

67908-2

67908-2

COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2012 JUN -1 PM 2:13

No. 67908-2

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

TIM EYMAN,

Plaintiff-Appellant,

v.

MICHELLE MCGEHEE, REDMOND CITY CLERK,

Defendant-Respondent.

REPLY OF CROSS APPELLANT MICHELLE MCGEHEE

James E. Haney, WSBA #11058
Kristin N. Eick, WSBA #40794
Attorneys for Defendant-Respondent
OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

TABLE OF CONTENTS

	<i>Page</i>
A. ARGUMENT.....	1
B. CONCLUSION.....	3

TABLE OF AUTHORITIES

Page

Cases

American Traffic Solutions, Inc. v. City of Bellingham, 163 Wn. App. 427,
260 P.3d 245 (2011)..... 2
Mukilteo Citizens for Simple Government v. City of Mukilteo, ___ Wn.2d
___, 272 P.3d 227 (Mar. 8, 2012)..... 2

Statutes

RCW 35A.29.170..... 2
RCW 7.16.160 2

A. ARGUMENT

Respondent - Cross-Appellant Michelle McGehee, Redmond City Clerk, hereby submits the following Reply Brief of Cross-Appellant pursuant to RAP 10.1(f)(4).

The City Clerk has cross appealed and assigned error to the trial court's decision that the City Clerk had a clear legal duty under RCW 35A.01.040 and RCW 35A.29.170 to transmit proposed Redmond Initiative No. 1 to the county auditor for a determination of the petition's sufficiency. Appellant Eyman has utterly failed to respond to this assignment of error and the City Clerk's arguments regarding the same, having neglected to direct any portion of his Opening Brief or his perfunctory Reply Brief to the issue. While Appellant Eyman continues to insist, without reference to supporting authority, that a writ of mandamus compelling the City Clerk to transmit the petition would not be a vain and useless act because the initiative is a valid expression of political speech, this argument has no bearing on whether the City Clerk had a clear legal duty to transmit the petition in the first instance.

As discussed at length in the City Clerk's Brief of Respondent - Cross Appellant, it is a prerequisite to issuing a writ of mandamus compelling the performance of any act that the municipal officer subject to

KNE989938.DOC;1\00020.050317\

the writ is under a clear duty to act. RCW 7.16.160. Again, the trial court erred in determining that the City Clerk is subject to a clear duty to act because the requirement to transmit an initiative petition to the county auditor is only triggered if the initiative is “authorized to be filed” under the provisions of Title 35A RCW. RCW 35A.29.170.¹ The local initiative power in noncharter code cities, such as Redmond, arises from statute. Accordingly, the exercise of the initiative power and corresponding duties of the City Clerk is subject to the limitations of RCW 35A.29.170.

Plainly, proposed Redmond Initiative No. 1 is not “authorized to be filed” under the provisions of Title 35A RCW. Nearly identical initiatives purporting to restrict local legislative authority to establish automated traffic safety camera programs were conclusively invalidated in both *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011) and *Mukilteo Citizens for Simple Government v.*

¹ RCW 35A.29.170 provides, in relevant part:

Initiative and referendum petitions authorized to be filed under provisions of this title, or authorized by charter, or authorized for code cities having the commission form of government as provided by chapter 35.17 RCW, shall be in substantial compliance with the provisions of RCW 35A.01.040 as to form and content of the petition, insofar as such provisions are applicable; shall contain a true copy of a resolution or ordinance sought to be referred to the voters; and must contain valid signatures of registered voters of the code city in the number required by the applicable provision of this title. . . . [T]he clerk shall transmit the petition to the county auditor who shall determine the sufficiency of the petition under the rules set forth in RCW 35A.01.040.

City of Mukilteo, ___ Wn.2d ___, 272 P.3d 227 (Mar. 8, 2012). Despite *Mukilteo Citizens* having been issued after Appellant Eyman filed his Opening Brief, he makes no attempt to distinguish it or to otherwise escape its significance in his Reply. The City Clerk thus had no clear duty to act.

B. CONCLUSION

Appellant Eyman's lackluster Reply Brief seems to signal his resignation to the fact that the Washington Supreme Court has removed the last glimmer of hope with respect to direct legislation of automated traffic safety cameras. Not only does the holding of *Mukilteo Citizens* dictate that the trial court correctly refused to issue a writ of mandate compelling transmittal of the initiative petition to the county auditor because it was a vain and useless act, but it also affirms that a city clerk has no clear duty to perform such an act. Where the proposed initiative is unequivocally invalid and exceeding the scope of the local initiative power, the city clerk is not obligated to ignore such clearly applicable case law. To hold otherwise would result in a waste of public resources.

RESPECTFULLY SUBMITTED this 31st day of May, 2012.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By 
James E. Haney, WSBA #11058
Kristin N. Eick, WSBA #40794
Attorneys for Defendant-Respondent

NO. 67908-2

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

TIM EYMAN,

Plaintiff-Appellant.

v.

MICHELLE MCGEHEE, REDMOND CITY CLERK

Defendant-Respondent.

DECLARATION OF SERVICE

James E. Haney, WSBA #11058
Kristin N. Eick, WSBA #40794
Attorneys for Defendant-Respondent
Michelle McGehee, Redmond City Clerk
OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, WA 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

I, Gloria J. Zak, hereby make the following declaration: I am now and was at all times material hereto over the age of 18 years. I am not a party to the above-entitled action and am competent to be a witness herein.

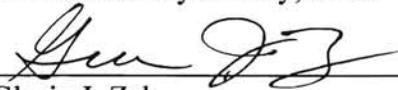
I hereby certify that I caused the Reply of Cross Appellant Michelle McGehee to be served upon the below-named individual in the manner identified below on this 31st day of May, 2012.

Via First Class U.S. Mail:

Daniel Quick, Esq.
DANIEL QUICK, PLLC
701 Fifth Avenue, Suite 4720
Seattle, WA 98104
Daniel@danielquick.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed at Seattle, Washington this 31st day of May, 2012.



Gloria J. Zak