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No. 84921-8

(Snohomish County Superior Court
No. 10-2-06342--9)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MUKILTEO CITIZENS FOR SIMPLE GOVERNMENT,

Appellant/Plaintiff,

v.

CITY OF MUKILTEO, CHRISTINE BOUGHMAN, SNOHOMISH COUNTY, and CAROLYN WEIKEL,

Respondents/Defendants,

and

NICHOLAS SHERWOOD, ALEX RION AND TIM EYMAN,

Respondents/Intervenor-Defendants.

BRIEF OF RESPONDENTS/INTERVENOR-DEFENDANTS

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TABLE OF CONTENTS

INTRODUCTION 1

I. THIS ACTION IS NOT JUSTICIABLE AND APPELLANT LACKS STANDING 2

II. INJUNCTIVE RELIEF IS NOT WARRANTED 9

III. THIS CASE IS NOT ABOUT THE POWER OF THE INITIATIVE, BUT THE POWER OF THE CITY COUNCIL TO SOLICIT INPUT FROM ITS CITIZENS 9

IV. APPELLANT'S COMPLAINT SEEKS TO STIFLE DEBATE AND ASKS FOR A REMEDY PROHIBITED BY THE FIRST AMENDMENT 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

1000 Friends of Washington v. McFarland,
159 Wn.2d 165 (2006) 8

Amalgamated Transit Union,
142 Wn.2d 183 (2000) 16

Barto v. Himrod,
8 N.Y. 483 (1853) 13

Brower v. State,
137 Wn.2d 44 (1998) 13

Buckley v. American Constitutional Law Foundation, Inc.,
525 U.S. 182 (1999) 14

Coppernoll v. Reed,
155 Wn.2d 290 (2005) 2, 10, 15

Distilled Spirits v. Kinnear,
80 Wn.2d 175 (1972) 8

Diversified Inv. Partnership v. Department of Social and Health Services,
113 Wn.2d 19 (1989) 13

Futurewise v. Reed,
161 Wn.2d 407 (2007). 10

Greater Harbor 2000 v. City of Seattle,
132 Wn.2d 267 (1997) 5

Huntamer v. Coe,
40 Wn.2d 767 (1952) 8

Maleng v. King County Corrections Guild,
150 Wn.2d 325 (2003) 10

Meyer v. Grant,
486 U.S. 414 (1988) 14

Nelson v. Appleway Chevrolet, Inc.,
129 Wn. App. 927 (2005). 2

Ocean Spray Cranberries, Inc. v. Doyle,
81 Wn.2d 146 (1972) 4

Pickering v. Board of Education,
391 U.S. 563 (1968) 15

Primark, Inc. v. Burien Gardens,
63 Wn. App. 900 (1992) 3

Ruano v. Spellman,
81 Wn.2d 820 (1973) 8

State ex rel. Gebhardt v. Superior Court,
15 Wn.2d 673 (1942). 4

State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.,
142 Wn.2d 328 (2000) 12

To-Ro Trade Shows v. Collins,
144 Wn.2d 403 (2001) 2

Vovos v. Grant,
87 Wn.2d 697 (1976) 3

Washington Natural Gas Co. v. Pub. Util. Dist. No. 1,
77 Wn.2d 94 (1969) 8

Statutes

RCW 43.135.041 12

RCW 47.46.030 12

RCW 7.49.020 9

Other Authorities

James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*,
64 Notre Dame L. Rev. 298, 298 (1989). 1

T. Cooley, Constitutional Limitations
169 (7th ed. 1903) 13

INTRODUCTION

Appellant seeks the Court to invalidate city-sponsored Resolution 2010-22, referred to the ballot by a unanimous vote of the Mukilteo City Council, spurred by a citizens initiative, Mukilteo Initiative No. 2, and to prohibit the matter from being placed on the November ballot. Respondents/Intervenor-Defendants Nicholas Sherwood, Alex Rion and Tim Eyman are the original sponsors of Initiative No. 2.

The Appellant's suit itself is not an uncommon political tactic.

> A lawsuit to strike an initiative or referendum from a ballot is one of the deadliest weapons in the arsenal of the measure's political opponents. With increasing frequency, opponents of ballot proposals are finding the weapon irresistible and are suing to stop elections... [I]t is generally improper for courts to adjudicate pre-election challenges to a measure's substantive validity.

James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 Notre Dame L. Rev. 298, 298 (1989).

At its most fundamental level, Appellant's suit is a political tactic to detract Intervenors from their campaign and to encourage Intervenors to expend funds for purposes other than informing the public about Initiative No. 2. Intervenors argue that (1) this suit is not justiciable because Appellant lacks standing, (2) injunctive relief is inappropriate in this case, (3) the challenge is to the power of the duly elected representatives of the

City to seek input from voters and not the power of voters to force the voters into a legislation-making role, and (4) the relief sought by Appellant frustrates free speech interests in prohibiting the ballot as a forum for public debate when that was the forum selected by the City.

I.

THIS ACTION IS NOT JUSTICIABLE AND APPELLANT LACKS STANDING

Appellant's Complaint expressly seeks declaratory relief under Chapter 7.24 RCW, the Uniform Declaratory Judgments Act ("UDJA"), and injunctive relief under Chapter 7.42 RCW. However, "[t]o proceed under the UDJA, a person must present a justiciable controversy and establish standing." *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 938 (2005). In the context of the UDJA, "the requirement of standing tends to overlap justiciability requirements." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 n.5 (2001). As noted by this Court in *Coppernoll v. Reed*, 155 Wn.2d 290, 300 (2005), standing is a "threshold inquiry."

Under the UDJA, a justiciable controversy is one that is:

> (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement.
> (2) between parties having genuine and opposing interests,

> (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
> (4) a judicial determination of which will be final and conclusive

Id. at 411. An analysis of the justiciability and standing doctrines reveals that Appellant has not, and simply cannot, meet these legal requirements.

The present case does not present a justiciable controversy because Initiative No. 2 may never be approved by the voters and, even if approved by the voters, the City Council may choose to ignore the results of the election. It is evident that this suit is the epitome of a "possible, dormant, hypothetical, speculative, or moot disagreement," and that any "harm" suffered by Appellant is merely "potential, theoretical, abstract or academic" at best. *To-Ro*, 144 Wn.2d at 411. Clearly, this case does not present a justiciable controversy.

However, in addition to a lack of justiciability, Appellant lacks standing. Similar to justiciability, standing requires a distinct and personal interest in an issue which is not contingent or a mere expectancy, and more than an abstract interest in having others, such as the City and County official named as defendants herein, comply with Appellant's view of the law. *See Vovos v. Grant*, 87 Wn.2d 697, 699 (1976), *Primark, Inc. v. Burien Gardens*, 63 Wn. App. 900 (1992). Appellant here has

failed to allege concrete harm to it, much less concrete harm caused by Resolution 2010-22 which merely places Initiative No. 2 on the ballot. Appellant cannot demonstrate standing.

In deciding whether an Appellant has standing, courts have looked at whether the Appellant has a special or peculiar interest which has been aggrieved any differently in kind or degree than what is experienced by the general public. *See Ocean Spray Cranberries, Inc. v. Doyle*, 81 Wn.2d 146, 154 (1972); *State ex rel. Gebhardt v. Superior Court*, 15 Wn.2d 673, 680 (1942).

At most, Appellant establishes that it and/or its members have certain **beliefs** and **positions** about how the City Council should go about making legislative decisions regarding traffic control cameras. For instance, the Declaration of Christine Preston states:

> [t]he association's **members believe** that it is in the public interest to support the authority of Mukilteo elected officials to act as the duly-elected representatives of Mukilteo citizens.
>
> .. it is **[Appellant's] position** that the Mukilteo City Council has exclusive authority to decide whether or not Mukilteo should use automated traffic safety cameras. ...
>
> It is inefficient and a **waste of resources** to put measures on the ballot that the state legislature has already decided the City Council should handle.

CP 100 (Declaration of Christine Preston, at 2, ¶¶ 3, 4, 5 (emphasis added)).

The organization's beliefs and positions are simply not a special or peculiar interest which is different in kind or degree than that shared by the general public. Rather, it is merely an abstract interest in having the City comply with the organization's view of the law in regard to citizen input on proposed legislation.

In the Superior Court, Appellant made vague references to the need to avoid a "waste of resources." *See* CP 89-90, at 3-4 (quoting Declaration of Christine Peterson (CP 100)). In response, Intervenor-Defendants argued that Appellant did not establish any of the criteria for taxpayer standing.

In order to have taxpayer standing, the taxpayer must first have a request to and a refusal from the Attorney General to prosecute the action. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281-82 (1997). Additionally, the taxpayer must have

> **a unique right or interest** that is being violated, in a manner **special and different from the rights of other taxpayers**." The taxpayer must show that the action complained of interferes with the taxpayer's legal rights or privileges. If not, the taxpayer has no standing to challenge the action.

Id. (emphasis added).

Having met none of those requirements, in its reply, Appellant claimed that it "**has not asserted taxpayer standing**." Intervenor-Defendants' Answer to Motion for Accelerated Review, Exhibit B, at 5 n. 3 (emphasis added). Apparently, Appellant wants to have its cake and eat it too. It wants to use public expense as the justification for both accelerated review and standing, but does not want to bother establishing that it has met the taxpayer standing requirements to assert interests in protecting against unnecessary public expense.

Nor has Appellant shown that the City Council's decision in Resolution 2010-22 to place Initiative No. 2 on the ballot has violated some "unique right or interest" that it (or its members) possess which is "special and different" from the public at large. Appellant simply does not like the City Council's decision to allow a public vote and such preferences do not constitute a unique right or interest. Even if its complaints about the City's Resolution No. 2010-22 were valid, its issue with the resolution involves no unique rights.

Appellant's interest in invalidating Resolution 2010-22 and prohibiting a public vote on Initiative No. 2 is completely abstract. Although many people may wish that particular matters were not on the ballot, the "injury" in having an opportunity to vote on Initiative No. 2 is

imperceptible and one that is not "special or peculiar" to Appellant or its members. Rather, disagreements regarding public policy are the natural product of our free society.

Although not clear from its briefing, Appellant may be claiming an interest in avoiding the expenditure of its own funds to influence voters regarding the measure. Yet, nothing requires it to make any expenditures. While such an interest may be unique to Appellant, it is not an interest which the Court should recognize as legally sufficient to confer standing. If the mere choice to oppose a proposed measure was sufficient to confer standing, the standing requirement itself would be rendered a nullity. Lobbyists would become litigators and legislative processes would likely come to a halt if anyone opposed to a potential law could simply sue on the basis that they do not want to go to the trouble to oppose it.

As the Court is well-aware, there are several instances in which the Court has decided the validity of local initiatives before the election in cases where the initiative was alleged to be beyond the scope of the initiative power. However, in no case has the Court held that private litigants may obtain pre-election review of an initiative without meeting standing requirements.

Appellant's briefing contains a footnote that it asserts shows that the Court can dispense with standing requirements if the case is of "serious public importance and immediately affects substantial segments of the population" and has a direct bearing on commerce or industry. Appellant's Opening Brief at 9 n.1 (quoting *Washington Natural Gas Co. v. Pub. Util. Dist. No. 1,* 77 Wn.2d 94, 96, 459 P.2d 633 (1969)). Appellant overstates the significance of *Washington Natural Gas*. There, the Appellant had some interest as a customer of the gas company. When combined with the **statewide** public importance, the Court chose to resolve the issues. *Id.* Here, the issue is not one of statewide importance, and there is simply no interest of the Appellant at stake other than its opinions or beliefs. [1]

---

[1] Appellant relied on the following cases to defend standing in the Superior Court. None indicate that standing requirements need not be met. *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165 (2006) (standing of a private organization did not come up because the county itself sued to prohibit the referendum); *Ruano v. Spellman,* 81 Wn.2d 820 (1973) (citizen suing to stop county actions which might interfere with an initiative; citizen was not suing to stop a vote on the initiative); *Distilled Spirits v. Kinnear,* 80 Wn.2d 175 (1972) (standing was not at issue because the case was a challenge to a tax on liquor by someone who paid the tax; the "public interest" in the issue was the reason for not applying the enrolled bill doctrine); *Huntamer v. Coe,* 40 Wn.2d 767 (1952) (declaratory judgment appropriate to consider legality of requiring candidates for public office to swear they did not belong to a subversive organization when plaintiffs were people who intended to be candidate for public office).

The Court should deny Appellant the relief it seeks because it lacks standing and the dispute at this stage is not justiciable.

II.

INJUNCTIVE RELIEF IS NOT WARRANTED

Additionally, to obtain an injunction—extraordinary relief—Appellant must prove that if the election were to go forward, it "would create great injury to the Appellant." RCW 7.49.020. While citing pre-election review cases where the local government did not want an initiative on the ballot and received an injunction, Appellant cites no cases where an outsider to the legislative process can obtain an injunction without showing harm. Appellant provides no evidence that it or its members are harmed in having a public vote so the representatives serving on the City Council can learn what their constituents believe about a particular topic. The absence of harm is a further reason to deny relief.

III.

THIS CASE IS NOT ABOUT THE POWER OF THE INITIATIVE, BUT THE POWER OF THE CITY COUNCIL TO SOLICIT INPUT FROM ITS CITIZENS

Pre-election review of matters slated for the ballot is highly disfavored. This disfavor is for obvious and well-established reasons:

> The fundamental reason is that "the right of initiative is nearly as old as our constitution itself, deeply ingrained in

> our state's history, and widely revered as a powerful check and balance on the other branches of government." [*Coppernoll v. Reed,* 155 Wash.2d 290, 297, 119 P.3d 318 (2005).] Given the preeminence of the initiative right, preelection challenges to the substantive validity of initiatives are particularly disallowed. *Id.* at 297, 119 P.3d 318. Such review, if engaged in, would involve the court in rendering advisory opinions, would violate ripeness requirements, would undermine the policy of avoiding unnecessary constitutional questions, and would constitute unwarranted judicial meddling with the legislative process. *Id.* at 298, 119 P.3d 318. Thus, preelection substantive challenges are not justiciable. *Id.* at 300-01, 119 P.3d 318. Further, substantive preelection review could unduly infringe on the citizens' right to freely express their views to their elected representatives. *Id.* at 298, 119 P.3d 318.

Futurewise v. Reed, 161 Wn.2d 407, 410-11 (2007).

Hence, the general rule is that courts do not rule on the validity of an initiative before its adoption. *Maleng v. King County Corrections Guild*, 150 Wn.2d 325, 300 (2003). "This reluctance stems from our desire not to interfere in the electoral process or give advisory opinions." *Id.* at 330. The presumption is that the power of initiative is allowed and the burden is on the challenger to the initiative to show otherwise. *Id.* at 334.

This case has even more potential ripeness problems than cases where the voters are seeking to force a vote on an initiative. Not only might the voters reject the measure at the polls, here there is no certainty

as to how the City Council would respond to the results of the November vote.

Appellant notes that the exception to pre-election challenges is when an initiative is challenged as being beyond the scope of the initiative power. However, in all of those cases voters were seeking to force an election on a subject which was beyond the scope of the initiative power.

This case is unique in that Appellant's challenge is not to the power of the **voters** to force an initiative on city government, but rather a challenge to the power of the **City** to seek the input of its citizens by placing a matter before them on the ballot All of the cases which Appellant cites for authority for a court to review an initiative prior to the election are ones in which the governmental entity chose not to place a matter on the ballot or sued for court authority to enable it to refrain from placing a matter on the ballot.

In contrast, the City Council chose to seek a public vote. Resolution 2010-22 states that the City received an initiative petition.

> The City Council desires to hear from the qualified electorate on the issues addressed in the Initiative Petition, **regardless of whether the subject of the Initiative is subject to the initiative process.**

CP 84 (emphasis added). The vote which Appellant seeks to enjoin is not about the initiative power, but the ability of the City to hear from the electorate.

Here, a unanimous vote of the Mukilteo City Council essentially declared that it did not matter whether the subject matter was properly the subject of an initiative; it chose to seek a public vote regardless. Initiative No. 2 is on the ballot, not because sufficient signatures were submitted on a petition, but because the City Council chose to pass Resolution 2010-22. Appellant's challenge is not to the exercise of the voters' initiative power, but to the City's power to seek input from its citizenry. Appellant has cited no authority that prohibits a city or any government entity from seeking the advice of its citizens through the election process.

While the face on the initiative does not assert that it is an advisory vote, if the voters approve the measure it could be simply treated as one. The use of advisory votes to solicit voter input is nothing new. *See State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328 (2000) (legislature authorized an advisory vote); *see also* RCW 43.135.041 (requiring advisory votes for tax increases); RCW 47.46.030(3) (advisory votes for traffic proposals). This dispute is

premature because both the vote results and the City's response to the vote are unknown.

Even if the City chose not to use Initiative No. 2 in an advisory function and the City Council were to treat Initiative No. 2 as enacting an ordinance if the measure is approved, it would simply be an example of conditional legislation. Legislative bodies have the authority both to refer a measure to the people and to condition the effectiveness of an enactment upon the happening of a future event, in this case a positive vote of the people. *Brower v. State*, 137 Wn.2d 44 (1998). When the City Council did so in this case, it was exercising its own legislative power. *Diversified Inv. Partnership v. Department of Social and Health Services*, 113 Wn.2d 19 (1989).

> When a law is made to take effect upon the happening of such an event, the legislature in effect declare the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to no other [persons] to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the Constitution imposes upon them."

T. Cooley, Constitutional Limitations 169 (7th ed. 1903) (quoting *Barto v. Himrod*, 8 N.Y. 483, 490 (1853)).

While the legislature gave the City of Mukilteo the authority to decide whether to include automatic ticketing machines (red light and

speed cameras), it did not dictate how that legislative decision must be made. It did not dictate the number or manner of public hearings or debate on the issue. To the point here, the legislature did not instruct cities to refrain from soliciting the input of their citizens on the question generally, and not to prohibit an election specifically.

IV.

APPELLANT'S COMPLAINT SEEKS TO STIFLE DEBATE AND ASKS FOR A REMEDY PROHIBITED BY THE FIRST AMENDMENT

Appellant seeks the extraordinary remedy of prohibiting a city-wide election on an issue the City has decided should be put to the voters. Such a remedy has significant free speech and right to petition government implications, founded in the First Amendment to the United States Constitution and Article I, Sections 4, 5, and 19 of the Washington Constitution.

The United States Supreme Court has made clear that the process involved in proposing legislation by means of initiative involves core political speech. *See Meyer v. Grant*, 486 U.S. 414 (1988) (overturning state's prohibition on using paid petition circulators); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (overturning various registration requirements for petition circulation). Also, the U.S.

Supreme Court has noted that the core value of the Free Speech Clause of the First Amendment is the public interest in having free and unhindered debate on matters of public importance. *See Pickering v. Board of Education*, 391 U.S. 563 (1968).

This Court echoed these same concerns in *Coppernoll v. Reed,* 155 Wn.2d.290 (preelection review of an initiative can infringe upon the constitutional rights of the people). In *Coppernoll*, opponents of a proposed initiative on tort reform petitioned the Washington State Supreme Court to reverse a trial court order dismissing their action to enjoin the Secretary of State from placing three sections of the initiative on the ballot arguing that those sections were unconstitutional. *Id.* at 3. The Supreme Court held that the proposed initiative did not exceed the scope of the legislative power and ordered the Secretary of State to place the initiative on the general election ballot. *Id.* at 9. In reaching this conclusion, the Court recognized its historical practice of refraining from inquiring into the validity of a proposed initiative before it is enacted. *Id.* at 4. The Court also recognized that First Amendment rights were implicated in preelection review.

> Because ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the

> measure), substantive preelection review may also unduly infringe on free speech values.

Id. at 5 (emphasis added). The Court noted that after the trial court invalidated Initiative 695 (requiring $30 vehicle license tabs) at issue in *Amalgamated Transit Union*, 142 Wn.2d 183 (2000), the Legislature quickly responded by passing an almost identical measure that was subsequently signed by the Governor. *Id.* at 4. The point of the example is that by exercising the right to initiative, the people exercised their First Amendment right to petition the government.

Striking a matter from the ballot based on pre-election review always raises First Amendment concerns. However, there is a significant reason why pre-election review should not result in striking this matter.

The legislative authority, the City Council of the City of Mukilteo wants public input on this issue regardless of whether the public can force a vote through the initiative power. Because the City has set up this issue as a matter for public dialogue and debate through an initiative campaign, it would violate the free speech interests in prohibiting the voters from expressing their views at the ballot box.

Appellant's claims fail to recognize that the campaign and vote itself for this measure is a valid expression of political speech, and that such expression is still fulfilled even if it is rejected by the voters,

accepted by the voters but ignored by the City Council, or enacted and subsequently invalidated by judicial decree. Clearly, the relief Appellant seeks is foreclosed by the historical protection of the right of people to vote in the initiative process.

Public votes on issues, even when a majority of voters reject them, serve the people and our system of government in many positive ways. Just as the Legislature considers bills that may or may not be signed into law by the Governor, so too, the people must be free to discuss and debate initiatives and their policies even if they never become law.

CONCLUSION

Respondents/Intervenor-Defendants urge the Court to affirm the Superior Court and deny Appellant's request for declaratory and injunctive relief.

RESPECTFULLY submitted this 23rd day of August, 2010.

GROEN STEPHENS & KLINGE LLP

By: *_____/s/Richard M. Stephens_____*
Richard M. Stephens, WSBA #21776
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DECLARATION OF SERVICE

I, Linda C. Hall, declare as follows pursuant to GR 13 and RCW 9A.72.085:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On August 23, 2010, I caused the foregoing document to be served on the following persons via the following means:

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

Executed this 23rd day of August, 2010, at Bellevue, Washington.

/s/ Linda Hall
Linda Hall

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To the Clerk of the Supreme Court:

In the matter of Mukilteo Citizens for Simple Government v. City of Mukilteo, Supreme Court Case No. 84921-8, attached for filing with the Court is Brief of Respondents/Intervenor-Defendants. Thank you for your assistance in this matter.

Linda Hall, Legal Secretary to
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