seven of this act, and shall, before entering upon his duties, take the oath of office, which shall be endorsed upon his appointment. The prosecuting attorney may take from each of his deputies a bond with sureties for the faithful performance of his duties; but the prosecuting attorney and the sureties on his bond shall be liable for all the official acts of his deputy: *Provided*, Such deputy shall receive his compensation from his principal, and no additional fees or salary shall be allowed any prosecuting attorney for such purposes.

Sec. 24. The prosecuting attorney, when not in attendance upon the district court, shall institute and prosecute proceedings before magistrates for the arrest of persons charged with, or reasonably suspected of, public offenses, when he has information that any such offense has been committed, and shall for that purpose attend when required by them. The prosecuting attorney shall also attend and appear before, and give advice to, the grand jury when cases are presented to them for their consideration, and shall draw all indictments when required by the grand jury. It shall be the duty of the prosecuting attorneys, elected under this act, to carefully tax all cost bills in criminal cases arising in their respective counties or districts, and they shall take care that no useless witness fees are taxed as part of such cases, and that the officers, authorized to execute process, tax no other or greater fees than the fees allowed by law: *Provided*, That, if they are not present at the trial of any criminal case, before any justice of the peace, and the cost bill in such last case is lodged with the county commissioners for such payment the said prosecuting attorney shall have the right to receive and retax the same, and it is made his duty so to do, if the board of county commissioners deem the bill exorbitant or improperly taxed.

Sec. 25. The prosecuting attorneys heretofore elected, and now exercising the duties of the office of prosecuting attorney, shall continue in office, until the second Monday in January, one thousand eight hundred and eighty-five, and until their successors are elected and qualified.

Sec. 26. No other or greater fees or salary, than herein provided, shall be allowed or paid to any prosecuting attorney in this territory.

Sec. 27. All acts and parts of acts in any manner conflicting with the provisions of this act be, and the same are hereby repealed: *Provided however*, That nothing herein contained shall be construed as

repealing one act or part of an act imposing an additional duty on prosecuting attorneys: *Provided further*, That the provisions contained in sections 12, 13, 14, 18 and 22 of this act shall not apply to any of the counties composing the second judicial district.

Sec. 28. This act shall take effect and be in force from and after its passage.

Approved November 23, 1883.

AN ACT

TO PROVIDE FOR THE CONSTRUCTION OF DITCHES, DRAINS OR WATERCOURSES.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington:* That the county commissioners of any county in the territory shall have power to cause to be established, located and constructed, for agricultural or sanitary purposes, as hereinafter provided, any ditch, drain, or watercourse within said county.

Sec. 2. Any person owning, possessing, or occupying any swamp, wet, marsh, or overflowed lands, in the territory, who shall desire to drain the same, when he shall deem it necessary, in order thereto that a ditch, or drain, should be opened through lands belonging to other persons, in case the owners of said lands shall refuse to permit the opening of said ditch or drain, through the same, or if the parties cannot agree upon the terms thereof, he shall make application in writing, to the board of county commissioners, of the county, in which such swamp, wet, marsh, or overflowed lands shall be situated, to enquire and determine whether such swamp, wet, marsh, or overflowed lands, are a source of disease, and whether the public health would be promoted by draining the same, or whether such ditch or drain is necessary for the proper cultivation of the same, and whether the permanent assessed value of the same would be increased by such drain said application shall be filed with the county auditor, together with a good and sufficient bond, conditioned to pay all costs and expenses of location and appraisalment, should the county commissioners grant said application, at least thirty days before a regular meeting of the board of county commissioners.

Sec. 3. That said application shall contain a description of the lands to be drained, the premises through which it will be necessary for the said ditches or drain to be constructed, and the owner or owners thereof, if known, and in a clear, concise manner, the facts showing the necessity of said ditch, or drain, and shall be verified by oath of the applicant. Twenty days' notice of said application shall be given to the owners of the lands, affected by said ditch or drain. Upon the filing of such application and bond, the county auditor shall prepare the necessary number of notices for the applicant, who shall cause one such notice to be given to the owner, of each tract sought to be affected, by the proceeding; the notice shall state, substantially, the prayer of the application, and the time and place, when and where, the

L A W S

OF

WASHINGTON TERRITORY,

ENACTED BY THE

LEGISLATIVE ASSEMBLY,

TENTH BIENNIAL SESSION,

1885-6.

Printed by Authority

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THOMAS H. CAVANAUGH, PUBLIC PRINTER.

1886.

either party, be transferred to the court at which said action should have been commenced if this act had been in force, and thereafter all proceedings shall be had therein at the court to which said transfer is made, as though said action had been commenced in said court.

SEC. 15. That this act shall take effect and be in force from and after its approval by the governor.

Approved January 9, 1886.

AN ACT

IN RELATION TO PROSECUTING ATTORNEYS, DEFINING THEIR DUTIES AND FIXING THEIR COMPENSATION.

Be it enacted by the Legislative Assembly of the Territory of Washington:

SECTION 1. That at the general election in this territory in the year one thousand eight hundred and eighty-six for delegate to congress, and every two years thereafter, there shall be elected by the qualified electors in the district comprising the counties of Walla Walla and Franklin, one prosecuting attorney. In the district comprising the counties of Spokane and Stevens, one prosecuting attorney. In the district comprising the counties of Lincoln, Douglas and Adams, one prosecuting attorney. In the district comprising the counties of Garfield and Asotin, one prosecuting attorney. In the district comprising the county of Whitman, one prosecuting attorney. In the district comprising the county of Columbia, one prosecuting attorney. In the district comprising the counties of Yakima and Kittitas, one prosecuting attorney. In the district comprising the counties of Clarke, Klickitat and Skamania, one prosecuting attorney. In the district comprising the counties of Lewis, Cowlitz, Mason and Thurston, one prosecuting attorney. In the district comprising the counties of Wahkiakum, Chehalis and Pacific, one prosecuting attorney. In the district comprising the county of Pierce, one prosecuting attorney. In the district comprising the counties of King, Kitsap and Snohomish, one prosecuting attorney. In the district comprising the counties of Jefferson, Clallam

Island and San Juan, one prosecuting attorney. In the district comprising the counties of Skagit and Whatcom, one prosecuting attorney.

SEC. 2. No person shall serve as prosecuting attorney under this act who has not been admitted to practice as an attorney-at-law in the supreme and district courts of this territory, and who is not a resident and qualified elector in the district for which he is elected.

SEC. 3. The prosecuting attorney for the district comprising the counties of Walla Walla and Franklin shall receive an annual salary of seven hundred and fifty dollars. The prosecuting attorney for the district comprising the counties of Spokane and Stevens shall receive an annual salary of seven hundred and fifty dollars. The prosecuting attorney for the district comprising the counties of Lincoln, Douglas and Adams, shall receive an annual salary of five hundred dollars. The prosecuting attorney for the district comprising the counties of Garfield and Asotin shall receive an annual salary of five hundred dollars. The prosecuting attorney for the district comprising the county of Whitman, shall receive an annual salary of seven hundred dollars. The prosecuting attorney for the district comprising the county of Columbia shall receive an annual salary of five hundred dollars. The prosecuting attorney for the district comprising the counties of Yakima and Kittitas shall receive an annual salary of seven hundred and fifty dollars. The prosecuting attorney for the district comprising the counties of Clarke, Klickitat and Skamania shall receive an annual salary of eight hundred dollars. The prosecuting attorney for the district comprising the counties of Lewis, Cowlitz, Thurston and Mason shall receive an annual salary of eight hundred dollars. The prosecuting attorney for the district comprising the counties of Wahkiakum, Chehalis and Pacific shall receive an annual salary of five hundred dollars. The prosecuting attorney for the district comprising the county of Pierce shall receive an annual salary of seven hundred and fifty dollars. The prosecuting attorney for the district comprising the counties of King, Kitsap and Snohomish shall receive an annual salary of twelve hundred dollars. The prosecuting attorney for the district comprising the counties of Jefferson, Clallam, Island and San Juan shall receive an annual salary of five hundred dollars. The prosecuting attorney for the district comprising the counties of Skagit and Whatcom shall receive an annual salary of five hundred dollars. Said sums to be paid quarterly out of any

funds in the territorial treasury not otherwise appropriated, upon presentation to the territorial treasurer of the proper warrant therefor, which warrant shall be paid in its regular numerical order.

SEC. 4. Each prosecuting attorney elected under this act shall before entering upon the discharge of the duties of his office take and subscribe an oath, faithfully to discharge the duties of said office, and shall enter into a bond to the Territory of Washington in the sum of five thousand dollars, conditioned that he will faithfully discharge the duties of his office, to be approved by the judge of the district for which he is elected, which said oath and bond shall be filed in the office of the auditor of the territory.

SEC. 5. Each prosecuting attorney shall be the legal advisor of the board of county commissioners for the county or district for which he was elected; he shall also prosecute all criminal and civil actions in which the territory or any county within his district may be a party; defend all suits brought against the territory, or any county composing his district and prosecute all forfeited recognizances, bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the territory, or any county within his district: *Provided*, The commissioners of any county may employ other attorneys, when they may deem it for the interest of their county.

SEC. 6. The prosecuting attorney of any county or district, from which an appeal, or writ of error is taken to the supreme court, shall appear in behalf of the territory or county in the supreme court, in all cases in which the territory or any county in his district is interested, and prosecute or defend the same as the case may be.

SEC. 7. Each prosecuting attorney, when required by the board of county commissioners of any county in his district, or by the president of such board, shall give to such board of county commissioners in writing if so required, his legal opinion touching any subject which such board of county commissioners may be called or required to act upon relating to the management of county affairs.

SEC. 8. The prosecuting attorney in each county or district is hereby required to give legal advice, when required, to all county and precinct officers, and directors and superintendents of common schools in all matters relating to their official business; and when so required, he shall draw up, in writing, all contracts obligations and like instruments of an official nature, for the use of said officers.

SEC. 9. It shall be the duty of the prosecuting attorney to visit, once in each year, the offices of the county auditors of

the several counties in his district, and he shall then examine the official bonds of all county and precinct officers on file in such offices, and it is made his duty to report to the board of county commissioners of their respective counties any defect in the bonds of any public officer in such county. He shall also once in each year, examine the public records, and books of the auditor, assessor, treasurer, superintendent of common schools and sheriff of each county in his district, and report to the board of county commissioners of their respective counties any failure, refusal, omission or neglect of such officers to keep such records and books as required by law.

SEC. 10. Whenever a petition for divorce remains undefended, it shall be the duty of the prosecuting attorney to resist such petition.

SEC. 11. No prosecuting attorney shall be allowed to conduct any suit for divorce on the part of the petitioner or applicant, in the courts of this territory, nor shall any partner in the practice of the law, or attorney having his office with the prosecuting attorney of this territory be allowed to prosecute any suit in behalf of the petitioner or applicant for a divorce in the courts of this territory.

SEC. 12. No prosecuting attorney shall receive any fee or reward from any person, on behalf of any prosecution, for any of his official services, except as provided in this act, nor shall he be engaged as council [counsel] for a party in any civil action depending upon the same facts as a criminal prosecution.

SEC. 13. Each prosecuting attorney shall, on the thirty-first day of December in each year, make to the governor of the territory a report setting forth the amount and the nature of business transacted by him in that year, with such other statements and suggestions as he may deem useful.

SEC. 14. When any prosecuting attorney fails from sickness, or other cause, to attend a term of the district court of the district or county for which he was elected, or is unable to perform his duties at such term, the court or judge may appoint some qualified person to discharge the duties of such term, and the person so appointed shall receive a compensation to be fixed by the court, to be deducted out of the territorial salary of such prosecuting attorney, not exceeding, however, one fourth of the quarterly salary of such prosecuting attorney.

SEC. 15. When a vacancy occurs in the office of prosecuting attorney, in any district or county, it shall be the duty of the governor to appoint some qualified person to discharge the

duties of the office, until the next general election for delegate to congress, and until another prosecuting attorney shall be elected and qualified: *Provided*, That the person so appointed shall be duly qualified as provided in section two of this act.

SEC. 16. Every prosecuting attorney shall receive for his services in prosecuting and defending civil actions, for any county within his district, and for legal advice to board of county commissioners, and county and precinct officers, and for such other duties as may be required in sections seven and eight of this act; and any other duties imposed by law, the following sums annually to be paid out of the county treasury of each county within his county or district, on the warrant of the county auditor of any such county, who shall take said prosecuting attorney's receipt for the amount of said warrant; that is to say, in counties where the population is one thousand or less, the sum of fifty dollars, and for any additional number of inhabitants above one thousand at the rate of twenty-five dollars per thousand, out of any money in the general fund of the county not otherwise appropriated; he shall also be entitled to receive for all amounts collected by him for the territory, or for his county or district ten per cent. on the amount collected.

SEC. 17. Each prosecuting attorney elected under this act may appoint one or more deputies, not to exceed two, who shall have the same power in all respects as their principal; the appointment shall be in writing, and shall be signed by the prosecuting attorney, and shall be filed in the auditor's office for the county where the court is held. He may revoke the appointment of any deputy at will, by writing filed in the same office. Each deputy shall be qualified as provided in section two of this act, and shall, before entering upon his duties, take the oath of office, which shall be endorsed upon his appointment. The prosecuting attorney may take from each of his deputies a bond with sureties for the faithful performance of his duties; but the prosecuting attorney and the sureties on his bond shall be liable for all the official acts of his deputy: *Provided*, Such deputy shall receive his compensation from his principal, and no additional fees or salary shall be allowed any prosecuting attorney for such purpose.

SEC. 18. The prosecuting attorney when not in attendance upon the district court shall institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of, a felony when he has information that any such offence has been committed, and shall for that purpose attend when required by them. The prosecuting attorney shall

also attend and appear before and give advice to the grand jury when cases are presented to them for their consideration; and shall draw all indictments when required by the grand jury. It shall be the duty of the prosecuting attorneys elected under this act to carefully tax all cost bills in criminal cases arising in their respective counties, or districts, and they shall take care that no useless witness fees are taxed as part of such costs, and that the officers, authorized to execute process, tax no other or greater fees than the fees allowed by law: *Provided*, That if they are not present at the trial of any criminal case, before any justice of the peace, and the cost bill in such last case is lodged with the county commissioners for such payment the said prosecuting attorney shall have the right to receive and retax the same, and it is made his duty so to do, if the board of county commissioners deem the bill exorbitant or improperly taxed.

SEC. 19. The prosecuting attorneys heretofore elected and now exercising the duties of the office of prosecuting attorney, shall continue in office until the second Monday of January, one thousand eight hundred and eighty-seven, and until their successors are elected and qualified.

SEC. 20. No other or greater fees or salary, than herein provided, shall be allowed or paid to any prosecuting attorney in this territory.

SEC. 21. It is further provided in this act that the prosecuting attorney for the counties of Clarke, Skamania, Klickitat, Yakima, Kityass shall receive for the year 1886 the sum of ten hundred and fifty dollars, to be paid out of the territorial treasury in the manner prescribed in this act for the payment of salaries of prosecuting attorneys.

SEC. 22. All acts and parts of acts in conflict with the provisions of this act are hereby repealed, saving the said terms of the prosecuting attorneys in office as in section nineteen hereof.

SEC. 23. This act to take effect and be in force from and after its passage and approval.

Approved February 4, 1886.

AN ACT

TO CREATE A DISTRICT COURT FOR THE COUNTY OF ASOTIN AND
DEFINING THE JURISDICTION THEREOF.

*Be it enacted by the Legislative Assembly of the Territory
of Washington:*

SECTION 1. That a court be and the same is hereby cre-

ated and established within the county of Asotin, to be called and known as the district court for Asotin county.

SEC. 2. That the said district court shall have jurisdiction within said county, of all matters, actions and causes, except those in which the United States shall be a party, in the same manner and to the same extent as other district courts in the first judicial district have, and all proceedings therein shall be governed by, and subject to the same laws, rules and regulations in all respects as other district courts in said district.

SEC. 3. That the said district court shall be held by the judge of the first judicial district and said judge shall appoint a clerk of said court, who shall before entering upon the duties of such office, take and subscribe an oath to faithfully discharge the same, and shall give a bond or other security in such sum and manner as the judge of said court may direct and shall keep his office at the county seat of said county.

SEC. 4. The regular term of said court shall be held at the county seat of said county on the first Monday in April and the third Monday in October in each year, and shall hold until the business of the term is transacted, unless sooner adjourned.

SEC. 5. All act and parts of acts in conflict with this act are hereby repealed.

SEC. 6. This act shall take effect and be in force from and after its passage and approval.

Approved February 4, 1886.

AN ACT

TO PROVIDE FOR A TERM OF THE SUPREME COURT OF WASHINGTON TERRITORY, FOR THE YEAR A. D. 1886.

Be it enacted by the Legislative Assembly of the Territory of Washington:

SECTION 1. That a regular term of the supreme court of said territory shall be held at the capital of said territory, commencing on the second Monday of July, A. D. 1886, and continuing for not less than two weeks thereafter and until all the business is disposed of, including all causes that would

APPENDIX C
Selected AGLOs and AGOs

AGO 1891-92, p. 186-87 (1891)

AGO 1907-08, p. 113 (1907)

AGO 1937-38, p. 190 (1937)

AGO 1937-38, p. 84 (1937)

AGLO 1973, No. 115

AGLO 1974 No. 15

AGO 2015 No. 6 (2015)

the area which he would be entitled to purchase would be governed by the length of the line of ordinary high tide included between the side lines of his upland holding, and his petition should show that the area he seeks to purchase lies *in front of* such upland holding. I do not see how this can be done excepting by describing the proposed area by metes and bounds, even if the law did not specifically require it.

If the proposed purchaser belongs to the second class above specified, his petition should show the nature and extent of his improvements, and should describe the area so improved by him by metes and bounds. If the tide lands have been platted and streets laid out, it would not be improper for the petition to show how the area applied for is situated with reference to the plat, but the law does not seem to require that to be done.

What I have heretofore said with reference to persons belonging to the first class will apply to persons of the third class, excepting that the petition in such case should show what lands the upland proprietor would have been entitled to purchase if he had not conveyed his right to the applicant.

Very respectfully,
W. C. JONES,
Attorney General.

OFFICE OF ATTORNEY GENERAL,

December 26, 1891.

Hon. A. W. Buddress, Port Townsend:

DEAR SIR—I am in receipt of your communication of recent date stating that you have been employed by the county commissioners of Island county as their county attorney, and you inquire if you can legally perform the duties of said office, notwithstanding the fact that you reside in another county.

Section 5, page 81, Laws of 1885-8, provides as follows:

"The commissioners of any county may employ other attorneys, when they deem it for the interests of their county."

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ully, W. C. JONES,
Attorney General.

OFFICE OF ATTORNEY GENERAL,
December 26, 1891.

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of your communication of recent
employed by the county commis-
county attorney, and you inquire
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385-d, provides as follows:
ity may employ other attorneys, when
in county."

Inasmuch as there is no practicing lawyer resident in Island
county, it is manifestly the duty of the county commissioners to
employ other lawyers to act as attorneys for Island county. And
there can be no doubt that when so employed in pursuance of the
provisions of law, he has full power to represent the county and
state in all legal proceedings within that jurisdiction. It would be
manifestly useless to empower the county commissioners to employ
other attorneys if necessary unless such other attorneys could legally
perform the duties which the law imposes upon the county attorney.

Second: You inquire whether the master of a steamboat, having
his residence on shore, is liable to pay road poll tax.

Section 7, page 622, Laws of 1889-90, provides that the county
commissioners shall annually levy upon each male person over
twenty-one years and under fifty years of age, except paupers, etc.,
found in each road district during the time for the collection of
road poll taxes for that year, an annual road poll tax of two dollars.
And every such person in a road district *who has not paid the same
in some other district* must pay the amount of the road poll tax so
levied.

I am unable to see any possible ground upon which the master
of a steamboat residing within this state can claim to be exempt
from paying a road poll tax. He is clearly within the requirements
of the section quoted, and the constitutionality of that provision
has never been questioned, so far as I am advised, by any one.

Very respectfully, W. C. JONES,
Attorney General.

OFFICE OF ATTORNEY GENERAL,
December 30, 1891.

Hon. R. B. Bryan, Supt. of Public Instruction, Olympia:

DEAR SIR—I am in receipt of your communication of recent date
in which you submit for my advice the following inquiries:

"*First:* In case a school district having a bonded indebtedness

stitution, provides:
 the labor of convicts of this
 any person, co-partnership,
 are shall by law provide for
 the state."

convicts can be employed

ne constitutional provision
 employ state convict
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 urse. The plan is to sell
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ral Stratton, of March 7,

07.

by A. J. Falknor, to Mr.
 amet, Washington.

he same is as follows:

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 ers his resignation, which
 ard. The board thereafter
 rneys of this county (there
 , and both of said attorneys
 he attorneys agreed to enter
 commissioners, whereby he
 y and precinct officers of the
 ss as would need prosecution
 n, the salary of a county and
 lass, but that under no con-
 or qualify therefor.
 do in this case?"

The situation certainly is peculiar. Before resorting to some
 make-shift policy the commissioners should prevail, if possible,
 upon some attorney to accept the position of county attorney
 and qualify as required by law. Any other course is liable to
 result in unfortunate complications.

It is necessary, under the statute, for the prosecuting attor-
 ney to certify and file the informations. However, if no one can
 be prevailed upon to accept the office of county attorney we be-
 lieve the court would have authority to appoint some attorney
 and to compel him to act under sections 4755, volume 2, of
 Ballinger's Code, as well as under the general powers of the
 court.

"Doubtless, in addition to the statutory grounds authorizing the
 action of the court in appointing special counsel, any reason which
 would disqualify the prosecuting attorney alike common to the gen-
 eral office of an attorney in his conduct of a cause, would justify such
 action of the court." *State v. Keaton*, 21 Wash. 53.

So far as representing the county in civil actions is concerned,
 upon failure to secure some one to accept the position of prose-
 cuting attorney the commissioners would probably have general
 authority to hire some one to look after the business of the
 county and pay him a reasonable compensation therefor.

Sections 342 and 466, volume 1, Ballinger's Code.

OPINION NO. 100.

Opinion rendered May 11, 1907, by J. B. Alexander, to Mr.
 L. D. Brown, county assessor, Bellingham, Washington.

Your communication of the 3rd inst., addressed to the attor-
 ney general, received and referred to me for answer.

Your official legal adviser is the prosecuting attorney of your
 county, and it is not within the official duty of this office to ad-
 vise, except through the prosecuting attorney's office. How-
 ever, with the consent of the latter we reply:

Your inquiry reads as follows:

"In the matter of real estate, assessed and valued in the even num-
 bered year (viz. 1906 in this case) as acreage, where a part or all of a
 tract so assessed and valued as acreage is platted into lots and blocks,

and must be so entered upon the 1907 assessment and tax roll, by what method or rule is the assessor to determine the 1907 valuation to be placed upon such lots and blocks?

"That is to say, must the assessor, in order to determine the 1907 valuation, do so by dividing the 1906 valuation of the acreage platted by the number of lots (the lots being of the same area and value) shown on the plat of the tract so platted, or may he value such newly platted lots on a basis of their value March 1, 1907, and at a value equal to and uniform with the 1906 valuation of other lots and blocks adjoining or in the near vicinity, or otherwise?"

The statute seems to make no provision for the valuation oftener than once in two years, and that on the even numbered year unless a revaluation is made by the board of equalization. An exception is to be found in case railroad lands are platted, as you will note by reference to section 8631 of Pierce's Code. This exception, however, is not material to your inquiry in this instance.

It would seem that the proper way of assessing separate lots is as first suggested by you; *i. e.*, that the assessor segregate the lots upon the roll and determine the 1907 valuation by dividing the 1906 valuation of the acreage platted by the number of lots (the lots being of the same area and value).

If a change in the valuation should appear necessary to make the same uniform with the lots and blocks adjoining or in the near vicinity, this would be a matter for action by the board of equalization.

OPINION NO. 110.

Opinion rendered May 11, 1907, by J. B. Alexander, to Mr. Stephen E. Chaffee, Sunnyside, Washington.

The attorney general is in receipt of your favor of the 30th ult., and has requested me to answer the same. We hesitate to express an official opinion upon the question, not because of any labor involved for this office, but because it is not within the duties of our office to advise, except through the channel of the prosecuting attorney of your county, but with his consent we advise as follows:

You inquire as to the validity of ordinance number nine of the town of Sunnyside, approved November 3, 1902, which or-

County Planning Council—Employment of Special Attorney

Olympia, Wash., September 16, 1937.

Hon. Ralph E. Foley, Prosecuting Attorney,
Spokane, Washington.

Dear Sir: We have received and given attention to your letter inquiring of the power of the county planning commission, which letter is as follows:

"We would like to have your answer to two questions:

"1. Can the County Planning Council employ an attorney?

"2. If your answer to the first question is 'yes' could a deputy prosecuting attorney be appointed and hold both positions and be paid by the planning board in addition to his regular salary as deputy prosecuting attorney? And let it be assumed that the total of both his deputy prosecutor's salary and his compensation as planning council attorney would amount to more than that of the prosecuting attorney.

"The county commissioners pay their engineer \$400.00 per month; the county doctor, \$350.00; the chief accountant, \$290.00 and they seem willing to pay the writer who has been their legal adviser for ten years compensation equal to the above professional help if it can be legally done."

The county planning commission is authorized under chapter 44, Laws of 1935, in case the county commissioners decide to organize such a commission under section 2 of the above act. The commission when organized is solely and strictly an advisory body of the county, and is an agency of the county, and its members are to the extent of their authority county officers or employees.

The commission being a county agency and the members being county officers or employees appointed by the county board, it must necessarily follow that the commission and members within their official powers and in connection with their official duties are entitled to the advice and services of the prosecuting attorney of the county unless the statutes imposing duties upon the prosecuting attorney should make some exception as to such officers or employees.

Turning now to the constitution and statutes of the state authorizing and governing prosecuting attorneys, we find various provisions of constitutional and statutory law relating to prosecuting attorneys.

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sh., September 16, 1937.

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The Washington constitution, article 11, section 5, as amended by the 12th amendment is as follows:

"The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office: *Provided*, that the Legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population. And it shall provide for the strict accountability of such officers for all fees which may be collected by them and for all public moneys which may be paid to them, or officially come into their possession."

The constitution having required the legislature to provide for prosecuting attorneys, regulate their compensation and prescribe their duties, it becomes necessary to examine the acts of the legislature under such clause of the constitution.

Rem. Rev. Stat., sections 112 to 116, inclusive, constitute the original act on the subject but they throw merely a general light on the inquiry. *Rem. Rev. Stat., sections 4127 to 4138*, constitute a more specific and elaborate set of laws governing prosecuting attorneys. *Section 4130* sets out the general duties of that office and is in part as follows: "Each prosecuting attorney shall be the legal adviser of the board of county commissioners for the county for which he was elected." *Section 4131* further sets out his duties and is as follows:

"Each prosecuting attorney, when required by the board of county commissioners or by the president of such board, shall give to such board of county commissioners, in writing if so required, his legal opinion touching any subject which such board may be called or required to act upon relating to the management of county affairs."

Section 4132 requires the prosecuting attorney "to give legal advice, when required, to all county and precinct officers, * * *" Other sections of the statutes also treat of his duties on points not directly involved in this inquiry. *Section 4138* prevents him from receiving additional compensation and is as follows:

"No prosecuting attorney shall receive any fee or reward from any person, on behalf of any prosecution, for any of his official services, except as provided in this chapter, nor shall he be engaged as attorney or counsel for a party in any civil action (or for) a party to any criminal proceedings depending upon the same facts as such criminal (civil) proceedings."

The county planning commission being merely advisory to the board of county commissioners, and the county commissioners having the right to the services of the prosecuting attorney, all necessary legal services to the planning commission are required and provided for by the statutes above mentioned. It would be unreasonable to say that under the above statutes the commission could hire an attorney to advise them in their duties of advising the county commissioners who are in turn amply provided with legal services through the prosecuting attorney. It accordingly seems plain to us that the county planning commission has no authority to employ an attorney unless such authority is granted by *chapter 44, Laws of 1935, supra*.

Now turning again to *chapter 44, Laws of 1935*, we find that section 10 contains the principal grant of power to the county planning commission and this power or authority is largely in investigating conditions and matters, assembling data, contacting the state planning council and making recommendations to the board of county commissioners. The only authority for the employment of help by the county planning commission is found in section 4 of the act which is as follows:

"The expenditures of any commission or regional commission authorized and established under this act, exclusive of gifts, shall be within the amounts appropriated for the purpose by the council or board. Within such limits, any such commission is authorized to employ such employees and expert consultants as are deemed necessary for its work."

To our minds it is manifest that the parties whom the county planning commission is authorized to employ under the above section are merely such employees as are necessary to perform their duties as set out in section 10 of the act, and are really employees of the county under the control of the county commissioners. By no rules of statutory construction can we arrive at the conclusion that chapter 44 authorizes the county planning commission to employ an attorney. On the other hand, if chapter 44 is construed to create a separate county office or agency such as would be independent of the board of county commissioners, the statute itself might be held unconstitutional under *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, and *State ex rel. Scofield v. Easterday*, 182 Wash. 209. In view of the foregoing, your first question is answered in the negative.

being merely advisory to and the county commissioners of the prosecuting attorney at the planning commission statutes above mentioned. under the above statutes to advise them in their commissioners who are in turn through the prosecuting attorney that the county plan employ an attorney unless 4, *Laws of 1935, supra.*

Laws of 1935, we find that of power to the county or authority is largely in assembling data, contacting recommendations to be the only authority for the planning commission is found as follows:

Regional commission authorized shall be within the amounts or board. Within such limits, such employees and expert work."

parties whom the county employ under the above are necessary to perform of the act, and are really control of the county commission can we arrive defines the county planning

On the other hand, if separate county office or of the board of county be held unconstitutional 46 Wash. 270, and *State Sh. 209*. In view of the held in the negative.

While the above makes it necessary to answer your second question, we may add that it appears to us that the prosecuting attorney and his deputies with such salary as is provided by law and the board of county commissioners, must render all legal services that the county planning commission may reasonably require.

G. W. HAMILTON, *Attorney General.*

By GEO. G. HANNAN, *Asst. Attorney General.*

Washington State Board for Vocational Education— Plan of Operation

Olympia, Wash., September 16, 1937.

Hon. Stanley F. Atwood, Chairman, Board for Vocational Education, Olympia, Washington.

Dear Sir: You have submitted to us a document entitled "Washington State Board for Vocational Education, State Plans for Vocational Education and Vocational Rehabilitation under the Smith-Hughes and George-Deen Vocational Education Acts and the Vocational Rehabilitation Act."

We have examined this plan and call your attention to our letter of July 18, 1937, regarding a proposed plan then under consideration which differs somewhat in its administrative setup from the one submitted at this time. All the defects of the former plan are carried over into this one. The first paragraph, on page 1, relating to the executive officer, leaves out a considerable and very material portion of the duty of the executive officer.

The superintendent of public instruction shall be the chief executive officer of the state board for vocational education and shall appoint, with the approval of said board, the necessary experts, assistants and employees to carry out the provisions of this act.

The plan under consideration entirely ignores the state superintendent of public instruction, except that it calls him, as ex officio, the chief executive officer and states that his only duty is to carry out the policies, rules and regulations of the state board for vocational education. This plan establishes a

County Roads—Status of County Commissioners

Olympia, Wash., May 6, 1937.

Honorable L. C. Thomas, County Commissioner,
Spokane, Washington.

Dear Sir: Your letter of April 21st addressed to this office was assigned to me for attention during my absence in Washington, D. C., where I represented the state before the supreme court. On my return and on the 6th day of May I found an unsigned copy of the same letter dated May 5th.

The first letter signed by yourself as county commissioner asks for a legal opinion as to the authority of the county commissioners in connection with a road matter and cites oral advice given by Mr. Patrick Winston representing the state highway department.

The nature of this question is immaterial inasmuch as the only thing I am permitted to examine is the authority of this office to answer your question.

As a county commissioner, your legal adviser is the prosecuting attorney and as he has not invited me to give an opinion I must refer you to him, unless your reference to chapter 187 of the Session Laws of 1937 and the fact that you have talked with a representative of the state highway department would justify my answering your question.

It is of paramount importance that you know who your legal adviser is, for his advice alone will protect you as a public official.

You may have been justified in presenting this question to Mr. Winston, representing the department of highways, inasmuch as chapter 187, Laws of 1937, refers to the county commissioners as agents of the state of Washington and clothes the director of highways with certain authority in relation to county road matters.

You may have been under the impression that you were acting not as a county official, but as a state official, in which latter event we would be justified in answering your letter, with the consent of the director of highways, who would, in that connection, be your superior officer.

ty Commissioners

ia, Wash., May 6, 1937.

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May 5th.

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cer.

In determining the question of whether or not you acted as a county official or a state official, the fact that the director of highways is in no sense your superior officer is, in my opinion, determinative.

Chapter 41, Laws of 1933, designated the county commissioners as agents of the state of Washington for certain road purposes which involved the expenditures of state monies, such provisions being considered necessary to obviate the constitutional objection to the levying of a state tax for a county purpose.

By uniform construction of administrative bodies involved and opinions of this office, however, county commissioners remained county officials at all times and in addition acted as agents of the state only in connection with the disbursement of state monies over which the director of highways had supervision.

Prior to the effective date of chapter 187, Laws of 1937, therefore, you were required to obtain all legal opinions from the prosecuting attorney, who, in turn, could consult this office if he wished, and the director of highways was compelled to require you to obtain the opinion of the prosecuting attorney as to the legality of any matters prior to exercising the discretion which the statutes vested in him.

I am of the opinion that this is still the situation and that you are still a county commissioner and acting as a county commissioner and a county officer while performing duties vested in you by chapter 187, Laws of 1937.

The inclusion of practically all laws relating to the power of county commissioners with respect to county road matters in the state highway code did not mean that a county commissioner, in exercising the authority so vested in him, acted as a state official in all matters covered by the so-called code.

The justification for the code was thought to be the convenience of finding all matters relating to highways in one act. I do not believe that the legislature intended to make a county road a state road or a county official a state official. Chapter 187, Laws of 1937, is entitled "The Washington State Aid Highway Act." While it strengthens the authority of the director of highways in the supervision of expenditures of state monies and extends the authority of the director somewhat in cases where

that extension is necessary to procure federal monies, it in no way relieves the county officials, whose duties may be set forth in the act, from responsibility as county officials.

Under date of April 29, 1937, the prosecuting attorney of King county gave an opinion to the board of county commissioners of that county involving their status under chapter 187, Laws of 1937. He would not have advised them at all, of course, if he had found that they were state officials or agents, as distinguished from county officials.

County commissioners in the past have often sought to obtain in advance some suggestion from the highway department as to the probable action of the director of highways and if a particular county expenditure were forwarded for reimbursement. The director's opinion, if given at all, was always limited to matters within his jurisdiction and always assumed that the county commissioners in making the original expenditure acted legally and under the advice of their legal adviser, the prosecuting attorney.

A copy of this letter is being forwarded to the prosecuting attorney of Spokane county, as your legal adviser, and we respectfully request that you take up all matters of a legal nature with him.

G. W. HAMILTON, *Attorney General.*

By E. P. DONNELLY, *Asst. Attorney General.*

Social Security "Employing Units"

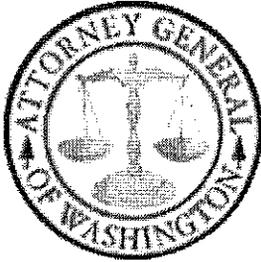
Olympia, Wash., May 6, 1937.

Honorable Chas. F. Ernst, Director of Social Security,
Olympia, Washington.

Dear Sir: You ask for an opinion as to what is "employing unit" under sections 8 and 19 of chapter 162 of the Laws of 1937?"

The word "employing unit" is found in section 8(a), (b), (c), and (1), (2); also in section 19(e), (f-1), (f-2), (f-3), (f-4), and (f-5).

A reading of these sections fully shows the legislative intent of making an "employing unit" an employer of one or more in-



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Attorney General Slade Gorton

July 19, 1973

Honorable Richard King
State Representative, 38th District
309 - 77th Place S.W.
Everett, Washington 98201

Cite as: AGLO 1973 No. 115
Dear Sir:

By recent letter you have asked whether, in our judgment, a constitutional amendment is needed in order to permit county agencies, without the approval of their respective county prosecuting attorneys, to retain other attorneys to counsel and represent them with respect to civil matters.

ANALYSIS

In general response to this question we are enclosing herewith a xerox copy of the opinion of the Washington Supreme Court in *State ex rel. Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937), together with a copy of our opinion of December 30, 1970, to the Skamania County Prosecuting Attorney [[to Robert K. Leick an Informal Opinion AIR-70661]]with respect to an analogous situation. From these materials you will readily discern the nature of the problem confronting the legislature in any attempt to authorize the employment of attorneys by county agencies without a constitutional amendment. If these attorneys were to be vested with any of the present powers and functions of the prosecuting attorney as legal counsel for all county officers, then, in accordance with the court's reasoning in the Melton case, such legislation would in all probability be held to be in conflict with Article XI, § 5, which states, in material part, that:

"The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public

convenience may require, and shall prescribe their duties, and fix their terms of office . . ."

[[Orig. Op. Page 2]]

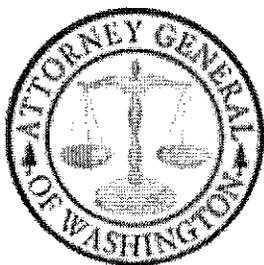
And, as you know, the present duties and functions of the various prosecuting attorneys do include the representation of county officers and agencies in civil matters as well as the representation of the state in criminal prosecutions. See RCW 36.27.020. Therefore, while it might, conceivably, be possible to enact legislation without a constitutional amendment which would allow county agencies to employ attorneys for certain limited purposes, it seems to us that the potential utility of any such attorneys would be severely restricted unless they could be vested with at least some of the powers and functions presently performed by the of the powers and functions presently performed by the prosecuting attorneys in civil matters – and this would require a constitutional amendment.

It is hoped that the foregoing explanation of this matter will be of some assistance to you.

Very truly yours,

FOR THE ATTORNEY GENERAL

PHILIP H. AUSTIN
Deputy Attorney General



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[Home](#) > EMPLOYMENT OF ATTORNEY

Attorney General Slade Gorton

OFFICES AND OFFICERS -- COUNTY -- PROSECUTING ATTORNEY -- COUNTY COMMISSIONERS -- SUPERIOR COURT JUDGES -- EMPLOYMENT OF ATTORNEY

A board of county commissioners acting pursuant to RCW 36.32.200 may, with the approval of a majority of the county superior court judges, employ an attorney to advise the board on general matters of its concern; such employment contract, however, may not extend beyond the term of the board.

February 1, 1974

Honorable James E. Carty
Prosecuting Attorney
Clark County
301 Court House
Vancouver, Washington 98660
Cite as: AGLO 1974 No. 15

Dear Sir:

By recent letter you have asked for our opinion on the following questions:

"1. When a Board of County Commissioners has passed a resolution, approved by a majority of a County's Superior Court Judges, authorizing the Board to hire an attorney, may that Board hire an attorney to advise the Board on general matters of its concern?"

"2. When approval to hire an attorney has been granted by a County's Superior Court Judges, for how long a period of time can a resolution authorizing the hiring of an attorney be effective for the purposes and authorities contained therein?"

We answer your first question in the affirmative and your second question as set forth in our analysis.

ANALYSIS

RCW 36.27.020 states that:

"The prosecuting attorney shall:

"(1) Be legal adviser of the board of county commissioners, giving them his written opinion when required by the board or the chairman thereof touching any subject which the board may be called or required to act upon relating to the management of county affairs;"

[[Orig. Op. Page 2]]

RCW 36.32.200 then provides that:

"It shall be unlawful for the board of county commissioners to employ, contract with, or pay any special attorney or counsel to perform any duty which the attorney general or any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such special attorney or counsel has been first reduced to writing and approved by the superior court judge of the county or a majority of the judges in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law."

By prohibiting a board of county commissioners from employing a special attorney to perform the foregoing, or any of the other duties of the prosecuting attorney without the approval of a majority of the superior court judges of the county, this statute, as we read it, impliedly authorizes such an employment with the approval of a majority of those judges. Accordingly, we answer your first question in the affirmative.^{1/}

Turning to your second question, there is no time limitation set forth in RCW 36.32.200 with respect to the duration of the effectiveness of a resolution adopted thereunder. Thus, unless the resolution, as [[Orig. Op. Page 3]] approved by the superior court judges, contains its own limitation its legal status as an authorization to employ a special attorney would appear to be of indefinite duration.

Beyond this, however, we perceive in your second question the issue of whether the employment of a special attorney by a board of county commissioners to perform the functions contemplated by your first question will be subject to rule that,

". . . where the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term, no power of the council so to do exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors. . . ." 37 Am.Jur., Municipal Corporations, § 66.

For the reasons set forth in our letter of October 3, 1960, to Mr. Ned W. Kimball, then legal counsel for Douglas County Public Utility District No. 1, we believe that it will be. We are also enclosing a copy of this letter for your immediate reference, and would direct your particular attention to the discussion appearing on pages 5 and 6. Based upon the authorities there cited, it is our opinion that the duration of such an employment contract between a board of county commissioners and a special attorney employed under RCW 36.32.200, supra, as is contemplated by your request may not extend beyond the term of the employing board.

It is hoped that the foregoing will be of some assistance to you.

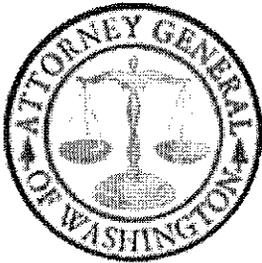
Very truly yours,

SLADE GORTON
Attorney General

PHILIP H. AUSTIN
Deputy Attorney General

*** FOOTNOTES ***

1/In so answering this question, we are not to be taken as having passed upon the constitutionality of RCW 36.32.200, supra. In accordance with long-standing policy, this office must presume that statute, as any other duly enacted statute, to be constitutional until such time as it is otherwise determined by a court of competent jurisdiction. Accord, AGO 1971 No. 12 [[to Gordon L. Walgren, State Senator on March 16, 1971]]. We would be remiss in this regard, however, not to point out to you the possible ramifications upon this question of State ex rel. Johnston v. Melton, 192 Wash. 379, 73 P.2d 1334 (1937), as explained in our letter of July 19, 1973, to State Representative Richard King [[an Informal Opinion AIR-73615]], copy enclosed.



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Attorney General Bob Ferguson

**COUNTIES—CHARTERS—ELECTIONS—ATTORNEY, PROSECUTING—Authority Of
Counties To Provide By Charter For The Prosecuting Attorney To Be Elected As A
Nonpartisan Office**

Article XI, section 4 of the Washington Constitution does not prohibit a county from providing in its charter for the election of the prosecuting attorney as a nonpartisan office.

November 4, 2015

The Honorable Mark B. Nichols Prosecuting Attorney
223 E 4th Street Suite 11
Port Angeles, WA 98362-3015

Cite As:
AGO 2015 No. 6

Dear Prosecutor Nichols:

By letter previously acknowledged, you have requested our opinion on the following question:

May a county operating under the home rule form of government convert the Office of County Prosecuting Attorney from partisan to nonpartisan by charter?

BRIEF ANSWER

Yes, home rule counties have wide latitude in structuring their government in their home rule charters and have statutory authority to designate county positions as nonpartisan.

ANALYSIS

Washington counties can choose whether to govern under a standardized commission form of government or under a home rule charter, which allows the county to create its own form of government. The home rule approach is authorized by article XI, section 4 of the Washington Constitution, as amended by Amendment 21 and approved by the voters in 1948. Under the home rule approach, a county adopts a charter "for its own government subject to the Constitution and laws of this state[.]" Const. art. XI, § 4. The home rule amendment "expressed the intent of the people of this state to have 'the right to conduct their purely local affairs without

[original page 2]

supervision by the State, so long as they abided by the provisions of the constitution and did not run counter to considerations of public policy of broad concern, expressed in general laws.'" *Henry v. Thorne*, 92 Wn.2d 878, 881, 602 P.2d 354 (1979) (quoting *State ex rel. Carroll v. King County*, 78 Wn.2d 452, 457-58, 474 P.2d 877 (1970)).

Counties have wide latitude in adopting home rule charters, subject to specific limitations in article XI, section 4, which specify that the positions of prosecuting attorney, the county superintendent of schools, judges of the superior court, and justices of the peace are to be treated differently from other positions in three respects.^[1] First, the home rule charter cannot "affect the election" of those positions. Second, the terms of those elective officers do not terminate at the time of the adoption of a home rule charter, in contrast to all other county elective officers. And third, the powers, authorities, and duties granted to and imposed on county officers by general law, which vest in the county legislative authority unless expressly vested in specific officers by the home rule charter, specifically do not include those powers, authorities, and duties vested in the prosecuting attorney, the county superintendent of schools, and the judges of the superior court and justices of the peace.

In construing these limitations, our office has previously opined that "counties lack the power to alter or diminish the authority of the prosecuting attorney through the home rule charter process" and that "[t]he prosecuting attorney in a home rule county thus enjoys the same statutory and constitutional authority as prosecuting attorneys in noncharter counties."

AGO 1986 No. 1, at 6. In that opinion, we were asked whether the legislative authority of a home rule county could condition its appropriation to the prosecuting attorney's office on a particular allocation of resources within that office. We answered the question in the qualified affirmative, concluding that the "delicate balance" between the county legislative authority's budget powers and the prosecuting attorney's independent discretion means that both offices must exercise their discretion to respect the others' powers and not eliminate the others' prerogatives.

We are now asked whether home rule counties may convert the office of prosecuting attorney from partisan to nonpartisan. "Partisan office" is defined by statute as a "public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." RCW 29A.04.110. This statute specifies that the following are partisan offices:

- (1) United States senator and United States representative;

[original page 3]

- (2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;

- (3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

RCW 29A.04.110.

The first question we must address is whether the office of prosecuting attorney is a state or county office for purposes of RCW 29A.04.110. This is because if the office is a state office, then it must be partisan as a matter of statute. RCW 29A.04.110(2). County prosecutors have been deemed "state officers" entitled to defense and indemnification from the state when prosecuting under state criminal laws. *Whatcom County v. State*, 99 Wn. App. 237, 250, 993 P.2d 273 (2000). But in the election context, the office of prosecuting attorney is consistently treated as a county office. For example, candidates for prosecuting attorney must file their declaration of candidacy with the county auditor, not the secretary of state (see RCW 29A.24.070(3)), and the office of prosecuting attorney is not included in the definition of "state office" in the campaign finance and reporting laws (see RCW 42.17A.005(44)). It accordingly makes little sense to consider county prosecuting attorneys as state officers for this purpose.

Having concluded that the office of prosecuting attorney is a county office for purposes of our analysis, RCW 29A.04.110(3) would allow home rule counties to designate that office as nonpartisan, unless the constitution prohibits it. Therefore, the answer to your question depends on interpretation of the scope of a county's power under the home rule provisions of the state constitution.

The relevant constitutional language provides that the home rule charter shall not "affect the election of the prosecuting attorney, the county superintendent of schools, the judges of the superior court, and the justices of the peace, or the jurisdiction of the courts." Const. art. XI, § 4. The term "affect" is not defined in the constitution. In construing terms undefined in the constitution, courts apply their ordinary meaning. *Gerberding v. Munro*, 134 Wn.2d 188, 199, 949 P.2d 1366 (1998) (using a dictionary definition to construe an

undefined term).[2] As relevant in this context, “affect” means “to act upon” or “to produce a material influence upon or alteration in.” *Webster’s Third New International Dictionary* 35 (2002).

Applying this ordinary meaning, we see two reasonable readings of this provision. The first, narrower reading would be that it simply bars county home rule charters from converting the position of county prosecutor into a non-elected, appointive position. That is, in prohibiting home rule charters from “affect[ing] the election of the prosecuting attorney” and other officers,

[original page 4]

article XI, section 4 prohibits changing the *elective nature* of the office. The second, broader reading is that the provision prohibits home rule charters from affecting *the election process* for prosecuting attorneys.

While both readings are plausible, our office has previously adopted the first interpretation. In a 2003 formal opinion that addressed (among other topics) whether a county could impose campaign finance restrictions on candidates for prosecutor, we wrote: “This provision simply requires that charter counties retain the office of prosecuting attorney and leave undisturbed the elective nature of the office. The provision is not framed so broadly as to preclude all local regulations that affect the manner in which elections are conducted for the office of prosecutor so long as the county leaves the office elective.” AGO 2003 No. 12, at 4.

Though the opinion cited no authority for this proposition, we have found nothing that would convince us to change our view. In particular, the legislative history of Amendment 21, which added this provision, contains no indication one way or the other about the framers’ intent. Voters’ Pamphlet 29-32 (1948). Additionally, in at least two cases our state Supreme Court has considered county charter provisions that at least arguably would have implicated this clause under the broader reading, one that changed elections for county offices to odd-numbered years (*Carroll*, 78 Wn.2d 452) and one that imposed new rules for elections to fill vacancies in county offices (*Henry*, 92 Wn.2d 878). Yet the Court never discussed the potential conflict between these changes and this clause. While the lack of discussion is certainly not a holding, it indicates that the Court did not consider the broader reading of this language obviously correct.

In short, because of our office’s prior interpretation and the lack of any evidence that would prompt us to revisit it, we continue to conclude that the requirement that a charter “shall not affect the election of the prosecuting attorney” (Const. art. XI, § 4) “simply requires that charter counties retain the office of prosecuting attorney and leave undisturbed the elective nature of the office.” AGO 2003 No. 12, at 4.

Given this conclusion, the answer to your question becomes quite simple. Because changing the position of prosecuting attorney from partisan to nonpartisan would

not disturb “the elective nature of the office” (AGO 2003 No. 12, at 4), we believe that such a change complies with article XI, section 4.

In an abundance of caution (in case a court ever adopts the broader reading), however, we will also consider how this proposal would fare under the broader reading of this language. Ultimately, though we think it is a closer question, we reach the same result: we see no conflict with article XI, section 4.

To assess whether designating the office of prosecuting attorney as nonpartisan would “affect the election” in the broader sense of affecting the election process, we consider the differences between elections of partisan and nonpartisan offices. In doing so, we ask whether making the position nonpartisan would “act upon” or “materially influence” the manner in which the county prosecutor is elected.

[original page 5]

The most significant difference between the election of partisan and nonpartisan offices arises in the primary. Under Washington’s top-two primary system, an election for a partisan office must be preceded by a primary, from which the top two candidates will be certified to appear on the general election ballot. RCW 29A.52.112(2).[3] The party preference appears on the primary and general election ballots, but only if the candidate expresses a party preference. RCW 29A.52.112(4). For nonpartisan elections, a primary is only required if more than two candidates file for the position. RCW 29A.52.220.

We acknowledge that a candidate’s indication of a party preference may affect how the candidates campaign and how voters perceive the candidates. But, it does not rise to the level of affecting the election because there is so little difference in how elections are conducted for partisan and nonpartisan offices under the top-two primary system. This is largely because, in Washington, the primary is not used to choose party nominees. “The top two candidates from the primary election proceed to the general election regardless of their party preferences.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 453 (2008).

Similarly, the small differences in when a primary is, or is not, conducted have little practical effect on the election. By way of example, if there are three candidates for a partisan position, the primary would be held and the top two candidates would proceed to the general election, regardless of party preference. If there are three candidates for a nonpartisan position, the primary would be held and the top two candidates would proceed to the general election. The difference would arise only if there were two candidates for a position; in that case, a primary would be held for a partisan position, but not for a nonpartisan position. But we conclude that this difference is too small and uncertain to “materially” affect the manner of conducting the election. Whether a primary occurs or not, the same two candidates would be competing for election. *Cf. Carlson v. San Juan County*, 183 Wn. App. 354, 370, 333 P.3d 511 (2014) (observing that all regulations of elections “affect” voting in some way, but not all are subject to stringent review).

While it is theoretically possible that a court could construe article XI, section 4 to preclude charters from having *any* effect at all upon the election of the prosecuting attorney, we think that is highly unlikely. Such reasoning would conflict with the courts' recognition of the broad authority of counties to formulate their own local governments through their locally-developed charters. See *Henry*, 92 Wn.2d at 881 (noting broad authority of counties to tailor their local affairs to charters); see also *Carroll*, 78 Wn.2d at 457-58 (same); *Carlson*, 183 Wn. App. at 368 (same). It would also call into question any number of small changes a county might make in its election process, from the form of its ballots to (formerly) the location of polling places or (currently) ballot drop boxes.

[original page 6]

We also considered that the process for filling vacancies in partisan and nonpartisan offices differs under article II, section 15. That provision requires vacancies in partisan county elective office to be filled by appointment by the county legislative authority from a list of names nominated by the county central committee of the party. In contrast, no such requirement exists for filling the vacancies of nonpartisan elected officers. While these are real differences in how vacant positions are filled for partisan and nonpartisan positions, we also conclude that they do not amount to "affect[ing] the election" of those positions. Cf. *Henry*, 92 Wn.2d at 881-82 ("The constitution does not express any public policy that would require counties to adopt a uniform approach to filling" vacancies in "offices that concern only the residents of a county.").

Finally, our analysis under this broader reading is limited to Washington's current system for conducting partisan and nonpartisan primaries and elections. Under a broader reading, article XI, section 4 invites a comparison between the general law and the terms of a county charter. If the general law changed, the analysis of whether the county charter complies with article XI, section 4 under the broader reading could change as well.

We trust that the foregoing will be useful to you.

ROBERT W. FERGUSON
Attorney General

JESSICA FOGEL
Assistant Attorney General

wros

[1] Two of the four listed offices no longer exist, at least in the same form and under the same name. The former office of "county superintendent of schools" has been replaced by

a system of "educational service districts." See Laws of 1969, 1st Ex. Sess., ch. 176, § 1 (enacting what is now RCW 28A.310.010, and explaining the transition from county superintendents of schools). The former office of justice of the peace has been replaced with a system of district courts, and by statute all references to justices of the peace are construed as references to district judges. RCW 3.30.010.

[2] Article XI, section 4 was amended in 1948. Const. amend. 21. Accordingly, there can be no issue of a need to turn to a nineteenth century dictionary to construe the word "affect." See State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 460, 48 P.3d 274 (2002) (cautioning against the use of anachronistic definitions).

[3] For an election to fill the unexpired term of a single county partisan office, the primary requirement does not apply if only one candidate has filed for the position. RCW 29A.52.112(2).

APPENDIX D

Arizona Revised Statute § 11-532

Arizona Revised Statute § 11-532

11-532. Powers and duties

A. The county attorney is the public prosecutor of the county and shall:

1. Attend the superior and other courts within the county and conduct, on behalf of the state, all prosecutions for public offenses.

2. Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when the county attorney has information that the offenses have been committed.

3. When not engaged in criminal proceedings in the superior court, attend upon the magistrates in cases of arrest when required by them, and attend before and give advice to the grand jury.

4. Draw indictments and informations, defend actions brought against the county and prosecute actions to recover recognizances forfeited in courts of record and actions for recovery of debts, fines, penalties and forfeitures accruing to the state or county.

5. Deliver receipts for monies or property received in the county attorney's official capacity and file duplicate receipts with the clerk of the board.

6. On the first Monday of January, April, July and October in each year, file with the board of supervisors an account, verified by oath, of all monies received in the county attorney's official capacity during the preceding three months, and at the same time pay it to the county treasurer.

7. When required, give a written opinion to county officers on matters relating to the duties of their offices.

8. Keep a register of official business, and enter therein every action prosecuted, criminal or civil, and of the proceedings therein.

9. Act as the legal advisor to the board of supervisors, attend its meetings and oppose claims against the county which the county attorney deems unjust or illegal.

10. Act as attorney for school districts except as provided in section 15-343, or except in any lawsuits involving a conflict of interest with other county offices at which time the attorney general may represent the school district.

11. Act as attorney for the community college district except as provided in section 15-1448 or except in any lawsuits involving a conflict of interest with other county offices, at which time the attorney general may represent the community college district.

12. Defend all locally valued and assessed property tax appeals as provided in section 42-16208.

B. Upon receipt of an appellant's brief in a criminal appeal, the county attorney shall furnish the attorney general with a true statement of the facts in the case, together with the available authorities and citations that are responsive to the assignments or specifications of error.

C. The county attorney may represent a school district governing board member against whom an action is brought in the board member's individual capacity until such time as it is established as a matter of law that the alleged activity or events which form the basis of the complaint were not performed, or not directed to be performed, within the scope or course of the member's duties.

D. Notwithstanding article 12 of this chapter, in connection with the investigation or prosecution of any matter involving the death of a person, the county attorney may request that the medical examiner, for the county in which the prosecution will take place, conduct the medical examination.

E. The county attorney may provide civil legal services to another county or other political subdivision of this state or an officer, employee or agency of a political subdivision of this state pursuant to an intergovernmental agreement entered into by the county and the other political subdivision of this state as provided in chapter 7, article 3 of this title at the request of the county attorney. Any intergovernmental agreement shall state any payment to be rendered for the services and the scope of the representation. The county attorney may also obtain civil legal services for the county or for an officer, employee or agency of the county, from the elected or appointed attorney of another county or other political subdivision of this state pursuant to an intergovernmental agreement.