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SUPREME COURT NO. 84921-8

SNOHOMISH COUNTY SUPERIOR COURT NO. 10-2-06342-9

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Mukilteo Citizens For Simple Government,

Appellant,

v.

City of Mukilteo, Christine Boughman, Snohomish County,
Carolyn Weikel,

Respondents,

and

Nicholas Sherwood, Alex Rion, Tim Eyman,

Respondent Intervenors.

BRIEF OF RESPONDENTS CITY OF MUKILTEO AND
CHRISTINA BOUGHMAN

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I. IDENTITY OF RESPONDING PARTIES

The responding parties are the City of Mukilteo, a municipal corporation of the State of Washington, and Christina Boughman, Mukilteo City Clerk, collectively referred to as the “City.”

II. RESPONSE TO STATEMENT OF THE ISSUES

Appellant Mukilteo Citizens for Simple Government (“Citizens”) claims that the Superior Court erred by concluding it was “premature to engage in pre-election review of the Initiative even though Washington courts have consistently held that pre-election review is appropriate to determine . . . whether a proposed measure exceeds the scope of the initiative power.” Opening Brief, pp. 1-2. The Superior Court did not rule that it was premature to engage in pre-election review with respect to whether the proposed measure exceeded the scope of the initiative power, as will be discussed below.

Further, the Superior Court’s denial of Citizens’ motion for declaratory and injunctive relief was not in error because whether the Legislature vested power to enact laws regarding automated traffic safety cameras with the City Council is not relevant to the facts before the Court.

III. SUMMARY OF ARGUMENT

The cases cited and arguments made by Citizens apply to a factual situation not present here. Specifically, Citizens accuses the City of “recharacterizing” this matter as an advisory vote. Citizens has improperly characterized the issue from the start. This is not an initiative under the powers of initiative set forth in RCW 35A.11.080 - .100. While it may have started out that way, the question to be submitted to the voters is something different. This case is about whether a City Council can send a question to its voters for voter input, an action clearly within the City Council’s authority.

IV. ARGUMENT

A. **Standard of Review.**

Citizens styles this appeal as “purely legal” issues that the Court reviews *de novo*. Opening Brief, p. 7. The City agrees that this matter involves legal issues, but the determination of the issues depends on the proper reading of the facts in the record. Citizens sought summary disposition of its claims under Civil Rule 56. CP 91. As such, *de novo* review is appropriate, and the Court reviews “all facts and reasonable inferences in the light most favorable” to the City. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005).

B. Pre-election Review is not appropriate because there is no “Initiative” to review.

Contrary to Citizens’ assertion, the Superior Court did not conclude that it was premature to engage in a pre-election review of the scope of the “Initiative.” The Superior Court’s minute entry simply reflected the “matter” was premature. CP 27. In other words, what the City Council determines to do with the input received from the electorate on November 2, 2010, is yet to be determined. If the City amends its existing traffic safety camera ordinance in a manner that is improper a challenge may be made at that time provided a plaintiff has appropriate standing. On this Court’s *de novo* review, the facts demonstrate that the City Council desires to hear from its electorate. CP 84. This is not about a citizen initiative.

C. Whether the proposition exceeds the scope of the initiative power is irrelevant because there is no “Initiative.”

Citizens claims the “Initiative” is beyond the scope of the initiative power because it usurps authority granted to the City Council under RCW 46.63.170. No power of the City Council here is usurped because it is the City Council that will need to take action to amend its traffic safety camera ordinance after the election, should it be the desire of the City Council. The several cases cited by Citizens for the proposition that

powers vested by the Legislature in a legislative authority are not subject to initiative have no application here because those cases deal with citizen attempts to bring initiatives that, if passed, would create new laws in areas where the Legislature expressly granted to the legislative authority the power to enact laws and ordinances. Contrary to Citizens' assertion, the subject question for the November 2, 2010 ballot alone would not enact law. Regardless of the outcome of the election, whether the City Council acts to amend its current traffic safety camera ordinance is yet to be seen. If the City Council takes such action, wholly within the power of the City Council, such action would not run afoul of the Legislature's vesting of that authority in the City Council. Because it is the City Council's action, there is no interference or usurpation of powers by the electorate.

D. The City is not circumventing law because it has the inherent right to seek the opinion of the qualified electorate.

Municipal corporations derive their authority, powers and duties from the state legislature. *Meadowdale Neighborhood Committee v. City of Edmonds*, 27 Wn.App. 261 (1980). As a code city existing under the authority of chapter 35A.11 RCW, the City's general grant of municipal power, conferred under chapter 35A.11 RCW, is:

intended to confer the greatest power of local self-government consistent with the

Constitution of this state and shall be construed liberally in favor of such cities.

RCW 35A.11.050. The Legislature granted the legislative body of each code city "all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law." RCW 35A.11.020. Under chapter 1.14 of the Mukilteo Municipal Code, the City adopted the provisions for initiative and referendum "for the qualified electors of the city" as provided in RCW 35A.11.080 - .100. CP 42. The powers adopted actually belong to the electorate. Here, case law cited by Citizens shows the courts have denied the electorate the ability to demand an initiative or referendum relating to subject areas where the Legislature vested legislative authority in the legislative body of entity. In other words, the cases cited by Citizens provide that the right of the electorate has been denied, not rights of the City Council. As such, under the City's broad powers, with or without the liberal construction that is required under RCW 35A.11.050, the City Council may still forward the question to the electorate to obtain their input. Citizens claims the City's inclusion of language in Resolution No. 2010-22 expressing the City's desire to hear from voters "regardless of whether the subject matter is subject to the initiative process" does nothing to further the City's position (Opening Brief, p. 16), but in fact that language makes clear the City

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Council wants the input from its electorate in a manner that the City Council can only receive by putting the question on the ballot.

Citizens also argues this case does not involve an advisory vote because it is not titled "advisory vote." Opening Brief, p. 15. Citizens' citation to RCW 29A.72.290 in support of its position is misplaced, as that statute only applies to statewide initiatives and referenda. If Citizens was not satisfied with the City's ballot title, Citizens could have challenged the ballot title by filing an appeal pursuant to RCW 29A.36.090, but Citizens has waived its right to challenge under that statute as the time for filing such appeal has run. *See* RCW 29A.36.090.

E. Neither declaratory relief nor injunctive relief is appropriate here.

Citizens' failure to show a clear legal or equitable right to prevent the City Council from sending the question to the voters demands that the question be allowed to remain on the November 2, 2010 ballot.

V. CONCLUSION

Citizens' claim is based on a faulty factual premise. This matter is not about an initiative. This matter does not involve a usurpation of power delegated to the City Council nor does it involve direct legislation. This is about the City Council's desire to hear from its electorate through use of

the ballot. With input from the electorate at the November 2, 2010 election, the City Council may or may not take action to amend its traffic safety camera ordinance. Viewing the facts as they are, the relief sought by Citizens should not be granted because the electorate is not making law: only the City Council can act to amend its traffic safety camera ordinance, consistent with the authority vested in it by the Legislature. As such, the Superior Court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of August, 2010.

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

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Certificate of Service

I, the undersigned, certify that on the 23rd day of August, 2010, I caused a true and correct copy of Brief of Respondents City of Mukilteo and Christina Boughman to be served, by the methods indicated below, on the following persons:

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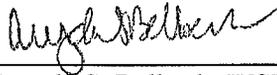
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Greetings:

Attached for filing are the following:

- (1) City of Mukilteo's and Christina Boughman's Answer to Statement of Grounds for Direct Review
- (2) Brief of Respondents City of Mukilteo and Christina Boughman

Mukilteo Citizens for Simple Government v. City of Mukilteo, et al.
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