

*E* FILED  
AUG 18 2016  
WASHINGTON STATE  
SUPREME COURT

*b/h*

NO. 92749-9

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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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; and ISLAND COUNTY BOARD OF  
COMMISSIONERS,

Respondents.

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BRIEF OF AMICUS CURIAE WASHINGTON STATE  
ASSOCIATION OF COUNTIES

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## I. INTRODUCTION

Member counties of the Washington State Association of Counties ("WSAC") regularly retain legal counsel by following the provisions of RCW 36.32.200. These provisions do not require the legislative authority of a county to seek approval from the county's elected prosecutor. Appellant in this case now seeks to reinterpret that law and install prosecutors as the gatekeepers to any county legislative authority's access to legal counsel. This change would have significant adverse impacts on counties throughout the state, and is unsupported by any interpretation of the law.

WSAC respectfully provides this Amicus Curiae brief to demonstrate the importance of every county legislative authority's right to retain legal counsel under RCW 36.32.200 without having to seek or obtain approval of that county's prosecutor. This right has been available to Washington counties since 1905 and its use has not been controversial. This case presents a unique opportunity for the Court to recognize and uphold the use and importance of the statute in the conduct of county business.

Appellant's attempt to prevent the Island County Board of Commissioners from acting under RCW 36.32.200 to acquire temporary, specialized legal services needed to perform county business misreads the law and constitutes a severe (and unnecessary) intrusion into the authority

of county legislative entities to complete the public business they are charged with performing. Preserving the ability to retain temporary counsel without a prosecutor's approval or objection thus has important statewide significance and consequences.

## II. INTEREST OF THE *AMICUS CURIAE*

WSAC is a non-profit organization that serves all of Washington's 39 counties. Its members include elected county commissioners, county councilmembers, county councilors, and county executives. WSAC offers specialized expertise and assistance to its members and their staff on a wide variety of programs and policy areas.

As their representative, WSAC is required to understand the disparate needs facing the legislative authority of each Washington county. Counties with different geographic locations, populaces, and sizes have differing legal demands and different capabilities to meet those needs. Legislative authorities often fulfill their needs by using RCW 36.32.200 to obtain temporary legal counsel qualified for the task at hand. Appellant's arguments in this appeal are intended to overturn that statute and establish a new, onerous and unnecessary legal bar that will prevent WSAC members from retaining counsel as needed to perform county business. WSAC asks this Court to preserve for each legislative authority in Washington's 39

counties the right to retain legal counsel as presently authorized under RCW 36.32.200.

### III. ARGUMENT

#### A. **County Legislative Authorities Routinely Retain Legal Counsel to Meet Needs That Would Otherwise Be Unfulfilled.**

A county legislative authority retains legal counsel pursuant to RCW 36.32.200 when it needs legal resources that cannot otherwise be provided by that county's prosecutor. Counties face an extraordinarily wide variety of legal issues, and RCW 36.32.200 is typically used to retain counsel in specialized or infrequently needed areas of law. This is true for all Washington counties, but is particularly important for smaller counties that have a limited number of deputy prosecutors, or where the prosecuting attorney has limited or no civil experience. In addition, deputy prosecutors often counsel a large number of county departments, yet cannot reasonably be expected to have expertise in all the areas of law these departments face.

Instances where legislative authorities retain legal counsel for specialized purposes or infrequent needs include the following nonexclusive list:

- Growth management;
- Employment, management and labor negotiations;
- Banking;

- Public Records Act;
- Tax appeals;
- Environmental and natural resources;
- Solid waste;
- Public works projects and contracts;
- Administration and provision of public defense services; and
- Bond financing;

*See* CP 687-695 (Letters from WSAC member counties, describing their use and understanding of RCW 36.32.200 to retain legal counsel).

Legislative authorities also rely on outside counsel for "second opinions" – matters involving particularly important or controversial legal issues – and conflict situations. Some reasons for seeking independent legal advice on these matters include where the levels of experience and expertise of lawyers in the prosecutor's office is thin or where there are a limited number of deputy prosecutors available. However, County legislative authorities also seek independent legal advice because (a) deputy prosecutors are employed and serve at the pleasure of the prosecutor, an independently elected official who may have his/her own policy perspective that could influence the legal analysis given to and legal representation of the legislative authority; and (b) because deputy prosecutors simultaneously advise other departments of county government that may have differing

policy positions on or legal stakes in an issue confronting the county. In each of these instances, specialized and independent legal advice to the county legislative authority is essential in aiding commissioners to understand complex matters, narrow the scope of conflicts, and receive responsive legal advice. *See* CP 691.

Some county legislative authorities retain legal counsel under RCW 36.32.200 to provide more reliable and routine legal services. The Metropolitan King County Council, for example, employs two full-time attorneys under the statute. Councilmembers rely on these attorneys for services where it is less practical to consult with the prosecutor's office, including matters that (a) are particularly sensitive and therefore must be kept as confidential as possible; (b) must be answered immediately and therefore cannot await discussion and review with the King County Prosecuting Attorney or staff; or (c) involve frequently recurring subjects affecting Council business such as public records disclosure, open public meetings, Council rules, ethics, and similar matters. CP 691.

RCW 36.32.200 benefits each county and its residents by enabling each county's legislative authority to obtain guidance on complex areas of law where such expertise may not otherwise exist within the prosecutor's office. Legislative authorities seek experienced counsel in non-routine and specialized areas of law to minimize the risks and costs of litigation and

ensure better outcomes. *See* CP 693. Legislative authorities seek specialized counsel in areas where issues arise infrequently, such as the issuance of a municipal bond, which may only occur once in twenty or more years. *See* CP 695. Legislative authorities also retain legal counsel for second opinions and to maintain their independence from the county's prosecuting attorney's office. All these uses of RCW 36.32.200 benefit the legislative authorities and ultimately the public. As noted by the commissioners of Wahkiakum County, "it would be unreasonable to assume that our elected prosecutors would have the expertise needed for every situation that our counties deal with in a consistently impartial [manner]". CP 697.

WSAC asks the Court to preserve counties' rights under RCW 36.32.200 for all the foregoing important purposes and functions.

**B. County Legislative Authorities Do Not Now Need to Obtain County Prosecutor Approval Prior to Retaining Legal Counsel, and Should Not be Required to Seek Such Approval.**

While the Appellant couches this appeal as a constitutional "as applied" challenge, the Island County Board of Commissioners applied RCW 36.32.200 in precisely the way the statute instructs: using a written contract, approved by the presiding judge, and lasting no more than two years. This is the same way that all counties utilize the statute because there is no requirement in RCW 36.32.200 for a legislative authority to obtain

approval from the county prosecutor before retaining legal counsel.

The process of retaining legal counsel is often handled cooperatively by the legislative authority and the prosecutor's office. This is done both as a courtesy to the prosecutor and to seek recommendations for legal counsel from the prosecutor, who typically is more familiar with the local legal market and where legal expertise lies. Given the dearth of legal actions involving RCW 36.32.200 over the past 100 years, this approach appears to be the voluntary and widespread norm throughout Washington. There is no requirement in the law for the legislative authority to seek the prosecutor's permission, and based on the statute's history there is no need to create such a requirement.

To change the law to require the prosecutor's approval (as the Appellant asks) would create a dangerous and harmful precedent as illustrated by this case. If the Court accepts Appellant's interpretation of RCW 36.32.200, in instances where a contentious relationship exists between the legislative authority and a prosecutor, or the two parties have differing positions on policy issues or goals, the prosecutor would be able to thwart the legislative authority's lawful functions, not to mention its discretion and ability to obtain independent legal advice. This would clearly subvert the separation of powers inherent in our governmental form, along with the legislative authority's inherent and statutory right to counsel.

WSAC adopts Respondent Susan Drummond's Response Brief at Section 4.2 in this regard. It would also elevate the position of county prosecutor over the county legislative authority, giving the prosecutor an effective veto right when the prosecutor disagrees with a directive from the legislative authority, fails to respond to that directive, or is not providing the quality of representation desired or needed by the legislative authority. In short, the prosecutor would be able to frustrate county policy, and obstruct the commissioners' legal duties, by denying the legislative authority the right to effective legal counsel. There is no basis in RCW 36.32.200 to subject a legislative authority's decision to obtain outside counsel to the whim of a disagreeable prosecuting attorney, and no good reason to do so here.

Retaining legal counsel is not normally contentious. County legislative authorities and prosecutors normally work cooperatively. But in the rare occasion that there is a disagreement between the legislative authority and prosecuting attorney, the legislative authority needs to retain the ability to petition the Superior Court for permission to hire legal counsel as contemplated in RCW 36.32.200. To illustrate this need, the Board of County Commissioners of Spokane County, which has never had a circumstance where the prosecutor failed to support its hiring of legal counsel under RCW 36.32.200, has affirmed its belief that the statute should

remain unchanged:

Although the Board believes that it will be able to work cooperatively with the elected Prosecutor in circumstances where outside counsel is needed to provide legal advice, we understand that there can be circumstances where a Prosecutor would object to the Board seeking qualified outside counsel through the provisions of RCW 36.32.200. In this instance, we believe it is essential that the statute remain inviolate.

CP 695.

Good government requires preserving the independence of county legislative authorities, and RCW 36.32.200 ensures that outcome. The Board of Clallam County Commissioners, while noting its good relationship with the Clallam County prosecutor, explains the importance of this:

Good public policy requires that Boards and Councils have the ability to successfully conduct the affairs of the County, and not be prevented in so doing by having their work nullified, or *de facto* vetoed when an independently elected County official cannot act, or when such official refuses to act. The authority granted in RCW 36.32.200 is akin to a fire suppression system, where one needs to "break the glass in case of emergency" to activate the fire system. County Boards and Councils have an occasional need to "break the glass".

CP 689. Disagreements like the one between the Island County Board of Commissioners and Mr. Banks are very rare, and should not be (and do not comprise) a reason to change or eliminate the statutory right to retain legal counsel when needed to perform county business. Instead, the disagreement in the present case actually underscores the importance of preserving the

right of the legislative authority to retain counsel pursuant to RCW 36.32.200. If the Court's upholds that statute as the Respondents and WSAC request, the decision will provide important guidance to all Washington counties and elected officials, enhancing the functions of government and limiting unnecessary intra-governmental disputes.

**C. The 1983 Amendments to RCW 36.32.200 Reinforce the Statutory Grant to Retain Legal Counsel.**

From 1905 until 1983, the text of what is now codified at RCW 36.32.200 remained virtually the same.<sup>1</sup> However, in 1983, as a compromise to the much broader originally proposed bill, Substitute Senate Bill No. 3151 ("SSB 3151") was adopted and became law. See 1983 Washington Laws chapter 129, section 1.

As originally proposed, Senate Bill No. 3151 would have repealed RCW 36.32.200 and added new sections to RCW Title 36. Senate Bill No. 3151, 1983 Senate Bills Volume 21.<sup>2</sup> Section 2 of the bill would have

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<sup>1</sup> See 1905 Session Laws, Chapter 25:

It shall be unlawful for any Board of County Commissioners in any county in this State 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 said special attorney or counsel shall have been first reduced to writing and approved by the Superior Judge of said county or a majority of the judges thereof, in writing indorsed thereon: *Provided*, this act shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

In 1963, when the legislature created RCW Title 36, except for stylistic changes, RCW 36.32.200 codified the 1905 law.

<sup>2</sup> A copy of Senate Bill 3151 is attached to this brief as Appendix A.

allowed the legislative authority of any county to contract to employ or retain one or more attorneys act as legal adviser to all county officers and appear for and represent the county and its officers in all civil proceedings. This, in effect, would have authorized a county legislative authority to create a civil law department to represent the county in civil litigation and provide legal advice on civil matters. The proposed bill stated, however, that it was not to be construed to impair the authority of the county prosecuting attorney with respect to criminal matters or administration of grand juries.

At committee, the recommendation was to adopt a substitute bill which, while making substantive changes to RCW 36.32.200, maintained the substance of RCW 36.32.200 – *i.e.*, the ability for a county legislative authority to retain legal counsel for its purposes. It is the substitute bill, SSB 3151, that was enacted. Some of the changes to RCW 36.32.200 in 1983 were substantive:

1. The term "board of county commissioners" was replaced by "county legislative authority," thereby recognizing the creation of other forms of county legislative bodies with the adoption of home rule charters by some counties.
2. SSB 3151 removed the word "special" as a modifier to describe the attorney or counsel retained by the legislative authority. This

elimination of this adjective to describe the attorney or counselor clarifies the distinction between the attorneys retained by the legislative authority under this statute and the prosecutor's authorization to hire temporary "special" prosecutors under RCW 36.27.040.

3. SSB 3151 limited any contract by a legislative authority for legal services to two years, a recognition that the legislative authority was not empowered to create a new department as Senate Bill No. 3151 would have allowed.

*See* Substitute Senate Bill No. 3151, Laws of 1983, ch. 129, §1.<sup>3</sup>

Presented with an opportunity to greatly expand the authority of county legislative authorities to create a county civil legal department, the Legislature declined. However, it is equally (and perhaps more) important to note that the Legislature did not impose any requirement upon county legislative authorities to obtain approval by the county prosecutor when retaining legal services. As the colloquy reproduced at pages 28-29 of the Respondent Island County Board of Commissioners' Brief indicates, the intent of the original bill was to unfetter a legislative authority's ability to hire attorneys related to all aspects of civil matters. While that proposed

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<sup>3</sup> A copy of Laws of 1983, ch. 129, §1 is attached to this brief as Appendix B.

bill failed, the resulting re-enactment and amendments to RCW 36.32.200 did not change the fundamental right of a county legislative authority to retain legal services without obtaining the prosecutor's approval.

#### IV. CONCLUSION

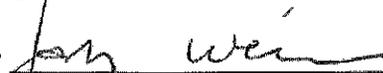
The legislative authorities in Washington's 39 counties rely on RCW 36.32.200 to obtain legal counsel because it is necessary for the full and effective governance of counties. It has worked very well for more than 100 years. RCW 36.32.200 allows legislative authorities to obtain legal advice for complicated or specialized issues, for second opinions, and to address conflict situations, all while contemporaneously avoiding the unnecessary, harmful and unconstitutional effects that would arise from creating the prosecutorial veto power proffered by Mr. Banks in this case.

WSAC respectfully asks that the Supreme Court affirm the trial court decisions in this case and uphold RCW 36.32.200.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of August, 2016.

WASHINGTON STATE ASSOCIATION OF  
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By



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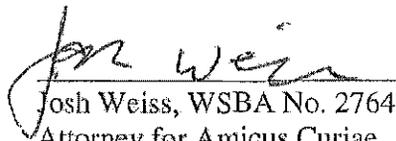
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# **APPENDIX 1**

SENATE BILL NO. 3151

State of Washington      48th Legislature      1983 Regular Session  
by Senators Thompson, Hayner, Bauer and Barr

Read first time on January 17, 1983 and referred to Committee on  
Local Government.

1      AN ACT Relating to counties; adding a new section to chapter 4,  
2 Laws of 1963 and to chapter 36.27 RCW; adding a new section to  
3 chapter 4, Laws of 1963 and to chapter 36.32 RCW; and repealing  
4 section 36.32.200, chapter 4, Laws of 1963 and RCW 36.32.200.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6      NEW SECTION. Sec. 1. There is added to chapter 4, Laws of 1963  
7 and to chapter 36.27 RCW a new section to read as follows:

8      Duties of the prosecuting attorney, as set forth in RCW  
9 36.27.020, shall, in any county entering into a contract pursuant to  
10 section 2 of this act, be modified to the extent and in the manner  
11 provided for by the contract.

12      NEW SECTION. Sec. 2. There is added to chapter 4, Laws of 1963  
13 and to chapter 36.32 RCW a new section to read as follows:

14      The legislative authority of any county may contract to employ or  
15 retain one or more persons admitted as attorneys and counselors by  
16 the courts of this state to perform any or all of the following legal  
17 services on behalf of the county:

18      (1) Act as legal adviser to the county officers, providing them  
19 with legal advice regarding the conduct of their public duties and  
20 drafting legal instruments used by them to perform their official  
21 business; and

22      (2) Appear for and represent the county in all civil proceedings  
23 to which the county or its officers are parties.

24 All such contracts must be in writing and shall clearly delineate the  
25 responsibilities and authority of the contracting attorney or  
26 attorneys. Nothing in this section may be construed as limiting the  
27 authority or the duties of the prosecuting attorney with respect to  
28 the prosecution of criminal actions or the administration of grand

Sec. 2

1 jury proceedings.

2 NEW SECTION. Sec. 3. Section 36.32.200, chapter 4, Laws of 1963

3 and RCW 36.32.200 are each repealed.

# **APPENDIX 2**

twenty-five hundred or more to less than twenty-five hundred, it shall continue to have a seven member council. If, after a city has become a council-manager code city its population increases to twenty-five hundred or more inhabitants, the number of councilmanic offices in such ~~((a))~~ city ~~((shall))~~ may increase from five to seven members upon the affirmative vote of a majority of the existing council to increase the number of councilmanic offices in the city. When the population of a council-manager code city having five councilmanic offices increases to five thousand or more inhabitants, the number of councilmanic offices in the city shall increase from five to seven members. ~~((it [is] that))~~ In the event of an increase in the number of councilmanic offices, the city council shall, by majority vote, pursuant to RCW 35A.13.020, appoint two persons to serve in these offices until the next municipal general election, at which election one person shall be elected for a two-year term and one person shall be elected for a four-year term. The number of inhabitants shall be determined by the most recent official state or federal census or determination by the state office of financial management. A charter adopted under the provisions of this title, incorporating the council-manager plan of government set forth in this chapter may provide for an uneven number of councilmen not exceeding eleven.

Passed the Senate March 15, 1983.

Passed the House April 18, 1983.

Approved by the Governor April 23, 1983.

Filed in Office of Secretary of State April 23, 1983.

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## CHAPTER 129

[Substitute Senate Bill No. 3151]

### ATTORNEYS HIRED TEMPORARILY BY CITIES AND TOWNS FOR PROSECUTOR DUTIES—CONTRACT DURATION

AN ACT Relating to counties; and amending section 36.32.200, chapter 4, Laws of 1963 and RCW 36.32.200.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 36.32.200, chapter 4, Laws of 1963 and RCW 36.32.200 are each amended to read as follows:

It shall be unlawful for ~~((the board of))~~ a county ~~((commissioners))~~ legislative authority to employ ~~((;))~~ or 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 presiding 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.

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

Passed the Senate March 24, 1983.

Passed the House April 16, 1983.

Approved by the Governor April 23, 1983.

Filed in Office of Secretary of State April 23, 1983.

### CHAPTER 130

[Reengrossed Substitute Senate Bill No. 3161]

#### SERVICE DISTRICTS—BRIDGE OR ROAD IMPROVEMENTS CAPITAL AND MAINTENANCE COST FUNDING—IMPROVEMENT DISTRICTS—POWERS AND DUTIES

AN ACT Relating to service districts; amending section 19, chapter 2, Laws of 1983 and RCW 84.52.052; and adding a new chapter to Title 36 RCW.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION.** Sec. 1. The legislative authority of a county may establish one or more service districts within the county for the purpose of providing and funding capital and maintenance costs for any bridge or road improvement a road district has the authority to provide. A service district may not include any area within the corporate limits of a city or town unless the city or town governing body adopts a resolution approving inclusion of the area within its limits. A service district is a quasi municipal corporation, an independent taxing "authority" within the meaning of Article VII, section 1 of the state Constitution, and a "taxing district" within the meaning of Article VII, section 2 of the state Constitution.

A service district shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes as well as all other powers that may now or hereafter be specifically conferred by statute, including, but not limited to, the authority to hire employees, staff, and services, to enter into contracts, and to sue and be sued. All projects constructed by a service district pursuant to the provisions of this chapter shall be competitively bid and contracted.

The county legislative authority shall be the governing body of a service district. The county treasurer shall act as the ex officio treasurer of the service district. The electors of a service district are all registered voters residing within the district.

**NEW SECTION.** Sec. 2. (1) A county legislative authority proposing to establish a service district, or to modify the boundaries of an existing service district, or to dissolve an existing service district, shall conduct a hearing at the time and place specified in a notice published at least once, not less than ten days prior to the hearing, in a newspaper of general circulation within the proposed service district. This notice shall be in addition to any other notice required by law to be published. The notice shall, where

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Please find the attached motion for leave to file an amicus brief, and amicus brief in the matter of State v. Susan Drummond and Island County Board of Commissioners.

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