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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 91551-2

Case Number 318877

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Spokane Entrepreneurial Center, Spokane County, Downtown Spokane Partnership, Greater Spokane Incorporated, The Spokane Building Owners and Managers Association, Spokane Association of Realtors, The Spokane Home Builders Association, The Inland Pacific Chapter of Associated Builders and Contractors, Avista Corporation, Pearson Packaging Systems, William Butler, Neil Muller, Steve Salvatori, Nancy McLaughlin, Michael Allen, and Tom Power,

Respondents,

v.

Envision Spokane,

Appellant,

and

Vicky Dalton in her official capacity as Spokane County Auditor, and City of Spokane,

Respondents,

and

Spokane Moves to Amend the Constitution,

Defendant.

APPELLANT'S REPLY BRIEF

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March 7, 2014

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Argument

The parties all agree that the Community Bill of Rights, an initiative to amend the City of Spokane's home rule charter, was properly placed on the ballot. After that process, Challengers used arguments that exceeded the bounds of pre-election challenges to convince the trial court to declare all the substantive provisions of the initiative facially invalid. Challengers' arguments run counter to established case law on the scope of pre-election challenges, particularly by wading into issues concerning the direct authority of the local government itself – issues of applied constitutionality and preemption. Further, even if Challengers' arguments do not exceed the bounds of pre-election challenges, the municipality and the people of the City have the inherent authority to recognize rights for the protection of health, safety, and general welfare. This right to local self-governance was violated by striking this initiative.

This Court should declare the provisions of the Community Bill of Rights valid for electoral consideration and order the City to place the initiative on the next available ballot.

I. Contrary to the arguments raised by the Challengers, pre-election review is narrow and disfavored.

The court only reviews this initiative in this pre-election challenge for whether the power to act has been delegated to the local legislative

body, whether the action is administrative, and whether the initiative attempts to wield a state or federal power.

A. Challengers bear a beyond a reasonable doubt burden of proof, and every presumption, inference, and interpretation must be made in favor of the initiative's electoral validity.

In a pre-election review, the general rules of statutory construction apply.[1] Challengers bear a beyond a reasonable doubt burden of proof. *E.g.*, *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013) (citations omitted); *State v. Somerville*, 67 Wash. 638, 122 P. 324 (1912) (upholding a labor law even against a substantive due process challenge during the *Lochner* era). The challenged law is presumed constitutional. *E.g.*, *League of Educ. Voters*, 176 Wn.2d at 818, 295 P.3d 743; *Wash. Ass'n for Substance Abuse and Violence Prevention v. State*,

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1 The same general rules of statutory construction used for a statute apply when a court reviews a charter, an initiative, or an ordinance. *City of Seattle v. Auto Sheet Metal Workers Local 387*, 27 Wn. App. 669, 679-80, 620 P.2d 119 (1980) (citing *Winkenwerder v. Yakima*, 52 Wn.2d 617, 632, 328 P.2d 873 (1958)) (additional citations omitted) (applying statutory construction rules to a charter), *overruled on other grounds by City of Pasco v. Public Emps. Relations Comm'n*, 119 Wn.2d 504, 511-12, 833 P.2d 381 (1992); *Roe v. TeleTech Customer Care Mgmt. LLC*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011) (citations omitted) (applying statutory construction rules to initiatives); *Am. Legion Post No. 149 v. Dept. of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008) (citations omitted) (same); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392, 816 P.3d 18 (1991) (citations omitted) (applying statutory construction rules to an ordinance, including rule of construing the law "so as to uphold its constitutionality"). There is generally one statutory construction standard regardless of whether the law is local or state, or created by the people or the legislature.

174 Wn.2d 642, 654, 278 P.3d 632 (2012). "Every reasonable presumption will be made in favor of the validity of a statute." *Paramino Lumber Co. v. Marshall*, 27 F. Supp. 823, 824 (W.D. Wash. 1939) (quotation omitted).

Multiple interpretations are resolved in favor of the law's validity. *E.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 671, 72 P.3d 151 (2003) (citations omitted); *Poolman v. Langdon*, 94 Wash. 448, 457, 162 P. 578 (1917). The court does not speculate about possible hypothetical invalid applications of a law. *See, e.g.*, *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1021 (9th Cir. 2010) (citations omitted). Instead, the law is justified by merely any valid state of facts. *E.g.*, *State v. Kitsap Cnty. Bank*, 10 Wn.2d 520, 526, 117 P.2d 228 (1941) (citation omitted).

In addition, as a first class city, Spokane is self-governing. *E.g.*, *City of Seattle v. Sisley*, 164 Wn. App. 261, 266, 263 P.3d 610 (2011) (citation omitted). Doubt concerning the existence of power is resolved in favor of first class cities. *E.g.*, *State ex rel. Schillberg v. Everett Dist. Justice Ct.*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979) ("A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." (citations omitted)). The court must attempt to harmonize state and local law. *E.g.*, *City of Seattle v.*

Wright, 72 Wn.2d 556, 559, 433 P.2d 906 (1967) ("A state statute is not to be construed as impliedly taking away an existing power of a city of the first class if the two enactments can be harmonized." (citing *Ayers v. Tacoma*, 6 Wn.2d 545, 554, 108 P.2d 348 (1940))).

Against these presumptions, Challengers' arguments rely on fishing for a worst-case application of the Community Bill of Rights provisions, then relying on that allegedly invalid application of the law to strike the entire initiative. This kind of argument ignores the applicable rules of statutory construction, where Challengers bear every burden. It ignores the Court's duty to harmonize the local law with applicable state or federal law, which is clearly possible here.

B. The Neighborhood Rights and Environmental Rights provisions do not interfere with powers legislatively delegated to the local legislative body, despite Challengers attempt to expand the delegation rule.

When the state legislature delegates a specific power to act to the local legislative body, a local initiative may not interfere with that power.[2] Opening Br. 10-14. Otherwise, the people may take that action by initiative. *Id.* Professor Trautman suggests that "the general predisposition in favor of participation by the people" requires "the court in doubtful cases to sustain the use of the initiative and referendum."

2 This review standard does not apply to state-wide initiatives. That difference is the reason why many courts say that local initiative power is narrower.

Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 83 (1973).[3]

The legislature has not delegated to the Spokane City Council or other local body the powers in the Neighborhood Rights provisions nor the Environmental Rights provisions. Therefore, the power to recognize the rights in these provisions is available to the people through initiative.

Unable to find a specific delegation of these powers to the local legislative body, Challengers attempt to expand the scope of this rule by asking the Court to hold that the legislature has delegated all land-use and water law powers to local legislative bodies. This requires two unfounded assertions. First, Challengers claim that all land-use and water law powers are governed by the Growth Management Act ("GMA"). *But see, e.g.*, *Woods v. Kittitas Cnty.*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007) ("Because the GMA does not provide for it, we hold that a site-specific rezone cannot be challenged for compliance with the GMA."). Second, Challengers claim that all local authority under the GMA is delegated to local legislative bodies. *But see, e.g.*, *Snohomish Cnty. v. Anderson*, 123 Wn.2d 151, 868 P. 116 (1994) (voiding a referendum because the local

3 The paragraph in which this sentence sits was favorably quoted in *1000 Friends*, but this particular sentence was replaced with an ellipsis, an omission that allowed the *1000 Friends* court to reach the opposite inference from what Professor Trautman advocated. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 177, 149 P.3d 616 (2006); *see also* Opening Br. 11 n.5.

legislative body acted under RCW 36.70A.201(2), which is a *particular* GMA statute that *expressly* delegated *that specific* decision-making authority to the local legislative body)[4]; *see also Woods*, 162 Wn.2d at 612, 174 P.3d 25 (GMA is not to be liberally construed). Both of Challengers' assertions are incorrect and contradict the proper analysis where legislative override of local authority is narrowly construed. *See, e.g.*, *Whatcom Cnty. v. Brisbane*, 125 Wn.2d 345, 355-61, 884 P.2d 1326 (1994) (Madsen, J., dissenting).

C. The Neighborhood Rights and Environmental Rights provisions are not administrative, as they enact a new plan or policy, and Challengers' attempt to expand the rule is inappropriate.

Washington Constitution Article II, Section 1, vests the legislative power. Because the initiative authority reserved by the people is described in this section, the courts require initiatives to be legislative in nature. Opening Br. 14-16. Courts apply this rule to state-wide and local initiatives, invaliding initiatives that are administrative in nature.[5]

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4 The precision of this decision was ignored in subsequent interpretations of *Anderson*. *See City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 388, 93 P.3d 176 (2004) (interpreting *Anderson's* holding to apply to the entire GMA chapter).

5 City of Spokane Charter Article XIV, Section 125 provides that the initiative process is used to propose charter amendments. Thus, this case is not governed by *Ford*, which voided a charter amendment initiative when the local government's charter had not authorized initiatives to amend the charter. *See Ford v. Logan*, 79 Wn.2d 147, 151-54, 483 P.2d 1247 (1971).

The Neighborhood Rights provisions and Environmental Rights provisions recognize rights for public participation, ecosystem protection, and a healthy environment. These are broad, new policies – not analogous to permit approvals or the other parcel-specific administrative actions at issue in the cases cited by Challengers. Creating these new policies is not administrative.

Challengers attempt to expand the definition of administrative actions to include any action that concerns a subject matter that is already regulated in some way. Since almost every subject has some regulations, the logical result of Challengers' rule would be that no subjects are available to the initiative.[6] The court should not allow this dramatic expansion of this rule, as this exception would then swallow the general rule disfavoring pre-election challenges.

D. The Environmental Rights, Workplace Rights, and Remedy provisions do not attempt to wield a state or federal power, which is the only other substantive criteria for striking an initiative, despite Challengers' claims to the contrary.

Successful pre-election challenges show that the initiative violates one or both of the above two standards. There are two exceptional cases, however, both holding the initiative attempted to wield a "higher"

6 "If a state standard-setting or regulatory law was considered to determine both the ceiling as well as the floor for regulation, there would be no space for local regulation once the state had acted." Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URBAN LAWYER 253, 264-65 (2004).

government's power. Opening Br. 16-17. An initiative cannot commandeer a federal power. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 991 P.2d 389 (1996). Nor can a local initiative commandeer a state power. *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980).

The Environmental Rights provisions, Workplace Rights provisions, and the Remedy provision do not attempt to wield a state or federal power. Opening Br. 18-24. Rather, they recognize purely local rights and enforcement of those rights through the City's Charter.

In order to argue otherwise, Challengers ask the Court to abandon the proper statutory construction rules, exceed the proper pre-election challenge rules, and narrow the scope of the local government's power. Challengers argument goes way beyond issues of the scope of the local initiative power and into issues of what is *ultra vires* for the local government itself. Challengers attempt to expand the scope of pre-election review to include hypothetical applications of a proposed law. This rewrites the rules of pre-election challenges.[7]

7 "Recognizing the importance of the initiative power, however, this court has allowed for pre-election review only in rare circumstances, consistently making the distinction that while a court may decide whether the initiative is authorized by article II, section 1, of the state constitution, it may not rule on the constitutional validity of a proposed initiative." *Philadelphia II*, 128 Wn.2d at 717, 911 P.2d 389 (citing *Seattle Bldg.*, 94 Wn.2d at 745-46, 620 P.2d 82 (concerning a *local* initiative)).

The Remedy provision provides that the proper remedy when a corporation violates the bill of rights is that the corporation loses its powers to cause further violation. Opening Br. 21-23. This is a reasonable remedy that is explicitly narrowly-tailored to the City's local health, safety, and welfare concerns.

Challengers contend that this will interfere with their alleged constitutional rights. Challengers do not, however, proceed to suggest any kind of constitutional analysis to determine whether the Remedy provision passes the appropriate level of scrutiny. Instead, Challengers seem to say that the mere existence of alleged corporate constitutional rights makes any local law invalid. They want to completely bypass constitutional balancing tests (which are not part of the pre-election challenge anyway).

No person – or entity – has constitutional rights that are so heavy that they break the scales of justice and avoid any judicial balancing. Corporate "rights" must be *balanced* against the government's interests. The proper time to apply the appropriate constitutional balancing test is not in a pre-election challenge under hypothetical facts.[8]

8 Courts allow the delegation and administrative pre-election challenge standards "because postelection events will not further sharpen the issue." *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005). But the broad substantive validity test that Challengers propose hinges on post-election events: whether a law is constitutional when applied to a given set of facts.

Even if general constitutionality were considered in a pre-election challenge, the proper remedy for Challengers' hypothetically invalid

II. The City has the authority to recognize greater human rights and environmental protections than the minimum floor provided by state or federal law, and Challengers' attempts to minimize this authority has dangerous implications for all local government power.[9]

As a home rule government, the City of Spokane has plenary police powers within its borders. Opening Br. 25-29. The City may pass

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applications of the Community Bill of Rights is not to render the law "totally inoperative," as that is the remedy for a facial challenge. *State v. Hunley*, 175 Wn.2d 901, 916, 287 P.3d 584 (2012) (citing *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)). Instead, Challengers' hypotheticals (if they were entertainable in a pre-election challenge) should be resolved by as-applied challenges, where "'[h]olding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated.'" *Id.* (quoting *Moore*, 151 Wn.2d at 669, 91 P.3d 875).

Challengers ask the court to presume hypothetical facts that would allegedly render the proposed initiative invalid in that context, and then to use that invalid context to rule the initiative would be invalid in all applications, and should therefore be voided in the pre-election stage. This goes way beyond the proper scope of a pre-election challenge, where the court only decides if a provision could ever be valid, or not. Even if as-applied constitutional challenges were proper at this time, the Challengers have not proposed any constitutional analysis for the Court to work with – not even arguing for a blanket appeal to strict scrutiny to kick the burden back to the law's proponents.

9 Home rule government power and the right to local self-government are properly argued before this Court. RAP 2.5(a)(3) allows consideration of "manifest error affecting a constitutional right." These arguments also concern substantial justice and the interests of the public at large:

> "A reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. . . . Even though the matter was not raised below, the courts have frequently recognized that error may be considered for the first time on appeal where the matter in question affects the public interest. . . . When the question

any law not contrary to some public policy of the state. *Id.*

The Community Bill of Rights furthers community participation, ecosystem protection, environmental health, and human rights. These goals are not contrary to state policies and they apply only within the city limits. The Community Bill of Rights provisions are easily harmonized with state and federal law and are within the authority of a home rule government.

III. The people of Spokane have the right to protect their health, safety, and welfare; this is the right to local self-government that the courts are obligated to protect.

The people have the power to create rights-protecting laws. Opening Br. 28-43. "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are *established* to protect and maintain individual rights." CONST. art. I, § 1 (emphasis added). This includes the power to protect the natural

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> is of such a nature that the present welfare of the people at large, or a substantial portion thereof, is involved, a departure from the general rule is warranted . . . ."

Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 622, 465 P.2d 657 (1970) (quoting 5 AM. JUR. 2D *Appeal and Error* §§ 548-49, 551 (1962)).

These arguments implicate Washington Constitution Article I, Sections 1, 30, and 32, and Article XI, Sections 10, and 11. *See* Opening Br. 25-43. Both the municipality and the people of the City have the inherent authority to adopt the Community Bill of Rights. To not hear these arguments could lead to a holding that completely ignores those rights, with detrimental consequences for democracy throughout this state. This is sufficient manifest error to warrant consideration under RAP 2.5(a)(3), fundamental justice, the public interest, or all three exceptions.

environment, upon which all health and safety ultimately depends. The courts, state law, and federal law cannot nullify the people's authority to "protect and maintain" their rights.

The Community Bill of Rights recognizes rights, providing constitutional protections through the local constitution. This is the most fundamental political act the people can take. Such law-making is immune from state or federal preemption, in the same way that state constitutional rights that are broader than analogous federal rights are not preempted by federal law.[10]

The courts must not interfere with the people's right to local self-government – their fundamental ability to agree to laws to protect themselves.

IV. Procedural issues of severability and the ballot title are not barriers to the Court ordering that the Community Bill of Rights appear on the ballot.

None of the Challengers' or City's procedural hurdles prevent the Court from ordering the Community Bill of Rights back onto the ballot.[11]

10 For example, the Federal Fourth Amendment does not preempt the broader protections provided by Washington Constitution Article I, Section 7. *See, e.g.*, *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

11 *League of Education Voters* provides the proper analysis for resolving a multipart initiative that contains a severability clause, like the Community Bill of Rights. 176 Wn.2d at 827-28, 295 P.3d 743. The same rule can resolve the City's concern regarding the intent of petition signers. City's Resp. Br. 20-21. The people's intent to recognize community rights would not go away if one or more of the provisions

Indeed, the County Auditor's response brief solves Challengers' and City's ballot title concern when the Auditor appropriately suggests that the proper remedy to the trial court's injunction is an order directing the City to take the necessary steps to ensure the Community Bill of Rights is placed on the ballot.[12]

Conclusion

All the parties agree that the proper process was followed to get the Community Bill of Rights on the ballot. The trial court's removal of the Charter amendment initiative exceeded the bounds of a pre-election challenge. The people and the City have the authority to adopt the provisions of the Community Bill of Rights. The Court should declare that each provision is valid, and order the City to place the Community Bill of Rights on the next available ballot.

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were held invalid.

12 "If this Court were to determine there are valid parts of the Initiative that were improperly enjoined from appearing on the 2013 General Election ballot, the courts needs to direct the City of Spokane, and not the Spokane County Auditor, to place them on the next available ballot. . . . Preparation of ballot titles and passing resolutions calling for an election on city measures are all imposed on the municipality . . . ." County Auditor's Resp. Br. 6.

Respectfully submitted on March 7, 2014,

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Community Environmental Legal Defense Fund

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Declaration of Service

I declare under penalty of perjury and the laws of the State of Washington that on March 7, 2014, I sent a true and correct copy of this filing by e-mail, per counsels' prior agreement under GR 30(b)(4), to the following:

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