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No. 79812-5 36935-4

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

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

and

WASHINGTON DENTAL SERVICE FOUNDATION, LLC, Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Protect Our Waters (“POW”) and Our Water-Our Choice (“OWOC”) submit this joint Reply Brief of Appellants.¹ This Court is asked to determine if the Water Additives Safety Act (App. C to Op. Br.) and/or the Medical Independence Act (App. D to Op. Br.) are within or beyond the scope of the initiative power in this pre-election review of local initiatives. Both initiatives should be found to be within the scope of the initiative power.

II. REPLY

A. The Fundamental And Overriding Purpose Of The Proposed Initiatives Is To Make It Illegal To Put Any Unsafe Drug In Any Public Water Supply Used In The City Of Port Angeles

This case likely rests on this Court’s determination of the fundamental and overriding purpose of each initiative. In addressing this purpose, Respondents assert that “the thrust of those initiatives is to require the City to stop fluoridation of the City’s water supply.” Respondents’ Brief (“Resp. Br.”) at 1. POW and OWOC argue that the thrust of the initiatives is much more general and much broader than just addressing fluoridation of the municipal water supply. The fundamental and overriding purpose of both initiatives is to make it illegal to put any unsafe drug in any public water supply used in the City of Port Angeles.² App. C-2 and D-2 to Op. Br.

The first initiative, the Water Additives Safety Act, allows drugs to be added to a public water supply only if they are approved by the U.S. Food

¹ This brief uses the same format for citations to the record as is used in the Opening Brief (“Op. Br.”).

² See Op. Br. at 21 for a more detailed statement.

and Drug Administration (“FDA”) as safe and effective for everyone.³ Section 3(A), App. C-2 to Op. Br. For disclosure purposes, the Water Additives Safety Act states that it:

does not prohibit fluoridation provided that the substance used for the purpose meets the approval of FDA and stringent safety standards as prescribed herein.

Sec. 5(A), App. C-2 to Op. Br.

The second initiative, the Medical Independence Act, simply prohibits putting drugs (substances used to treat people) in any public water supply for the City of Port Angeles. Sec. 2, App. D-2 to Op. Br. Again for disclosure purposes, this Act clarifies that it requires addition of hexafluorosilicic acid⁴ to the municipal water supply to cease when this ordinance goes into effect. Sec. 5, App. D-2 to Op. Br.

Neither initiative applies to substances which are added to treat the water to make it safe or potable.⁵ Both initiatives go into effect 30 days after election certification.⁶ Election certification occurs 15 to 21 days after the election. RCW 29A.60.190.

The “stringent safety standards” required by the Water Additives Safety Act provide that when adding an FDA approved drug to any public

³ The Respondents argue that there is no authority for local government to “delegate standard-setting authority to the FDA”. Resp. Br. at 46. The Act does not mandate the FDA to set safe and effective levels but does not allow drugs to be added to the public water supply if safe and effective levels have not been set by the FDA.

⁴ Hexafluorosilicic acid is a source of fluoride.

⁵ Sec. 1 and 3(C), App. C-2 to Op. Br.; Sec. 3, App. D-2 to Op. Br.

⁶ Sec. 5(B), App. C-2 to Op. Br.; Sec. 5, App. D-2 to Op. Br.

water supply, the contaminants that are added with that drug may not cause the finished water to fail to meet the Maximum Contaminant Level Goals (“MCLGs”) set by the U.S. Environmental Protection Agency (“EPA”).⁷ Sec. 2(C) and 3(B), App. C-2 to Op. Br; See 40 CFR 141.2.

The EPA requires that public water systems do not exceed Maximum Contaminant Levels (“MCLs”) set by the EPA.⁸ The EPA has also set MCLGs.⁹ The Water Additives Safety Act does not generally require contaminants in public water supplies serving the City to meet the MCLGs. It simply prohibits putting any drug in a public water system if the contaminants added with that drug would cause MCLGs to be exceeded. Sec. 2 and 3(B), App. C-2 to Op. Br.

As an example, for arsenic in drinking water, the EPA has set an MCL at 0.010 mg/l and set an MCLG at 0 mg/l. 40 CFR 141.62 and 141.51. The Water Additives Safety Act would prohibit putting drugs in any public water supply that are contaminated with arsenic at any detectable level. See Sec. 2 and 3(B), App. C-2 to Op. Br.

⁷ “Maximum contaminant level goal or MCLG: The level of a contaminant in drinking water below which there is no known or expected risk to health. MCLGs allow for a margin of safety.” WAC 246-290-72004(1)(a). “Maximum contaminant level or MCL: The highest level of a contaminant that is allowed in drinking water. MCLs are set as close to the MCLGs as feasible using the best available treatment technology.” WAC 246-290-72004(1)(b). “‘Best available technology (BAT)’ means the best technology, treatment techniques, or other means that EPA finds, after examination for efficacy under field conditions, are available, taking cost into consideration.” WAC 246-290-010.

⁸ 40 CFR 141.62 for inorganic contaminants; 40 CFR 141.61 for organic contaminants.

⁹ 40 CFR 141.51 for inorganic contaminants; 40 CFR 141.50 for organic contaminants.

B. There Is Specific Authority For The Corporate City To Locally Control Harmful Substances In Drinking Water

The authority for the Water Additives Safety Act is provided explicitly in the initiative itself which states:

[U]nder Article 11 SECTION 11 of the State Constitution, RCW 35.88.020 and RCW 35A.70.070(6), The City Of Port Angeles may . . . exercise control over water pollution

Article 11, SECTION 11, generally referred to as the authority for “police power”¹⁰ states:

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

The purpose of Ch. 35.88 RCW is to give a corporate city the right to control pollution in the water furnished to people in the city by public waterworks:

[T]he purpose [is] protecting the water furnished to the inhabitants of cities and towns from pollution

RCW 35.88.010.

“Pollution” is not defined in Ch. 35.88 RCW so we rely on the dictionary definition. Western Telepage v. City of Tacoma, 140 Wn.2d 599, 609, 998 P.2d 884 (2000). Pollution is “the introduction of harmful substances or products into the environment.” Webster’s New Universal Unabridged Dictionary (2003).

The control of harmful substances in the water furnished to the inhabitants of the City is justified both by the express grant of power to the

¹⁰ “The courts will go far in sustaining the exercise of the police power for the preservation of the public health and safety.” State ex rel. Rhodes v. Cook, 72 Wn.2d 436, 439, 433 P.2d 677 (1967)

Corporate City in RCW 35.88.020 and by the Corporate City’s police power granted by the State Constitution.

The authority for the Medical Independence Act is not explicitly stated in this initiative but it also controls pollution in water furnished to inhabitants and so it is also justified by RCW 35.88.020 and by the Corporate City’s police power.

RCW 35.88.020 states, in part,

Every city and town may by ordinance prescribe what acts shall constitute offenses against the purity of its water supply and the punishment or penalties therefor and enforce them. The mayor of each city and town may appoint special policemen, . . . who may arrest with or without warrant any person committing, within the territory over which any city or town is given jurisdiction by this chapter, any offense declared by law or by ordinance, against the purity of the water supply, or which violate any rule or regulation lawfully promulgated by the state board of health for the protection of the purity of such water supply.

Under RCW 35.88.020, the Corporate City is given authority to determine what acts shall be considered offenses against the purity of its water supply. The Water Additives Safety Act and the Medical Independence Act effectively establish that adding unsafe drugs to any public water supply used in the City “shall be considered offenses against the purity of its water supply.”

C. The Authorities In Ch. 70.142 RCW And Ch. 35.88 RCW Are To Be Harmonized

The Respondents cite to RCW 70.142.040 for the proposition that the Legislature has authorized only one type of local government (counties with 125,000 people) to set local water quality standards stricter than those established by the State Board of Health. Resp. Br. at 29-30, 37-40, 44-47.

Ch. 70.142 RCW authorizes the State Board of Health to adopt “maximum” contaminant limits for public water supplies to protect public health. RCW 70.142.010(1) (“the state board of health shall adopt by rule a maximum contaminant level for water provided to consumers' taps”). Consistent with EPA regulations, Ch. 70.142 RCW recognizes that state and local MCLs may be more strict than the federal MCLs. RCW 70.142.010(2) (“State and local standards for chemical contaminants may be more strict than the federal standards”). RCW 70.142.040 authorizes stricter county standards but does not prohibit stricter city standards.

There is no conflict with state or federal statute when a city acting under the authority of RCW 35.88.020, and its police power, sets local water purity standards that are more strict than state or federal standards. See Weden v. San Juan County, 135 Wn.2d 678, 693, 958 P.2d 273 (1998) (“In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa”).

Respondents’ argue that “No city is allowed to adopt stricter water quality standards than those established by the state Board of Health.” Resp. Br. at 29-30, 37-40, 44-47. The Respondents provide no authority for this proposition, but suggest that the grant of such authority to counties with 125,000 people in RCW 70.142.040 preempts other statutory grants of such authority to individual cities because otherwise “the prohibitions in RCW 70.142.040 would have no meaning and be absurd.” Id. There is no statement of intention or necessary implication in Ch. 70.142 RCW to preempt a city from setting stricter water purity standards than the MCLs set

by the State Board of Health. See Tacoma v. Luvene, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992) (“Preemption occurs when the legislature states its intention expressly, or by necessary implication, to preempt the field”).

The general rule requires the provisions of Ch. 70.142 RCW to be harmonized with the provisions of Ch. 35.88 RCW and this leads to the conclusion that both counties of 125,000 people and cities can set water purity standards stricter than state and federal standards. See Harmon v. DSHS, 134 Wn.2d 523, 542, 951 P.2d 770 (1998) (“statutes on the same subject matter must be read together to give each effect and to harmonize each with the other”). It is not absurd, as Respondents suggest, that both counties over 125,000 and cities independently can set water purity standards. The more strict standards providing the safest water would control.

Respondents argue that the Water Additives Safety Act uses a different definition of contaminant and requires a different monitoring procedure than Ch. 246-290 WAC. Resp. Br. at 45-46. These definitions and techniques in the initiative only apply to the initiative’s stricter standards and are not in conflict with Ch. 246-290 WAC. Ch. 70.142 RCW does not preempt the initiatives and the initiatives do not conflict with this chapter when this chapter is harmonized with Ch. 35.88 RCW.

D. The Initiatives Do Not Interfere With The City Council’s Rightful Authority To Operate A Utility

The Respondents claim that the initiatives are beyond the scope of the initiative power because RCW 35A.11.020 grants the “legislative body” of a code city the power of operating and supplying municipal water utility services. Resp. Br. at 33-40.

The most fundamental argument in reply is that the Corporate City setting water purity standards that must be met for all public water supplies in the City does not interfere with the proprietary function of operating a utility under the new legislatively-established Citywide water purity standards. The Respondents argue that Port Angeles Municipal Code (“PAMC”) 13.28.010 “acknowledges that the City’s water system is subject to comprehensive regulations established by the Legislature, the state Board of Health, and the state Department of Health.” Resp. Br. at 30. This is a misstatement. PAMC 13.28.010 states that the purpose of the water service regulations is, in relevant part:

to promote the public health, safety, and general welfare of the users of the water system, in accordance with the standards established by the City, County, State and Federal governments.

This purpose statement specifically acknowledges that the water system is to be operated pursuant to “standards established by the City.” PAMC 13.28.010. Appendix 1-1 hereto.

Setting local water purity standards for all public water systems serving the City is not the same as “operating” a utility. Putting unsafe drugs in a public water supply is inconsistent with the concept of providing a utility. It is not a utility function to medicate people to affect their minds or bodies.

The word “utilities” in RCW 35A.11.020 is not defined in the statute and so we rely on the dictionary definition. Supra, this brief at 4. A utility is a public service; something useful. Webster’s New Universal Unabridged Dictionary (2003). Putting unsafe drugs in any public water supply is inapposite to the concept of providing “something useful.” The initiatives do

not interfere with operating a utility but instead provide City standards recognized as appropriate by PAMC 13.28.010.

E. This Court Should Not Consider Substantive Invalidity Challenges In Preelection Review Of Local Initiatives

The Respondents argue that substantive invalidity challenges while prohibited by the Court in preelection review of statewide initiatives, are still allowed in preelection review of local initiatives. Resp. Br. at 3-5; 20-24. This is a fundamental legal error made by Respondents and accepted by the trial court. See Para. 4.5 to 4.7, App. A-9 to A-10 to Op. Br. The Respondents argument should be rejected. POW and OWOC argue that substantive invalidity challenges are not allowed in preelection review both for statewide and for local initiatives. Op. Br. at 16-19.

The only opinion that uses the term “substantive invalidity” is Coppernoll v. Reed, 155 Wn.2d 290, 297, 119 P.3d 318 (2005). A challenge that “the measure, if passed, would be substantively invalid because it conflicts with a federal or state constitutional . . . provision” is a “substantive invalidity” challenge. Id. The Coppernoll Court states that substantive invalidity challenges are not allowed in this state because of the “constitutional preeminence of the right of initiative,” because it “involves issuing an advisory opinion, violates ripeness requirements, undermines the policy of avoiding unnecessary constitutional questions, and constitutes unwarranted judicial interference with a legislative process,” and because it “may also unduly infringe on free speech values.” Id. at 297-98.

The Coppernoll Court also found that substantive invalidity challenges are not justiciable under the UDJA because there is “no actual,

present, or existing dispute” first because the “initiative may be rejected by voters” and second because “there is no guarantee that [Respondents] will suffer any injury.”¹¹

All of these reasons to reject preelection review for substantive invalidity are equally valid for state and local initiatives.¹²

The Coppernoll ruling that “substantive invalidity” challenges are not “allowed” in preelection review, is founded on case law reviewing local initiatives.¹³

Generally, courts are reluctant to rule on the validity of an initiative before its adoption by the people. This reluctance stems from our desire not to interfere in the electoral process or give advisory opinions. Seattle Bldg. & Constr. Trades Council v. City of Seattle, 94 Wn.2d 740, 746, 620 P.2d 82 (1980).

¹¹ The Respondents’ lawsuit was brought under the UDJA. ACP at 5-9.

¹² The Respondents argue that the “constitutional preeminence of the right of initiative” is only applicable to statewide initiatives. Resp. Br. at 22. The Maleng Court in deciding that a local initiative was within the scope of the initiative power stated “One of the foremost rights of Washington State citizens is the power to propose and enact laws through the initiative power.” Maleng at 330. Save Our Park v. Hordyk, 71 Wn. App. 84, 93, 856 P.2d 734 (1993) ruled in preelection review of a local initiative that the “right of the people to initiate laws is fundamental.” This recognition in local initiative cases of the fundamental right to initiate laws may come from the language in Article II, Sec. 1 of the Washington Constitution which states: “the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls.” All of the other reasons offered by the Coppernoll Court for not allowing substantive invalidity challenges are equally applicable to preelection review of state and local initiatives.

¹³ For this issue, the Coppernoll Court cites to Maleng v. King County Corr. Guild, 150 Wn.2d 325, 76 P.3d 727 (2003) (reviewing a local initiative) and Philadelphia II v. Gregoire, 128 Wn.2d 707, 911 P.2d 389 (1996) (reviewing a state initiative). Coppernoll at 297-98; Maleng at 327-28; Philadelphia II at 708-09. The Philadelphia II Court relied on a case of preelection review of a local initiative (Seattle Bldg. & Constr. Trades Council v. City of Seattle (“Seattle”), 94 Wn.2d 740, 745-46, 620 P.2d 82 (1980)) for its authority on this matter.

However, an established exception to this rule in Washington is that a court will review a proposed initiative to determine if it is beyond the scope of the initiative power. Id. at 746

Philadelphia II at 716-17.

The Respondents cite to Seattle for their authority that “substantive invalidity” review is permitted in preelection review of local initiatives. Resp. Br. at 4, Note 9; 24, Note 23. But the Philadelphia II and Coppernoll Courts rely on Seattle for their authority that “substantive invalidity” challenges are not allowed in preelection review. Philadelphia II at 716-17; Coppernoll at 297-99. The Respondents are wrong.

The Seattle Court in its preelection subject matter review, looked at the “obvious intent and thrust” of the local initiative and found this was “not within the power of the City to do.” Seattle at 748. The limitation of subject matter review of initiatives to the “fundamental and overriding purpose” in recent cases is equivalent to the limitation in Seattle to the “obvious intent and thrust” of an initiative. See Philadelphia II at 719; Coppernoll at 302-03; Futurewise v. Reed (“Futurewise”), No. 80430-3 (Slip Op., September 7, 2007).

F. It Is Not New Law But Rather Is A Restatement Of Existing Law To Limit All Preelection Subject Matter Review To The Fundamental And Overriding Purpose Of The Initiative

It is valid in preelection review to determine if the subject matter of the initiatives is “proper for direct legislation.” Coppernoll at 297-99; Op. Br. at 16-20. Coppernoll limited subject matter review to consideration of the “fundamental and overriding purpose” of the initiative and refused to consider “mere incidentals.” Coppernoll at 302-03; Op. Br. at 16-20. This

limitation on subject matter review to the “fundamental and overriding purpose” of the initiatives was recently reaffirmed in Futurewise v. Reed, No. 80430-3 (Slip Op., September 7, 2007).

Respondents argue that POW and OWOC are seeking a “fundamental change to established precedent on preelection review of local initiatives” when POW and OWOC seek to limit preelection subject matter review (including application of the legislative “action” test and the legislative “body” test) to the “fundamental and overriding purpose” of the initiatives. Resp. Br. at 5 and 21.

Coppernoll provides that absent procedural challenges, preelection review can only challenge that the subject matter is not proper for direct legislation. Coppernoll at 297-98. The Malkasian Court in a recent review of a local initiative states:

As we recently affirmed in Coppernoll v. Reed, 155 Wn.2d 290, 299, 119 P.3d 318 (2005), preelection challenges regarding the scope of the initiative power address the fundamental question of whether the subject matter of the measure was “proper for direct legislation.”

City of Sequim v. Malkasian, 157 Wn.2d 251, 255, 138 P.3d 943 (2006); Op. Br. at 19.

Because there are no procedural challenges in the instant case, all allowed challenges are “subject matter” challenges. Coppernoll at 299 (citing to four local initiative preelection cases with subject matter challenges including “Seattle”). In subject matter challenges, only the “fundamental and overriding purpose” of the ordinance is reviewed. Futurewise (Slip Op.); Coppernoll at 302-03; Philadelphia II at 719; Seattle at 748 (“obvious intent and thrust”). Therefore, it is not new law, but is rather a restatement of

existing law, to limit preelection subject matter review (including application of the legislative “action” test and the legislative “body” test) to the “fundamental and overriding purpose” of the initiatives. Such a clarification by this Court would give important guidance to lower courts and would usefully tend to reduce the level and cost of preelection review. See Introduction to Op. Br.

Respondents err when they state that neither the Coppernoll case nor the Philadelphia II case address the legislative “action” test. See Resp. Br. at 2. In both cases, the fundamental issue was whether the initiative exceeded “legislative” power which includes the legislative “action” test. Philadelphia II at 718-19; Coppernoll at 301-03. Coppernoll and Philadelphia II did not address the legislative “body” test because this test only applies to local initiatives, but it clearly falls into the category of being a subject matter challenge and not a substantive invalidity challenge.

G. This Court Should Find That There Are Other Public Water Systems Besides The Port Angeles Municipal Water System That Provide Water Service In The City Of Port Angeles

POW and OWOC have requested that this Court make one additional Finding of Fact based on the undisputed fact, admitted by Respondents, that there are other public water systems besides the Port Angeles municipal system that provide water service in the City of Port Angeles. Op Br. at 10-14. Prior to the trial, POW and OWOC supplied evidence of another small public water system in the City. ACP 71-90. At the trial, the Respondents admitted that it “is a public drinking water system and is regulated by the

State.” RP1 at 85. Based on this admission, this Court may enter the requested finding. Op. Br. at 10-14.

Respondents state in a footnote in their brief that no evidence was offered that this well was used by the residents. Resp. Br. at 15, Note 19. The well agreement was signed in 2002 and established the public water system in perpetuity. APC at 74-80. Despite this new argument in Respondents’ Brief, the record before the trial Court includes evidence of another public water system serving the City and an admission to that effect by Respondents. This Court should make the requested finding.

POW and OWOC also have letters in the Clerk’s Papers showing evidence of two other public water systems serving the City. Op. Br. at 10-11. The Respondents admitted that this information is correct prior to the entry of judgment. Id. Respondents argue that the trial court did not accept this additional evidence of other public water systems serving the City. Resp. Br. at 16. This is irrelevant because the record includes the admissions of the Respondents to this undisputed fact. See Op. Br. at 13.

Respondents argue that the evidence is not material. Resp. Br. at 16. However, it is material that there are now or could be in the future other public water systems serving the City. The initiatives set Citywide pollution standards that apply equally to all public water systems that now serve or will serve the City and this is one basis for the initiatives qualifying as legislative actions.

Respondents argue that the City Council does not have authority to control pollution in other public water systems. Resp. Br. at 16, 46-47. This authority is provided both by the police power and by RCW 35.88.010 which

give the City authority over all property associated with any public water system serving inhabitants of the City. RCW 35.88.010.

The Respondents cite to Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health, 151 Wn.2d 428, 432-34, 90 P.3d 37 (2004) for the proposition that a County could not require a water district to fluoridate. Resp. Br. at 17, 47. The Parkland Court cites to the water district's authority to decide to fluoridate (RCW 57.08.012) and found it to be more specific than the County's authority to "improve the public health" and ruled that the most specific statute prevailed in a conflict. Id. Whether the City could enforce its pollution standards on a water district serving inhabitants in the City is a substantive invalidity issue that is not ripe for resolution because there is no current conflict. But at least one public water system serving the City is a small water system not affected by RCW 57.08.012. Supra, this Brief at 13-15.

1. POW and OWOC did not need to assign error to the trial court's failure to accept their letters

Respondents argue that POW and OWOC failed to assign error to the trial court's ruling excluding their evidence of other water providers. Resp. Br. at 14-18. The trial court only excluded part of the POW and OWOC evidence of other water providers. Supra, this Brief at 13-15. But as discussed in the Opening Brief, an Appellate Court has the duty to enter proper conclusions of law based on all of the undisputed evidence. Op. Br. at 13. The presence of other water systems in the City is an undisputed fact because it was admitted by Respondents. Op. Br. at 10-14; supra, this brief at 13-15. It is not necessary to find that the trial court erred in order for the

Appellate Court to rely on this undisputed fact and so there is no need to make an assignment of error.

H. The Respondents Erroneously Cite To Facts That Are Not Part Of The Undisputed Facts Relied On By The Superior Court

This case was decided by the trial court on undisputed facts in the record. Op. Br. at 12. No one has challenged those facts actually entered by the trial court. Op. Br. at 1-3; Resp. Br. at 12. These facts are verities on appeal. Keller v. Bellingham, 92 Wn.2d 726, 729, 600 P.2d 1276 (1979). Additional facts requested by Respondents should only be considered by this Court if the Respondents can show that they have been “admitted or conceded to be undisputed” by POW and OWOC. See Op. Br. at 13. The Respondents have sprinkled their brief with citations to alleged facts associated with citations to Respondents’ Clerk’s Papers (RCP). This Court should strike those citations and the argument in reliance upon those citations when they go beyond the undisputed facts in the trial court’s Findings of Fact, Conclusions of Law, and Judgment (App. A to Op. Br.) unless they are undisputed facts added by this Court based on admissions by adverse parties.

I. An Election Should Be Ordered On The Initiatives

In the Opening Brief, POW and OWOC request that this Court enter a decree ordering an election on the initiative(s) within the scope of the local initiative power. Op. Br. at 14-16. The Respondents did not object to this request. Resp. Br.

J. This Court Can Decide What Is The “Fundamental And Overriding Purpose” Of The Proposed Initiatives

Respondents argue that there is no finding of fact specifying the “fundamental and overriding purpose” of the initiatives and there was no request for such a finding. Resp. Br. at 13, 18-19. The “fundamental and overriding purpose” of the proposed initiatives is not a finding of fact but is a legal issue that this Court can address de novo based on the language of the initiatives. Leschi v. Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774 (1974) (determining the “meaning” of a proposed law is a question of law).

In a footnote, Respondents argue if the “purpose” of the initiatives were considered a conclusion of law, POW and OWOC did not request such a conclusion. Resp. Br. at 19, Note 22. In its briefing below, POW and OWOC argued that the fundamental and overriding purpose of the initiatives was to prescribe acts that shall constitute offenses against the purity of the water supply. ACP at 107. In the trial court’s Findings of Fact, Conclusions of Law, and Judgment, the trial court entered Conclusions of Law specifying its view of the “purpose” of the initiatives in paragraphs 4.2 to 4.4 and the trial court stated in paragraph 4.4 that “each initiative clearly seeks to direct the City’s operation of the municipal water system.” App. A to Op. Br. POW and OWOC assigned error to all of the trial court’s conclusions of law. Op. Br. at 2.

K. Restatement Of What Subject Matter Challenges Are Allowed For Preelection Review Of A Local Initiative

POW and OWOC analyzed the limits on preelection review established by a long line of cases in the Op. Br. at 16-20. Based on this analysis, there can only be two types of challenges to a state or local initiative

in preelection review: 1) procedural requirements not being met; and 2) the subject matter is not proper for direct legislation. Id. A challenge that the subject matter is not proper for direct legislation is also referred to as a challenge that the initiative is beyond the scope of the initiative power. Id. The only challenge in the instant case is that the initiatives are beyond the scope of the initiative power. Id.

A third type of challenge is not allowed in preelection review for state or local initiatives and this is called a substantive invalidity challenge. Id. A challenge that “the measure, if passed, would be substantively invalid because it conflicts with a federal or state constitutional . . . provision” is a “substantive invalidity” challenge. Supra, this Brief at 9-13. The scope of a challenge that an initiative is beyond the scope of the initiative power does not include substantive invalidity challenges. Id.; Op. Br. At 16-20.

In a preelection challenge that a local initiative is beyond the scope of the initiative power, a court must first determine the purpose of the initiative. Op. Br. at 16-20; supra, this Brief at 9-13. The relevant purpose is the “fundamental and overriding purpose.” Id. Mere incidentals to this overriding purpose are not considered in preelection review. Id.

This Court should determine that the initiative is not beyond the scope of the initiative power for the City of Port Angeles if:

- 1) The fundamental and overriding purpose of the initiative is legislative and not administrative; and
- 2) The fundamental and overriding purpose of the ordinance is within the legislative authority granted to the city as a corporate entity.

Id.

Respondents argue this is new law, but this is just a restatement of existing law. Supra, this Brief at 11-13. POW and OWOC have previously addressed and rejected Respondents' argument that substantive invalidity challenges are allowed in local preelection review. Id. at 9-13.

L. The Proposed Ordinances Are Legislative And Not Administrative

In the Op. Br. at 23 to 26, POW and OWOC demonstrate that the proposed initiatives are legislative in nature.

The purpose statements¹⁴ by POW and OWOC accurately describe the fundamental and overriding purpose of the initiatives. See App. C-2 and D-2 to Op. Br. The Respondents' description of the initiatives ("to require the City to stop fluoridation of the City's water supply") is a mere incidental to the actual fundamental and overriding purpose of the initiatives. The Coppernoll and Seattle Courts make clear that mere incidentals are not part of preelection review. Coppernoll at 301-04; Seattle at 745-48.

The Respondents' description is inadequate because the initiatives address all unsafe drugs and not just fluoride.¹⁵ App. C-2 and D-2 to Op. Br.

¹⁴ Supra, this Brief at 1.

¹⁵ The Medical Independence Act prohibits putting "any product, substance, or chemical in public water supplies for the purpose of treating physical or mental disease or affecting the structure or functions of the body of any person, or with any other intent of acting in the manner of a preventive or treating medication or drug for humans or animals." Sec. 2, App. D-2 to Op. Br. The Water Additives Safety Act prevents adding "any substance to a public drinking water supply with the intent to treat or affect the physical or mental functions of the body of any person or which is intended to act as a medication for humans unless the manufacturer, producer, or supplier provides proof that the substance is specifically approved by the United States Food and Drug Administration ("FDA") for safety and effectiveness with a margin of safety that is protective against all adverse health and cosmetic effects at all dosage ranges consistent with unrestricted human

The Respondents' description is also inadequate because the initiatives propose regulation of all public water systems and supplies that now serve, or in the future will serve, inhabitants of the City and not just the municipal water system and supply. Id. (see Note 15).

If this Court accepts the POW and OWOC characterization of the fundamental and overriding purpose of the initiatives, it should find that the initiatives are legislative. Op. Br. at 21-26.

The Respondents argue that the details of the operation of the municipal water system is an administrative matter. Resp. Br. at 25-26. POW and OWOC concur. But the creation of local water supply purity standards for all public water systems in the City is a legislative matter. Op. Br. at 23-26.

The Respondents also argue that all decisions of the City regarding the operation and addition of additives to its water utility are administrative because they are pursuant to a plan that has been adopted by a “power superior to it” as specified in Ch. 246-290 WAC.¹⁶ Resp. Br. at 26-32. The power being exercised by the initiatives is power granted by Ch. 35.88 RCW (and the police power) to establish a Citywide local ordinance that regulates

water consumption.” Sec. 3(A), App. C-2 to Op. Br.

¹⁶ Respondents claim that POW and OWOC misstate a standard for determining if an action is administrative or legislative. Resp. Br. at 32. They follow with a quote allegedly from Ruano v. Spellman, 81 Wn.2d 820, 873, 505 P.2d 447 (1973). The last page of Ruano is 831, so page 873 does not exist in Ruano, and the quote cited by Respondents is not found anywhere in Ruano. The quote cited is found in Bidwell v. Bellevue, 65 Wn. App. 43, 46, 827 P.2d 339 (1992) and in Ballasiotes v. Gardner, 97 Wn.2d 191, 196, 642 P.2d 397 (1982) which was used by POW and OWOC to fully quote in their Op. Br. the cited language. Op. Br. at 24.

the purity of all public water systems in the City. Op. Br. at 26-29. This power is independent of Ch. 246-290 WAC and is not pursuant to plan specified in Ch. 246-290 WAC. The initiatives are legislative because the setting of Citywide water purity standards for all public water systems “is of a permanent and general character,” makes “new law,” “prescribes a new policy,” and does not pursue a plan already adopted by “some power superior to it.” See Op. Br. at 23-26.

This Court should find that the fundamental and overriding purpose of the initiatives is legislative in nature.

M. The Authority To Set Citywide Water Purity Standards Is A Power Granted To The Corporate City And Therefore Is Suitable For Initiative

Case law provides that powers must be granted to the city as a corporate entity in order for those powers to be subject to initiative. Op. Br. at 26. The Opening Brief describes that the power to be exercised by the initiatives is based on Ch. 35.88 RCW and the police power of the City. Op. Br. at 12, 26-29, Note 11. These powers are granted to the Corporate City. Op. Br. at 26-29; supra, this Brief at 4-7. Because the fundamental and overriding purpose of the initiatives is within the legislative authority granted to the City as a corporate entity, this Court should find that the initiatives are within the scope of the local initiative power. Op. Br. at 11-12.

Respondents argue that the “delegation to legislative body” test is not met because the initiatives interfere with the City Council’s authority under RCW 35A.11.020 to operate and supply municipal water utility services. Resp. Br. at 33-40. The initiatives make it illegal to put any unsafe drug in any public water supply used in the City. Op. Br. at 1. It does not deprive the

City Council of its right to operate a water utility for the Corporate City to adopt Citywide water purity standards that prohibit putting unsafe drugs in any public water supply now, or in the future, serving inhabitants of the City.

Respondents rely on the statement of the law from Priorities First v. City of Spokane, 93 Wn. App. 406, 411, 968 P.2d 431 (1998), review denied, 137 Wn.2d 1035 (1999) that an initiative cannot interfere with a power delegated by the state to the City Council. Resp. Br. at 33-34. In a restatement of this law, the Priorities First Court found that the people cannot deprive the City Council of the power to do what a state law **specifically** permits them to do. Id. (emphasis supplied.) The full quote is in Resp. Br. at 33. RCW 35A.11.020 specifically permits the City Council to operate a water utility. The City in adopting citywide water purity standards does not deprive any water utility business serving the City from operating its utility. There is a fundamental difference between setting Citywide public water purity standards and operating a utility within these Citywide standards.

Respondents cite to City of Seattle v. Yes For Seattle, 122 Wn. App. 382, 93 P.3d 176 (2004), review denied, 153 Wn.2d 1228 (2005) for the proposition that the existence of general authority to regulate the City's water utility is irrelevant if a proposed initiative would interfere with a specific grant of power. Resp. Br. at 34-37. Yes for Seattle is distinguished because the Yes for Seattle Court determined that the proposed initiative was a development regulation and the Growth Management Act (Chap. 36.70A RCW) requires development regulations to be adopted by the City Council. Yes for Seattle at 388-92. In the instant case, the City Council is only

specifically directed to operate a proprietary utility and is not specifically directed to adopt Citywide water purity standards. The only specific authority to adopt Citywide water purity standards is granted to the Corporate City in Ch. 35.88 RCW.

Respondents argue that Ch. 35.88 RCW only gives corporate cities jurisdiction over the “source of the municipal water to protect the water source from pollution.” Resp. Br. at 36. Without any citation, Respondents claim that this authority is limited and unremarkable. *Id.* RCW 35.88.010 and -.020 are quoted in full in the Op. Br. at 27. RCW 35.88.010 gives the Corporate City jurisdiction over all of the property associated with any part of any public water system (municipal or not, including but certainly not limited to water system sources) serving the inhabitants of the City “for the purpose of protecting the water furnished to the inhabitants of [the City] from pollution.” RCW 35.88.020 gives the Corporate City authority to adopt ordinances to prescribe and enforce offenses, within this jurisdiction, against the purity of this water. The statute in near-current form was first adopted in 1907 but was amended in 1965 and 2007.

The authority to set Citywide water purity standards is strongly grounded by a specific grant of authority in Ch. 35.88 RCW and by the police power and this power is legislative power granted to the Corporate City.

N. The Substantive Invalidity Challenges By Respondents Should Be Rejected For Preelection Review

In the Opening Brief and in this Reply, POW and OWOC have demonstrated that substantive invalidity challenges are improper for preelection review of local initiatives. Op. Br. at 16-20; *supra*, this Brief at

9-13, 17-19. Respondents are in conflict with Coppernoll and Philadelphia II when they characterize Seattle and Close v. Meeham, 49 Wn.2d 426, 429-31, 302 P.2d 194 (1956) as substantive invalidity challenges that justify preelection review of mere incidentals to the fundamental and overriding purpose of an initiative. See Resp. Br. at 40-41; Op. Br. at 11. In both Close and Seattle, the fundamental and overriding purpose of the initiatives was not within the legislative authority of the corporate city.

Respondents challenge that the initiatives, if passed, would cause an impairment of contract citing to Ruano and Bidwell. Resp. Br. at 42-44. The Ruano Court found that just the submission of the initiative would have an adverse impact on bond holders that would impair their contracts. Ruano at 825-29. Bidwell also deals with bond issues. Bidwell at 49-51. These cases can be distinguished from the contract impairment claimed here because no bonds are involved in the instant case.

In considering the constitutional prohibition on the impairment of contract, the Ruano Court states:

It is fundamental that this prohibition reaches any form of legislative action, including delegated legislative activity by a municipal corporation or even direct action by the people.

Ruano at 825. However, the impairment of a public contract is allowed if it “is reasonable and necessary to serve a legitimate public purpose.” Tyrpak v. Daniels, 124 Wn.2d 146, 152, 874 P.2d 1374 (1994). This test is met if police power is legitimately exercised for public purpose and the legislation is reasonable to achieve that purpose. Id. at 156. In the instant case, the police power is being used in a reasonable way to prevent unsafe contamination of public water supplies and to prevent the use of public water

supplies for medicating people without their consent. See App. C-2 and D-2 to Op. Br. With such a valid public purpose and because the initiatives are reasonable to accomplish that purpose, impairment of contract is allowed. The contract allows a court order to relieve the City of its obligation to fluoridate (para. 55, App. E-5 to Op. Br.) and has a repayment provision if the City otherwise terminates (para. 5.9, App. E-6 to Op. Br.).

Further, under more recent case law, this contract impairment challenge is not proper for preelection review because it is a substantive invalidity challenge that is a mere incidental to the fundamental and overriding purpose of the proposed initiatives. Coppernoll at 302.

Respondents raise a substantive invalidity issue when they argue that the OWOC initiative would unconstitutionally transfer property rights. Resp. Br. at 47-48. This also is a mere incidental to the purpose of the initiative and should not be considered in preelection review. Coppernoll at 302.

III. CONCLUSION

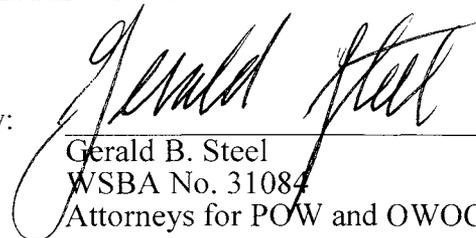
POW and OWOC respectfully request that this Court find that the initiatives are within the scope of the initiative power and order an election.

Dated this 24th day of September, 2007.

Respectfully submitted,

GERALD STEEL PE

By:


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CERTIFICATE OF SERVICE

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I certify that on the 24th day of September, 2007, I caused a true and correct copy of this certificate and Appellants' Reply Brief to be served on the following by first class mail:

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Gerald Steel

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APPENDIX 1 - PAMC 13.28.010

13.28.010
13.28.040

Chapter 13.28

WATER SERVICE - GENERAL PROVISIONS

Sections:

13.28.010	Purpose.
13.28.020	Applicability.
13.28.030	Inspections.
13.28.040	Unlawful Acts Defined.
13.28.050	Hydrants - Authorized Use.
13.28.060	Emergency Interruption of Service.
13.28.070	Cross-Connections Prohibited.
13.28.075	Procedure for Abatement of Unlawful Cross-Connections and Installation of Backflow Devices.
13.28.080	City Not Liable for Damages.
13.28.090	Discontinuance of Service.
13.28.100	Administration.
13.28.110	Violations - Penalty.

13.28.010 Purpose. The purpose of Chapters 13.24 through 13.48 is to establish fees for service, and general rules and regulations for the service and extension of service from the water system of the City; and to promote the public health, safety, and general welfare of the users of the water system, in accordance with standards established by the City, County, State and Federal governments. (Ord. 2181 Ch. 2 §1, 12/3/81)

13.28.020 Applicability. The provisions of Chapters 13.24 through 13.48 shall apply to all water services provided by, and to all work performed by the Department. (Ord. 2181 Ch. 2 §2, 12/3/81)

13.28.030 Inspection.

A. Right of entry by City employees for inspection shall be governed by PAMC 1.20.010.
B. Whenever the owner of any premises supplied by the Department restrains authorized City employees from making such necessary inspections, a reduced pressure principle backflow assembly shall be installed at the owner's expense, or water service may be refused or discontinued. (Ord. 2570 §4, 3/16/90; Ord. 2181 Ch. 2 §3, 12/3/81)

13.28.040 Unlawful Acts Defined.

A. Any person causing damage to any property belonging to the Department shall be liable to the Department for any and all damages resulting either directly or indirectly therefrom.
B. It is unlawful for any person to wilfully disturb, break, deface, damage or trespass upon any property belonging to or connected with the water system of the City, in any manner whatsoever.
C. It is unlawful for any person to store, maintain or keep any goods, merchandise, materials or rubbish within a distance of five feet of, or to interfere with, the access or operation of any water meter, gate valve, fire hydrant, or other appurtenance in use on any water service, connection, water main, or fire protection service. (Ord. 2181 Ch. 2 §4, 12/3/81)

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