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SUPREME COURT  
STATE OF WASHINGTON  
Mar 21, 2016, 2:18 pm  
BY RONALD R. CARPENTER  
CLERK

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RECEIVED BY E-MAIL

# EXHIBIT 1

**Island County Superior Court Decision  
Reviewing and Approving County Decision to Retain Counsel,  
without attachment, April 20, 2015**

**(CP 1343-49)**



**SUPERIOR COURT OF THE STATE OF WASHINGTON**

**FOR ISLAND COUNTY**

*Law & Justice Facility, 101 NE 6<sup>th</sup> St, PO Box 5000, Coupeville WA 98239-5000  
Phone: (360) 679-7361 Fax: (360) 679-7383*

**ALAN R. HANCOCK**

*Judge*

**VICKIE I. CHURCHILL**

*Judge*

**ANDREW SOMERS**

*Court Administrator*

April 20, 2015

**RECEIVED**

Hon. Helen Price Johnson, Chair  
Board of County Commissioners  
P.O. Box 5000  
Coupeville, WA 98239

**APR 20 2015**

**ISLAND COUNTY  
COMMISSIONER'S OFFICE**

Hon. Jill Johnson, Member  
Board of County Commissioners  
P.O. Box 5000  
Coupeville, WA 98239

Hon. Richard Hannold, Member  
Board of County Commissioners  
P.O. Box 5000  
Coupeville, WA 98239

Re: Contract for special attorney services

Dear Members of the Board:

You have unanimously asked us to approve a contract for special attorney services to be provided to the Board of County Commissioners as outlined in Section 2 of Exhibit A attached to the resolution authorizing the contract.

These services include:

1. Advising the Board of County Commissioners on long-term legal strategy, relevant legal requirements, and the GMA framework for planning.
2. Coordinating and consulting with relevant County Departments on development of proposed legislation.
3. Advising on the anticipated review process and structure for considering proposed legislation.
4. Reviewing and advising on proposed legislation.

5. Defending adopted legislation or resolving disputes through other means, such as settlement, as directed.

The authority under which you seek this approval is RCW 36.32.200, which provides:

*"It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.*

*"Any contract written pursuant to this section shall be limited to two years in duration."*  
(Emphasis added.)

Prosecuting Attorney Gregory Banks has advised us that he objects to us approving this contract. He has sent us a memorandum in which he argues that the statute authorizing us to approve the contract is unconstitutional. We are enclosing a copy of his memorandum in this regard. Note that he heads his memorandum with a capitalized statement that it is exempt from public disclosure and should not be disseminated. As the clients in this situation, we are the ones who decide whether we should assert the attorney-client privilege or the work product privilege in a particular matter. We decline to assert these privileges, and we are therefore making this memorandum available for public inspection and copying.

As far as the practical reasons for approving this contract are concerned, it is our understanding that the board has publicly expressed its desire for a successful, coherent, integrated and legally defensible comprehensive plan update. The board needs counsel with special expertise in Growth Management Act issues who can provide legal and strategic advice during the update process to help guide the board in its policy-making decisions. The board would like for this technical land use expertise to be made available to county long range planners, who have the responsibility of drafting code and regulation language during the update process. The board's intention is to create a cooperative relationship between an experienced land use expert and the prosecuting attorney's office to ensure open communication and augment the talents that exist in the prosecutor's office. Mr. Banks has advised the board that his office is working at capacity and that his office is unable to provide the board with strategic advice. Mr. Banks has acknowledged that his office's work on the comprehensive plan update is subject to limitations that he says the board has placed on his office by the board's budget decisions.

It is also our understanding that the board believes that the prosecuting attorney's office does not have the necessary expertise "in-house" to perform all of the required tasks in connection with the comprehensive plan update.

You have appropriately detailed the many reasons for hiring outside counsel in this situation in the introductory "whereas" clauses of the contract.

We believe that we should give due deference to the board's reasons for seeking outside counsel in this regard. The board, not the prosecuting attorney, is the legislative policy-making authority for Island County. (See, e.g., RCW 36.32.120(7).) The prosecuting attorney is the legal adviser to the board and represents the county in civil litigation. (See, e.g., RCW 36.27.020(1) and (4).) We believe that you have set forth valid reasons for seeking outside counsel.

As far as Mr. Banks's legal challenges are concerned, he first argues that the county's competitive solicitation process set forth in Island County Code 2.29.030 has not been followed. However, the board has express authority under ICC 2.29.030(B)(12) to waive competitive solicitation with regard to service contracts. We can understand that the board would want to do this, since any decision as to who will provide professional services, and particularly attorney services of the sort the board is seeking, is highly individualized.

Next, Mr. Banks raises the issue of the constitutionality of RCW 36.32.200, and has expressly threatened to take legal action to prevent the board from hiring outside counsel. Therefore, we must address these issues.

We begin with the proposition that a statute is presumed constitutional and any party challenging its constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt. Belas v. Kiga, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998); Island County v. State, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

In Island County v. State, the Washington State Supreme Court stated:

"[T]he 'beyond a reasonable doubt' standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution. [Citations omitted.] Ultimately, however, the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate. [Citation omitted.]

Mr. Banks cites Article 11, sections 4 and 5 of the Constitution of Washington, and argues that hiring outside counsel, over the objection of the prosecuting attorney, would violate these constitutional provisions. Article 4 provides that the legislature shall establish a system of county government. It further provides, among other things, that if a home rule charter is adopted, the election of the prosecuting attorney and the powers and authority of the

prosecuting attorney shall not be affected. Article 5 provides for the election of prosecuting attorneys, among other things.

He further cites RCW 36.27.020 concerning the duties of the prosecuting attorney, and RCW 36.27.040, which authorizes the prosecuting attorney to appoint deputy prosecuting attorneys and special deputy prosecuting attorneys.

He further cites RCW 36.27.030, which provides that a court may appoint a person to discharge the duties of the prosecuting attorney in the case of the disability of the prosecutor, and cases construing that statute. (See page 4 of March 9, 2015, memorandum from Mr. Banks to us.)

We are mindful of these statutes and the cases construing them. However, we are not being asked to exercise our authority to appoint a person to discharge the duties of the prosecuting attorney in case of the disability of the prosecutor. Nor are we being asked to appoint a special deputy prosecuting attorney. Rather, we are being asked to appoint outside counsel under the provisions of RCW 36.32.200, a separate grant of authority from the Legislature. We note that there is nothing in the express terms of these constitutional provisions and statutes that prohibit the board from seeking our approval for the appointment of outside counsel. The constitution and the statutes do not state that *only* the prosecuting attorney (or a deputy prosecuting attorney or special deputy prosecuting attorney) can perform the duties of the prosecuting attorney in all instances. Thus, we must look to case law and other authorities in considering the constitutionality of RCW 36.32.200.

Mr. Banks's argument that RCW 36.32.200 is unconstitutional is primarily based on the case of State ex rel. Johnston v. Melton, 192 Wash. 379, 73 P.2d 1334 (1937), and two informal letter opinions of the Attorney General, AGLO 1973 No. 115 and AGLO 1974 No. 15.

In the Melton case, the Supreme Court dealt with a 1937 statute that authorized the prosecuting attorney to hire investigators with the same authority as the sheriff of the county, but that such investigators shall only be under the authority and direction of the prosecuting attorney. The statute further provided, among other things, that any such investigator shall have the same authority as the sheriff to make arrests. The court held that this grant of power to prosecuting attorneys violated Article 11, section 5 of the constitution, which provides for the election of various county officials, including the sheriff. Much of the court's analysis hinged on whether the investigators authorized to be appointed under the statute were county officers. The court stated: "If, when appointed, they become, in fact and in law, county officers, the section must be held to be unconstitutional." 192 Wash. at 383. The court also noted that "the investigators, although appointed by the prosecuting attorneys and placed under their direction, are given the right to exercise independent powers," and that the statute was "a definite and express grant of official power [to the investigators]." Id., at 385.

In AGLO 1973 No. 115, a state representative asked the Attorney General to opine on the question of whether a constitutional amendment would be needed in order to permit county agencies, without the approval of their respective county prosecuting attorneys, to retain other

attorneys to counsel and represent them with respect to civil matters. In answer, the Attorney General cited RCW 36.27.020, and stated:

“Therefore, while it might, conceivably, be possible to enact legislation without a constitutional amendment which would allow county agencies to employ attorneys for certain limited purposes, it seems to us that the potential utility of any such attorneys would be severely restricted unless they could be vested with at least some of the powers and functions presently performed by the prosecuting attorneys in civil matters—and this would require a constitutional amendment.”

We note that informal letter opinions of the Attorney General, such as this one, have no precedential value. We further note that RCW 36.32.200 does, in fact, constitute legislation which allows a board of county commissioners to employ attorneys for certain limited purposes, with the prior approval of the county’s presiding superior court judge. However, we recognize the general concern that the Attorney General raises.

In AGLO 1974 No. 15, the Attorney General opined that when a board of county commissioners has passed a resolution, approved by a majority of a county’s superior court judges, authorizing the board to hire an attorney, the board may hire an attorney to advise the board on general matters of its concern. (Since this opinion was issued, the statute has been amended to provide that such a resolution must be approved by the county’s presiding superior court judge.)

In a footnote in the opinion, the Attorney General cited the Melton case, and indicated that he was not to be taken as having passed on the constitutionality of RCW 36.32.200, but that, in accordance with long-standing policy, he must presume the statute to be constitutional unless it is held unconstitutional by a court of competent jurisdiction.

After due consideration, we are by no means convinced that RCW 36.32.200 is unconstitutional, much less convinced beyond a reasonable doubt that the statute is unconstitutional. As the Supreme Court stated in Island County v. State, *supra*, we assume the Legislature considered the constitutionality of the statute when passing it and we afford due deference to that judgment.

There is nothing in the statutes prescribing the duties of the prosecuting attorney, the procedures for appointing special deputy prosecuting attorneys, and the like that expressly conflicts with the action that is being undertaken by the board. While we recognize that the Melton case raises a possible constitutional question concerning the board’s proposed action, the facts of that case are distinguishable from the present situation. The statute in question in Melton was a general grant of authority for the prosecuting attorney to hire investigators on an indefinite basis; such investigators were to have independent, statutory arrest and other powers which were the province of the sheriff. The constitutionality of RCW 36.32.200 was not at issue in Melton.

By contrast, in the present case, any contract approved under RCW 36.32.200 (titled "Special attorneys, employment of") requires the independent approval of the presiding superior court judge, and must be of limited duration. The informal letter opinion of the Attorney General in AGLO 1973 No. 115 has no precedential value, and was rendered without any consideration of RCW 36.32.200. AGLO 1974 No. 15 actually supports the board's proposed action in the present matter, though the Attorney General cautioned about the possible effect of Melton.

While we recognize that we have authority, generally, to decline to approve a contract for special attorney services, we believe that it would be an inappropriate exercise of our discretion to do so in this case, where the contract is justified under the facts and no court has ever declared the statute to be unconstitutional.

Furthermore, we believe that a court of competent jurisdiction would likely decide that the statute is constitutional. The statute recognizes that situations will arise where the board needs to appoint special counsel to supplement the work undertaken by the prosecuting attorney. There are times when the prosecuting attorney and deputy prosecuting attorneys do not have the expertise, or the time or resources, needed to provide the requisite legal services, particularly where there are special projects requiring extraordinary legal work.

These realities are reflected in the fact that the board has, in fact, made use of RCW 36.32.200 in the past for specific projects. Budget Director Elaine Marlow has stated that the board has employed special counsel for solid waste contract hauler negotiations, development of the Clean Water Utility, tidal energy issues, bond and loan counsel, representation of an elected official in certain matters, and labor negotiations.

To our knowledge, the prosecutor has not objected to these uses of special counsel, and this is entirely understandable. It seems unlikely to us that the prosecutor's office has the expertise to provide representation as bond counsel, in labor negotiations, and the like. It also seems unlikely that the prosecutor's office has the time to properly devote to such matters in addition to the other routine duties of the office. Yet, if the prosecutor were successful in any lawsuit to declare the statute unconstitutional, his office would have to perform these services.

A private attorney could be hired as a special deputy prosecuting attorney to perform such specialized services. But only the prosecutor can hire a special deputy prosecutor, and it appears that Mr. Banks is unwilling to make such an appointment in the present matter. Furthermore, there are practical problems associated with appointing someone as a county employee, not the least of which is that the private attorney may refuse to accept any such appointment.

It is puzzling to us that the prosecuting attorney would object to the board's present proposal to hire special counsel, and go so far as to threaten a lawsuit challenging the constitutionality of RCW 36.32.200. Such special counsel will actually aid his own office in carrying out its duties, and is being appointed because, among other things, the prosecutor is apparently unwilling or

unable to provide some of the legal advice and services that the board is requesting, and has every right to request.

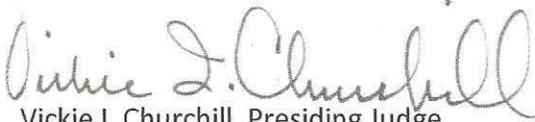
Among other things, the board wants ongoing strategic advice in order to avoid the errors of the past. The prosecutor apparently can't or won't provide the board with such advice. This is troubling, because at their best, legal services represent, figuratively speaking, not only the ambulance providing services to someone who has fallen off a cliff, but also the guardrail preventing someone from falling off the cliff in the first place.

Should there be a constitutional challenge to RCW 36.32.200, a court might place limitations on the scope of the statute. It might, for example, limit use of the statute to the kinds of special projects for which the board has used the statute in the past. But note that the statute already has safeguards built in to guard against its misuse. Any contract for outside counsel must be approved by the county's presiding judge, and any such contract must be limited to no more than two years duration.

We have always carried out our duty to ensure that any such contract for special counsel is being sought for a proper purpose. We have disapproved such contracts in the past where, for example, there were no proper provisions for cost containment. The present contract is being approved for a proper purpose, and has appropriate cost containment measures built into it.

We are approving the contract for special attorney services.

Very truly yours,



Vickie I. Churchill, Presiding Judge  
Island County Superior Court



Alan R. Hancock, Judge  
Island County Superior Court

Enclosure

Copy: Hon. Gregory M. Banks

# **EXHIBIT 2**

**Island County Board of Commissioners Resolution C-48-15  
County Decision to Engage Counsel  
April 28, 2015**

**(CP 1520-26)**

**BEFORE THE BOARD OF COUNTY COMMISSIONERS  
OF ISLAND COUNTY, WASHINGTON**

IN THE MATTER OF EMPLOYING )  
SPECIAL COUNSEL TO ASSIST IN )  
THE DEVELOPMENT AND ADOPTION )  
OF THE COUNTY'S GROWTH )  
MANAGEMENT ACT COMPREHENSIVE )  
PLAN, DEVELOPMENT REGULATIONS, )  
AND SUCH OTHER ACTIONS DEEMED )  
APPROPRIATE TO ADDRESS THE GMA )  
\_\_\_\_\_ )

RESOLUTION C-46-15

WHEREAS, the Board of County Commissioners of Island County is responsible for adopting the County's Growth Management Act required Comprehensive Plan and Development Regulations, and related legislation, pursuant to various state laws, including Wash. Const. Art. XI, § 11, Ch. 36.70A RCW, and Ch. 36.70 RCW; and,

WHEREAS, following the public review process, the Board of County Commissioners makes the final decision on whether to adopt revisions to the County's Comprehensive Plan and Development Regulations that serve the best interests of Island County citizens; and,

WHEREAS, recognizing this responsibility, the Board of County Commissioners desires successful, coherent, integrated and legally defensible GMA Comprehensive Plan policies and Development Regulations that serve the best interests of Island County citizens; and,

WHEREAS, since GMA's enactment, Island County has been involved in an unprecedented amount of litigation, particularly over GMA environmental and resource land issues; and,

WHEREAS, Island County desires an approach to GMA which, over the long term, not only results in the successful defense of County legislation, but ultimately reduces the litigious nature of such planning within the County, and serves the public's best interest, consistent with relevant legal requirements; and,

WHEREAS, in order to achieve these objectives, the Board of County Commissioners has a need for proactive legal strategy, advice, and assistance during the GMA update process to guide decisions and actions in the development and adoption of the County's Comprehensive Plan, Development Regulations, and other actions deemed appropriate to address the GMA; and,

WHEREAS, the County requires further assistance with proactively planning to address these challenges so that the Board of County Commissioners is fully informed as to the planning and legal challenges the County is facing; and,

WHEREAS, in land use matters, in which a county is planning not just for the moment but over the long term, through a twenty-year planning period, it is critical that policies and requirements be strategically developed in concert with sound legal input; and,

WHEREAS, the County wishes to avoid "crises-based" decision making, and instead engage in the methodical development of legislation to address future challenges; and,

WHEREAS, for long term policies and requirements to be soundly developed, those making the final policy decisions must be fully informed as to how proposed legislation fits within the relevant legal structure; and,

WHEREAS, developing a proactive approach, centered on the strategic development of a long range plan, will take significant up front resources and experience to address, particularly given the controversial and contested nature of the land use issues facing the County; and,

WHEREAS, the Board of County Commissioners has consulted extensively with the Prosecuting Attorney as to these objectives and the need for extensive and experienced legal support; and,

WHEREAS, at present, the Prosecuting Attorney's office is unable to provide said comprehensive and proactive legal strategy, advice and assistance. There are currently conflicts, resource constraints, and communication issues to resolve, as reflected in meetings between the Prosecuting Attorney and Board of County Commissioners; and,

WHEREAS, immediate assistance is required due to GMA's upcoming update deadline, and it is deemed necessary and advisable that legal counsel experienced in GMA and land use planning related matters be employed as special counsel; and,

WHEREAS, the County has identified special counsel (Law Offices of Susan Elizabeth Drummond, PLLC), a firm with significant experience in the field of GMA and with advising a variety of local jurisdictions throughout the state on the range of options available for developing a long term legal strategy on legislative land use matters; and,

WHEREAS, the Board of County Commissioners desires to resolve outstanding concerns and establish a cooperative working relationship with the Prosecutor's Office, the Planning and Community Development Department, along with special counsel, as that will best serve the public interest; and,

WHEREAS, to address its pressing need for assistance, RCW 36.32.200 authorizes the County's legislative body to employ experienced counsel on approval by the Superior Court Judge; and,

WHEREAS, the Board of County Commissioners in its budgeting authority has designated a fund balance in the Island County General Fund to support its state-

mandated 2016 Comprehensive Plan update, and a portion of this designated fund balance is available to fund special counsel and land use planning assistance; and,

WHEREAS, ICC 2.29.030(B)(12) allows a waiver from competitive bidding for service contracts on a case by case basis; and,

NOW, THEREFORE, BE IT HEREBY RESOLVED by the Board of County Commissioners of Island County, Washington, as follows:

Section 1. Special Counsel for GMA Legislation. The Law Offices of Susan Elizabeth Drummond, PLLC, shall be employed as special counsel to advise on GMA related legislative issues for up to a maximum period of two (2) years, and to perform the services identified as set forth in the attached terms of engagement. Per ICC 2.29.030(B)(12), the Board of County Commissioners waives competitive bidding. Compensation shall not exceed the maximum set forth in the Exhibit A – Terms of Engagement, unless approved in writing by the Board of County Commissioners and Presiding Judge of the Island County Superior Court.

Section 2. Terms of Engagement. The terms of engagement are set forth in Exhibit A and are hereby approved.

Section 3. Effective Date. This Resolution shall take effect on the last date signed below and following Superior Court approval.

ADOPTED by the Board of County Commissioners of Island County, Washington, on April 28, 2015.

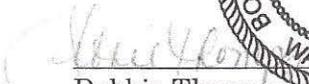
**BOARD OF COUNTY COMMISSIONERS  
ISLAND COUNTY, WASHINGTON**

  
Helen Price Johnson, Chair

  
Richard M. Hannold, Member

  
Jill Johnson, Member

ATTEST:

  
Debbie Thompson  
Clerk of the Board



Approved this 20th day of April, 2015.

  
Vickie I. Churchill, Presiding Judge of the  
Superior Court of the State of Washington  
in and for the County of Island

## EXHIBIT A – TERMS OF ENGAGEMENT

These terms of engagement for professional services addresses legal services to be provided to Island County, Washington (County) by the Law Offices of Susan Elizabeth Drummond, PLLC (Service Provider).

### SECTION 1 EFFECTIVE DATE AND TERM

This engagement will be effective upon approval in writing by the Island County Presiding Superior Court Judge, pursuant to RCW 36.32.200, and once all parties have signed this document. Any revision must be approved in writing by both the Board of County Commissioners and the Superior Court Judge.

The engagement shall terminate two (2) years from the effective date. The Board of Island County Commissioners may at any time terminate this engagement before its expiration with or without cause. Service Provider may terminate the engagement with sixty (60) days notice and compliance with the Rules of Professional Conduct.

### SECTION 2 SERVICES TO BE PROVIDED

The Board of County Commissioners requires immediate legal input on developing a coherent strategy for planning for growth over its 20-year planning period. Land use issues have been heavily litigated in the County, and the County requires strategic assistance in developing an approach which can reduce litigation over the long term, while complying with relevant legal requirements, including Ch. 36.70A RCW, and serving the best interests of the public.

To accomplish these objectives, Service Provider shall provide legal services to the County in connection with development and adoption of the County's Growth Management Act Comprehensive Plan, Development Regulations, and such other legislative actions determined appropriate to address the GMA. Services shall include:

1. Advising the Board of County Commissioners on long-term legal strategy, relevant legal requirements, and the GMA framework for planning.
2. Coordinating and consulting with relevant County Departments on development of proposed legislation.
3. Advising on the anticipated review process and structure for considering proposed legislation.
4. Reviewing and advising on proposed legislation.
5. Defending adopted legislation or resolving disputes through other means, such as settlement, as directed.

Service Provider shall provide legal services in a manner consistent with the accepted practices for other similar services, performed within the time prescribed by, and pursuant to the direction of, the Board of County Commissioners. Service Provider shall coordinate with the County Planning and Community Development Department, the County Public Works Department, and with the County Prosecutor, so as to best assist the County.

### SECTION 3 COMPENSATION AND METHOD OF PAYMENT

Payments for services shall be made following performance of such services. No payment shall be made for any services except as identified herein. Service Provider shall submit to the County each month an invoice for services rendered during the previous month. The County shall provide payment approximately thirty (30) days thereafter.

The County shall pay Service Provider for work performed under this engagement based on a \$4,000 per month flat fee plus reimbursable costs. Reimbursable costs incurred for this representation, such as travel, postage, or large copy projects, shall be billed at the actual cost incurred.

The maximum fees and charges in connection with this project shall not exceed \$120,000 without further authorization by the Board of Island County Commissioners and the Island County Superior Court Judge.

### SECTION 4 INDEPENDENT CONTRACTOR RELATIONSHIP

Service Provider is an independent contractor with the authority to control and direct the performance of the details of the work; however, the results of the work contemplated herein must meet with County approval and are subject to the County's general rights of inspection to ensure satisfactory completion.

No Service Provider employee or representative shall be deemed to be a County employee or representative for any purpose, and Service Provider employees are not entitled to any benefits the County provides for its employees. Service Provider is solely responsible for its acts and for the acts of its agents or employees during performance of the engagement. As an independent contractor, Service Provider is responsible for the reporting and payment of all applicable local, state, and federal taxes.

### SECTION 5 INSURANCE

Service Provider shall procure and maintain, for the duration of the engagement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with performance of the engagement.

Service Provider shall provide a Certificate of Insurance evidencing:

(A) Commercial General Liability insurance written with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage.

(B) Professional Liability insurance with limits of no less than \$1,000,000 per claim and \$1,000,000 policy aggregate limit.

The County shall be named as an additional insured on the commercial insurance policy, in respect to work performed by Service Provider. Any payment of deductible or self-insured retention is the Service Provider's sole responsibility. The County shall be given forty-five (45) days prior written notice of any cancellation, suspension or material change in coverage.

All insurance coverage required to be provided by Service Provider or any subcontractor, is

intended to apply on a primary non-contributing basis in relation to any other insurance or self-insurance available to County.

#### **SECTION 6 INDEMNIFICATION**

(A) County agrees to indemnify, defend and hold Service Provider and its officers, employees, and agents harmless from claims and actions (including any costs and attorney fees) filed or authorized to be filed against Service Provider, which raise claims related to the authority which may be provided to the Board of County Commissioners by RCW 36.32.200, and this statute's implementation through this engagement. Should such an event occur, the Board of County Commissioners may elect to retain additional special counsel with Superior Court consent, and/or supplement the flat fee if necessary (with Superior Court consent) to defend such litigation. Paragraph 6(B) does not apply to Paragraph 6(A).

(B) Except as provided in Section 6(A): To the extent of its comparative liability, each party agrees to indemnify, defend and hold the other party, its elected and appointed officials, employees, agents and volunteers, harmless from and against any and all claims, damages, losses and expenses, including but not limited to court costs, attorney's fees and alternative dispute resolution costs, for any personal injury, for any bodily injury, sickness, disease or death and for any damage to or destruction of any property (including the loss of use resulting therefrom) which are caused by a negligent act, error, or omission, of its elected and appointed officials, employees, agents or volunteers, in the implementation of this engagement. In the event of any concurrent negligent act, error, or omission of the parties, each party shall pay its proportionate share of any damages awarded. The parties agree to maintain a consolidated defense to claims made against them and to reserve all indemnity claims against each other until after liability to the claimant and damages, if any, are adjudicated.

(C) The parties agree all indemnity obligations shall survive the completion, expiration or termination of this engagement.

#### **SECTION 7 NONDISCRIMINATION**

In performance of this engagement, Service Provider will not discriminate against any employee or applicant for employment on the grounds of race, religion, creed, color, national origin, sex, marital status, disability, sexual orientation, age or other basis prohibited by state or federal law; provided that the prohibition against discrimination in employment because of disability shall not apply if the particular disability prevents the proper performance of the particular work involved.

#### **SECTION 8 ASSIGNMENT/SUBCONTRACTING**

Service Provider shall not assign its performance under this engagement.

#### **SECTION 9 JURISDICTION AND VENUE**

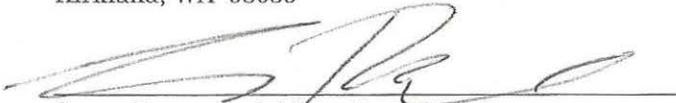
This engagement shall be governed by laws of the State of Washington, both as to interpretation and performance. Any judicial proceeding related to this engagement shall be instituted and maintained in Island County Superior Court, State of Washington.

#### **SECTION 10 SEVERABILITY**

If any engagement term is held illegal or unenforceable by a court with jurisdiction, the validity of the remaining terms will not be affected, and this engagement shall be interpreted as if it did not contain the invalid provision. Further, if any engagement provision conflicts with Washington laws, said provision which may conflict therewith shall be deemed inoperative or modified to the extent necessary to avert the conflict.

EXECUTION. The parties execute the engagement terms as follows, which may be accomplished in counterparts:

Law Offices of Susan Elizabeth Drummond, PLLC  
5400 Carillon Point, Bldg. 5000, Ste. 476  
Kirkland, WA 98033



Susan Drummond, Managing Member  
Signed, April 22, 2015

ACCEPTED by the Board of County Commissioners of Island County, Washington, on April 28, 2015.

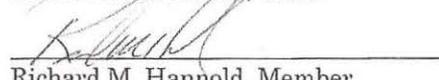
ATTEST

  
Debbie Thompson  
Clerk of the Board

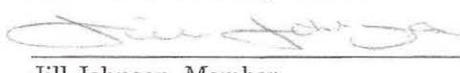
BOARD OF COUNTY COMMISSIONERS  
ISLAND COUNTY, WASHINGTON



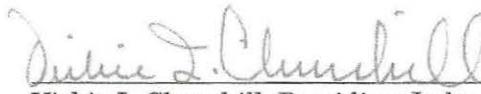
Helen Price Johnson, Chair



Richard M. Hannold, Member



Jill Johnson, Member



Vickie I. Churchill, Presiding Judge of the  
Superior Court of the State of Washington  
in and for the County of Island

# **EXHIBIT 3**

**Island County Superior Court Findings of Fact and Conclusions  
of Law Supporting Order Denying  
Plaintiff's Motion for Preliminary Injunction  
October 29, 2015**

**(CP 2016-23)**

NGT  
WORKING COPY

FILED  
DEBRA VAN PELT  
ISLAND COUNTY CLERK

2015 NOV -3 PM 2:20  
The Honorable Brian L. Stiles

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF ISLAND

STATE OF WASHINGTON, on the Relation of  
Gregory M. Banks, Prosecuting Attorney of Island  
County,

Plaintiff,

v.

SUSAN E. DRUMMOND, and LAW OFFICES  
OF SUSAN ELIZABETH DRUMMOND, PLLC,

Defendants,

and

ISLAND COUNTY BOARD OF  
COMMISSIONERS,

Intervenor/Defendant,  
and Counterclaim  
Plaintiff.

NO. 15-2-00465-9

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
SUPPORTING ORDER  
DENYING PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION

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Plaintiff State of Washington ex rel. Island County Prosecuting Attorney Gregory Banks ("Banks") presented a Motion for Preliminary Injunction to prevent Defendants Susan E. Drummond and the Law Offices of Susan Elizabeth Drummond PLLC ("Drummond") from providing legal services to Island County, Washington ("Island County"). A hearing was held on October 15, 2015 at which all parties presented briefing and argument. Banks was

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW SUPPORTING ORDER DENYING  
PLAINTIFF'S MOTION FOR PRELIMINARY  
INJUNCTION - 1

720465.4/028622.00001

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& BURGESS PLLC**  
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206.682.3333 phone | 206.340.8856 fax | www.scbllw.com

VERIFIED

2019

1 represented by counsel Pamela B. Loginsky, Drummond was represented by counsel Robert B.  
2 Gould, and Island County was represented by counsel Scott M. Missall.

3 The Court has considered all of the pleadings and papers on file in this case, including  
4 the Injunction Motion, Response and Reply briefs of the parties, the Declarations and materials  
5 filed in support of those briefs, Exhibit 1 as submitted by counsel for Banks at the October 15,  
6 2015 hearing, and the argument of the parties. Being fully advised in the premises, the Court  
7 now adopts and enters these Findings of Fact and Conclusions of Law in Support of its Order  
8 Denying Plaintiff's Motion for Preliminary Injunction.

9 **I. FINDINGS OF FACT**

10 1. Drummond does not hold a public office in Island County, and Drummond is  
11 not a public officer or official of Island County.<sup>1</sup>

12 2. Island County requires a wide range of legal services. While the County's needs  
13 are often served by the Island County Prosecuting Attorney's Office ("PAO"), there are times  
14 the Island County Board of Commissioners ("Board") recognizes the need to retain outside  
15 counsel pursuant to its authority under RCW 36.32.200 to handle specific legal services for a  
16 specific project or on a temporary basis.<sup>2</sup>

17 3. RCW 36.32.200 was originally adopted into the Revised Code of Washington  
18 in 1905. It has been rarely amended, and Washington courts have never declared RCW  
19 36.32.200 to be unconstitutional.<sup>3</sup>

20 4. The Board has retained special counsel under RCW 36.32.200 twenty times over  
21 the past sixteen years. With the exception of Drummond's retention, Banks has not filed a Quo  
22 Warranto action against any other special counsel retained by the Board.<sup>4</sup>

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24  
25 <sup>1</sup> Transcript of October 15, 2015 Preliminary Injunction Hearing ("Transcript") at 4:12-25.

26 <sup>2</sup> Transcript at 29:7-10.

<sup>3</sup> Transcript at 28:4-9.

<sup>4</sup> Transcript at 29:7-12.

1           5.     In April 2015, pursuant to its authority under RCW 36.32.200, the Board  
2 selected Drummond to advise Island County on, and assist Island County with preparing, its  
3 2016 Growth Management Act update ("GMA Update"). As it has done previously in similar  
4 situations, the Board negotiated a contract with Drummond, and prepared and adopted  
5 Resolution C-48-15 authorizing the retention of Drummond pursuant to RCW 36.32.200 for  
6 the purposes of working on the GMA Update.

7           6.     The facts, information, and evidence before the Court show and support that  
8 Drummond is a well-qualified, competent attorney able to provide the legal services for which  
9 Drummond was retained. There is no contrary evidence.<sup>5</sup>

10          7.     As required by RCW 36.32.200, the Board asked Island County Presiding Judge  
11 Churchill to approve Resolution C-48-15 and the contract with Drummond. On March 9, 2015  
12 Banks sent a letter to the Island County Superior Court expressing his objection to the Board's  
13 request and explaining his legal opinion for that position. On April 20, 2015, Presiding Judge  
14 Churchill and Superior Court Judge Hancock jointly issued a seven page letter which approved  
15 the Board's request and explained the reasons for the Court's decision.<sup>6</sup>

16          8.     The facts, information, and evidence before the Court show and support the  
17 finding that the PAO and Drummond worked cooperatively from April 2015 until  
18 approximately the time Banks filed this Quo Warranto action,<sup>7</sup> and that Banks thereafter refused  
19 the County's requests to continue working cooperatively with Drummond while the litigation  
20 was undertaken and completed.

21          9.     The facts, information, and evidence do not show or support that Island County  
22 or the PAO was harmed by the legal assistance Drummond provided to the Board or to the PAO  
23 between April 2015 and the time Banks filed this action, or during the time after Banks filed  
24

25 \_\_\_\_\_  
26 <sup>5</sup> Transcript at 29:17-23.

<sup>6</sup> Transcript at 28:11-17.

<sup>7</sup> Transcript at 29:10-12, 15-17.

1 this action.<sup>8</sup> Banks has made no showing of immediate harm to the PAO or the public if the  
2 injunction is not granted.<sup>9</sup> The contract with Drummond protects the County because it allows  
3 termination of the contact by the Board if necessary.<sup>10</sup> The Court does not find credible the  
4 claim by Banks that the Board's action or Drummond's work is disenfranchising the voters of  
5 Island County.<sup>11</sup>

6 10. The facts, information, and evidence do not show or support the claim that  
7 Drummond's legal work on behalf of the County in connection with its GMA Update has  
8 replaced or displaced the PAO.<sup>12</sup>

9 11. The facts, information, and evidence show and support the Board's retention of  
10 Drummond as providing additional resources to the PAO, and that Drummond's services for  
11 the County are benefitting Island County, the Board, and the PAO.<sup>13</sup>

12 12. The facts, information, and evidence show and support a finding that issuance  
13 of the preliminary injunction at this point may cause some or all of the following negative  
14 consequences: (a) undermining Island County's GMA goals; (b) interfering with the public's  
15 and the legislature's interests in complying with the GMA; (c) intruding on the Board's  
16 legislative duties; (d) undermining the Board's duly made legislative actions; and (e) denying  
17 the County the benefit of Drummond's services under Resolution C-48-15.

## 18 II. CONCLUSIONS OF LAW

19 Based upon the foregoing Findings of Fact, the Court makes and enters the following  
20 conclusions of law:

21 1. The standards for issuance of a preliminary injunction are well defined. A party  
22 seeking relief by injunction must meet three criteria: (1) it has a clear legal or equitable right;

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24 <sup>8</sup> Transcript at 29:10-23; 30:5-17.

25 <sup>9</sup> Transcript at 29:1-6 and 12-14.

26 <sup>10</sup> Transcript at 29: 23 to 30:4.

<sup>11</sup> Transcript at 30:15-17.

<sup>12</sup> Transcript at 30: 5-11.

<sup>13</sup> Transcript at 30: 5-14.

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW SUPPORTING ORDER DENYING  
PLAINTIFF'S MOTION FOR PRELIMINARY  
INJUNCTION - 4

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1 (2) it has a well-grounded fear of immediate invasion of that right; and (3) the acts complained  
2 of either are resulting in or will result in actual and substantial injury. Additionally because  
3 "injunctions are addressed to the equitable powers of the court, the listed criteria must be  
4 examined in the light of equity including balancing the relative interests of the parties and, if  
5 appropriate, the interests of the public." *Tyler Pipe Indus., Inc. v. Department of Revenue*, 96  
6 Wn.2d 785, 638 P.2d 1213 (1982); *Rabon v. City of Seattle*, 135 Wn.2d 278, 957 P.2d 621  
7 (1998). If any one of these four factors is absent, the requested relief must be denied. *Kucera*  
8 *v. State*, 140 Wn.2d 200, 995 P.2d 63 (2000).

9 2. Decisions granting or denying injunctions are within the sound discretion of the  
10 trial court. *Rabon*, 135 Wn.2d 278. Preliminary injunctions should not be issued in doubtful  
11 cases. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 157 P.3d 831 (2007).

12 3. Banks has failed to establish that he has the requisite clear legal or equitable  
13 right, and has failed to establish that that he is likely to prevail on the merits of this case.<sup>14</sup> As  
14 indicated in the Island County Superior Court judges' decision dated April 20, 2015,  
15 incorporated herein, the Board is authorized to hire Drummond as special counsel under RCW  
16 36.32.200, a 105-year old statute that has never been ruled unconstitutional. That statute is thus  
17 presumed to be constitutional, and is not challenged on that basis by Banks in this proceeding.<sup>15</sup>

18 4. Banks has also failed to establish that Drummond has invaded, or is invading,  
19 any legal or equitable right of Banks. Likewise, Banks has failed to establish that the Board  
20 has invaded, or is invading, any legal or equitable right of Banks.

21 5. Banks has also failed to establish that Banks, Island County, or the general  
22 public have suffered, are suffering, or will suffer an actual and substantial injury if a preliminary  
23 injunction is not issued.<sup>16</sup>

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26 <sup>14</sup> Transcript at 28:17-20.

<sup>15</sup> Transcript at 28:4-25.

<sup>16</sup> Transcript at 29:4-6.



1 LAW OFFICE OF ROBERT B. GOULD

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By  FOR  
Robert B. Gould, WSBA No. 4353  
Attorney for Defendants Susan E. Drummond  
and Law Offices of Susan Elizabeth  
Drummond, PLLC  
PEZ EMAIL AUTHORIZATION

Copy received, notice of presentation waived:

By \_\_\_\_\_  
Pamela B. Loginsky, WSBA No. 18096  
Special Deputy Prosecuting Attorney  
Attorney for State ex rel. Gregory Banks

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW SUPPORTING ORDER DENYING  
PLAINTIFF'S MOTION FOR PRELIMINARY  
INJUNCTION - 7

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1 SHORT CRESSMAN & BURGESS PLLC

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3 By \_\_\_\_\_

4 Scott M. Missall, WSBA No. 14465  
5 Athan E. Tramountanas, WSBA No. 29248  
6 Attorneys for Island County Board of Commissioners

6

7 LAW OFFICE OF ROBERT B. GOULD

7

8 By \_\_\_\_\_

9 Robert B. Gould, WSBA No. 4353  
10 Attorney for Defendants Susan E. Drummond  
11 and Law Offices of Susan Elizabeth  
12 Drummond, PLLC

11

12 **Copy received, notice of presentation waived:**

13

14 By *Pamela Beth Loginsky*

15 Pamela B. Loginsky, WSBA No. 18096  
16 Special Deputy Prosecuting Attorney  
17 Attorney for State ex rel. Gregory Banks

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FINDINGS OF FACT AND CONCLUSIONS OF  
LAW SUPPORTING ORDER DENYING  
PLAINTIFF'S MOTION FOR PRELIMINARY  
INJUNCTION - 7

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# **EXHIBIT 4**

**Summary Judgment and Declaratory Judgment Decisions  
Supporting County and Judiciary's  
Use of RCW 36.32.200**

**(CP 1551-59, 1548-50)**

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IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON, on the  
Relation of Gregory M. Banks, Prosecuting  
Attorney of Island County,

Plaintiff,

vs.

SUSAN E. DRUMMOND, and Law Offices  
of Susan Elizabeth Drummond, PLLC;

Defendants

and

ISLAND COUNTY BOARD OF  
COMMISSIONERS,

Intervenor/Defendant,  
and Counterclaim  
Plaintiff.

NO. 15-2-00465-9

~~(Proposed)~~ *will*

ORDER

(1) GRANTING THE INTERVENOR'S  
AND DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT;

(2) DENYING THE PLAINTIFF'S  
AMENDED MOTION FOR  
SUMMARY JUDGMENT; AND

(3) DISMISSING THIS QUO  
WARRANTO ACTION WITH  
PREJUDICE

*(4) Granting Intervenor's  
cross-claim for a declaration  
that Resolution 48-15 is null and void*

*S  
AR  
MJB*

This matter having come on pursuant to Drummond's Joinder in County's Summary Judgment Motion and Island County Board of Commissioners Motion for Summary Judgment Affirming Use of RCW 36.32.200 and Dismissing Plaintiff's Quo Warranto Action.

The court has considered the records on file and the following pleadings, except for those portions subject that were struck in separate orders:

- (1) Island County Board of Commissioners Motion for Summary Judgment Affirming Use of RCW 36.32.200 and Dismissing Plaintiff's Quo Warranto Action, with the following supporting documents:

- (a) Declaration of Helen Price Johnson in Support of Island County Board of

~~(Proposed)~~ ORDER (1) GRANTING THE INTERVENOR'S AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; (2) DENYING THE PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT; AND (3) DISMISSING THIS QUO WARRANTO ACTION WITH PREJUDICE -- 1

PROSECUTING ATTORNEY  
OF ISLAND COUNTY  
P.O. Box 5000  
Coupeville, Washington 98239  
360-679-7363

1 Commissioners' Opposition to Plaintiff's Motion for Summary Judgment,  
2 signed December 4, 2015

3 (b) Declaration of Richard M. Hannold in Support of Island County Board of  
4 Commissioners' Reply on Board's Motion to Intervene and for Continuance,  
5 signed September 28, 2015, with the following exhibits:

6 (i) A list of County resolutions retaining outside counsel.

7 (ii) *Island County v. Growth Management Hearings Board, Western*  
8 *Washington Region*, Island County Superior Court Cause No. 15-2-  
9 00416-1, Order Dismissing Island County's Petition for Review  
10 (Sept. 21, 2015).

11 (c) Declaration of Michael Shelton, signed November 30, 2015

12 (d) Declaration of Helen Price Johnson, signed September 18, 2015, with the  
13 following exhibit:

14 (i) Island County Superior Court's April 20, 2015, letter to Island  
15 County Board of Commissioners

16 (e) Declaration of Jill Johnson in Support of Island County Board of  
17 Commissioners' Opposition to Plaintiff's Motion for Summary Judgment,  
18 signed December 4, 2015.

19 (f) Island County Board of Commissioners' Resolution C-48-15, dated April 28,  
20 2015

21 (g) Declaration of Defendant Susan Drummond, signed September 27, 2015,  
22 with the following attachment:

23 (i) Transcript of March 18, 2015, Meeting

24 (h) Third Declaration of Helen Price Johnson in Support of Island County Board  
25 of Commissioners' Dispositive Motion for Summary Judgment and  
26 Dismissal of Case, signed December 18, 2015, with the following exhibits:

27 (i) Island County Commissioners – Work Session, Wednesday, July 1,  
28 2009, Summary Minutes

- 1 (ii) E-mail from Gregory Banks to Island County Board of  
2 Commissioners, dated July 16, 2009
- 3 (iii) E-mail from Debbie Thompson to Elaine Marlow, dated August 26,  
4 2009
- 5 (iv) Letters from the Grant County Board of Commissioners and the  
6 Chelan County Board of Commissioners.
- 7 (2) Drummond's Joinder in County's Summary Judgment Motion and Supplemental  
8 Briefing with the following supporting documents and/or previously filed and  
9 incorporated documents:
- 10 (a) Declaration of Robert B. Gould in Support of Drummond's Joinder in  
11 County's Summary Judgment Motion with the following attachments:
- 12 (i) Excerpts from Gregory Bank's December 4, 2015, deposition
- 13 (ii) Selected excerpts from responses to a request for production of  
14 correspondence between Gregory Banks and the local newspaper for  
15 the period between January 1, 2006 through October 15, 2015
- 16 (b) Declaration of Former Island County Commissioner William L. McDowell  
17 III
- 18 (c) Declaration of Susan Drummond in Support of Summary Judgment  
19 Response, signed December 7, 2015
- 20 (d) Declaration of Susan Drummond Providing Attachments in Support of  
21 Summary Judgment Response, signed December 7, 2015, with the following  
22 attachments:
- 23 (i) Excerpted e-mail communications between the Washington  
24 Association of Prosecuting Attorneys and Gregory Banks
- 25 (ii) Excerpted examples of decisions to engage counsel made by the  
26 Island County Board of County Commissioners pursuant to RCW  
27 36.32.200
- 28 (iii) Newspaper article on litigation over 2006 election.

1 (e) Island County Board of Commissioners' Response to Plaintiff's Amended  
2 Motion for Summary Judgment (December 7, 2015), with the following  
3 attachments:

4 (i) Appendix 3, Declaration of Helen Price Johnson, signed December  
5 4, 2015

6 (ii) Appendix 4, Declaration of Richard M. Hannold, signed September  
7 18, 2015 with Exhibit A (list of County resolutions retaining outside  
8 counsel) and Exhibit B (*Island County v. Growth Management*  
9 *Hearings Board, Western Washington Region*, Island County  
10 Superior Court Cause No. 15-2-00416-1, Order Dismissing Island  
11 County's Petition for Review (Sept. 21, 2015))

12 (iii) Appendix 5, Declaration of Michael Shelton, signed November 30,  
13 2015

14 (iv) Appendix 6, Declaration of Helen Price Johnson, signed September  
15 18, 2015 with Exhibit A (Island County Superior Court's April 20,  
16 2015, letter to Island County Board of Commissioners)

17 (v) Declaration of Jill Johnson, signed December 4, 2015

18 (vi) Island County Board of Commissioners' Resolution C-48-15, dated  
19 April 28, 2015

20 (vii) Excerpts from Declaration of Defendant Susan Drummond, signed  
21 September 27, 2015.

22 (3) Plaintiff's Response to Island County Board of Commissioners' and Defendants'  
23 Motions for Summary Judgment with the following supporting documents and/or  
24 previously filed and incorporated documents:

25 (a) Plaintiff's Motion to Strike

26 (b) Plaintiff's CR 12(f) Motion to Strike Portions of the Answer of the Island  
27 County Board of Commissioners

28 (c) Statement of Supplemental Grounds for Relief with Respect to Plaintiff's

1 Motion to Strike Portions of the Answer of Defendant Drummond

2 (d) Statement of Supplemental Grounds for Relief with Respect to Plaintiff's CR  
3 12(f) Motion to Strike Portions of the Answer of the Island County Board of  
4 Commissioners

5 (e) Plaintiff's Reply Memorandum in Response to (1) Island County Board of  
6 Commissioners' Response to Plaintiff's Motion to Strike Portions of Answer;  
7 and (2) Drummond's Joinder in County's Response to Motion to Strike  
8 Motion and Submission of Supplemental Briefing

9 (f) Declaration of Gregory M. Banks in Opposition to Defendants' Motion for  
10 Summary Judgment, with the following exhibits:

11 (i) 2016 Public Official Bond of Gregory M. Banks

12 (ii) Island County Board of Commissioners' Resolution C-85-09 and  
13 Resolution C-86-09

14 (iii) August 15, 2013, Island County Job Posting

15 (iv) July 2015 Salary Survey Data Collected by Island County Human  
16 Resources Director

17 (v) Orders of Invalidity in Western Washington Growth Management  
18 Hearings Board Cause No. 95-2-0063

19 (vi) Whidbey News-Times Articles, dated March 6, 2014, and November  
20 15, 2014

21 (vii) December 2, 2015, letter from Commissioner Helen Price Johnson

22 (g) Declaration of Pamela B. Loginsky in Support of Plaintiff's Response to  
23 Island County Board of Commissioners' and Defendants' Motions for  
24 Summary Judgment, with the following exhibits:

25 (i) September 3, 2015, Request for Public Records

26 (ii) Selected Excerpt of Plaintiff's First Interrogatories and Request for  
27 Production to Defendant Drummond and Defendant Drummond's  
28 Response

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- (iii) November 4, 2015, correspondence between Pamela B. Loginsky and Scott Missall
- (iv) December 22, 2015, correspondence between Pamela B. Loginsky and Scott Missall
- (v) December 29, 2015, letter from Scott Missall to Pamela Loginsky with enclosures
- (vi) Board of Island County Commissioners' Responses to Interrogatories 10 and 11 and Request for Production number 5
- (h) Declarations of Lawrence H. Haskell, Andy Miller, and Karl Sloan
- (i) Declarations of Ruth Gordon and Debra Van Pelt
- (j) Transcript of April 8, 2015, Island County Board of Commissioners Work Session
- (k) Transcript of April 15, 2015, Island County Board of Commissioners Work Session
- (l) Plaintiff's Amended Motion for Summary Judgment and Entry of Order Ousting Defendants from the Office of the Island County Prosecuting Attorney with the following supporting documents:
  - (i) Arizona Revised Statute § 11-532
  - (ii) Declaration of Gregory M. Banks in Support of Plaintiff's Amended Motion for Summary Judgment with the following exhibits:
    - I. Certificate of Election
    - II. Oath of Office
    - III. Public Official Bond
    - IV. Certificate of Good Standing
    - V. Island County Prosecuting Attorney Civil Client Satisfaction Survey Results
    - VI. Declaration of Daniel Mitchel
    - VII. Declaration of Adam Long

1 VIII. April 20, 2015 letter from Superior Court Judges to Island  
2 County Commissioners and appended March 9, 2015,  
3 memorandum

4 IX. Thurston County Superior Court's order in *City of Oak*  
5 *Harbor v. WWGMHB and Island County*, Cause No. 12-2-  
6 00032-5

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8 (iii) Declaration of Pamela B. Loginsky in Support of Plaintiff's Amended  
9 Motion for Summary Judgment with the following exhibits:

10 I. September 4, 2015, letter from Jeffrey T. Even, Deputy  
11 Solicitor General

12 II. Quo Warranto Information and Complaint for Judgment of  
13 Ouster

14 III. Defendants' Answer, Affirmative Defenses, and Reservations

15 IV. Amended Answer of Defendants

16 V. Answer and Counterclaim of Island County Board of  
17 Commissioners

18 VI. Selected documents related to SSB 3151 (1983)

19 (iv) Attorney General Opinions and Attorney General Letter Opinions

20 (m) Plaintiff's Reply to Defendants' Response to Amended Summary Judgment  
21 Motion, with the following supporting documents:

22 (i) Supplemental Declaration of Pamela B. Loginsky in Support of the  
23 Plaintiff's Amended Motion for Summary Judgment, with the  
24 following attachments:

25 I. Board of Island County Commissioners' Responses to  
26 Plaintiff's Request for Admissions Numbers 2 and 3

27 II. Defendant Drummond's Response to Plaintiff's Requests for  
28 Admission Numbers 8, 9 and 23

- 1 (ii) RCW 36.27.020, RCW 36.32.200 and RCW 36.32.330  
2 (iii) Declarations of David Alvarez, Jacquelyn M. Aufderheide, Steven M.  
3 Clem, Rea L. Culwell, Juelanne Dalzell, Garth Dano, Randall K.  
4 Gaylord, Mark McClain, James L. Nagle, Mark Roe, and Richard  
5 Weyrich

6 (4) Island County Board of Commissioners' Response to Defendant Drummond's  
7 Joinder and Supplemental Briefing on Summary Judgment, with the following  
8 supporting document:

9 (a) Declaration of Helen Price Johnson in Support of Board's Response to  
10 Drummond's Supplemental Briefing, with the following exhibits:

- 11 (i) December 2, 2015, letter authored by Helen Price Johnson  
12 (ii) Letters from the Board of Commissioners of Chelan County, Clallam  
13 County, Grant County, King County, San Juan County, Skagit  
14 County, Spokane County, and Whakiakum County

15 (5) Island County Board of Commissioners' Reply to Plaintiff's Response on Board's  
16 Motion for Summary Judgment, with the following supporting documents:

17 (a) Second Declaration of Richard M. Hannold in Support of Island County  
18 Board of Commissioners' Motion for Summary Judgment, with the following  
19 exhibit:

20 (i) Island County Board of Commissioners' Resolution C-54-10

21 (b) Declaration of Scott M. Missall in Support of Island County Board of  
22 Commissioners' Motion for Summary Judgment, with the following exhibit:

23 (i) January 5, 2016, letter from Scott Missall to Pamela Loginsky

24 (6) Defendant Drummond's Joinder in County's Summary Judgment Reply and  
25 Supplemental Brief, with the following supporting document:

26 (a) Declaration of Robert B. Gould in Support of Defendants Drummond's  
27 Motion for Summary Judgment of Dismissal, signed January 8, 2016, with  
28 the following exhibits:

- (i) Subpoena in a Civil Case
- (ii) December 24, 2015, letter from Robert B. Gould to Pamela Loginsky
- (iii) December 31, 2015, letter from Island County Superior Court Judges Churchill and Hancock to Pamela B. Loginsky

Based on the pleadings presented and the argument of counsel the court makes the following

**CONCLUSIONS OF LAW:**

- (1) No disputed issues of material facts exist and judgment may be rendered as a matter of law.
- (2) Judgment should be granted in favor of Ms. Drummond and the Island County Board of Commissioners in this case for the reasons set forth in the Court's oral ruling.

Now, therefore, based on the above Conclusions of Law, it is hereby

**ORDERED:**

This quo warranto action is dismissed with prejudice.

Dated this January 15 day of January 15, 2016.

*Brian Stiles*  
 Judge Brian Stiles

Prepared in conformity with the Court's oral ruling by:

*Pamela Beth Loginsky*  
 Pamela B. Loginsky, WSBA No. 18096  
 Special Deputy Prosecuting Attorney  
 Attorney for State ex rel. Gregory Banks

*(3) The intervenors counter claim for declaratory relief is granted. PBL*

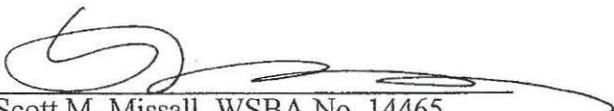
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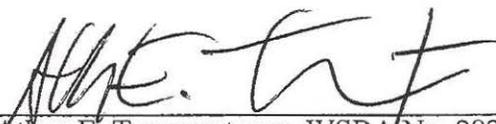
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4 Robert B. Gould, WSBA No. 4353  
Attorney for Defendants

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9 Scott M. Missall, WSBA No. 14465  
Attorney for the Island County Board of Commissioners

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14 Athan E. Tramountanas, WSBA No. 29248  
15 Attorney for the Island County Board of Commissioners

The Honorable Brian L. Stiles  
Hearing Date: Friday, February 19, 2016  
Telephonic Argument Scheduled: 11:00 a.m.

FILED  
DEBRA VAN PELT  
ISLAND COUNTY CLERK  
2016 FEB 24 PM 1:50

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF ISLAND

STATE OF WASHINGTON, on the  
Relation of Gregory M. Banks, Prosecuting  
Attorney of Island County,

Plaintiff,

vs.

SUSAN E. DRUMMOND, and Law Offices  
of Susan Elizabeth Drummond, PLLC;

Defendants

and

ISLAND COUNTY BOARD OF  
COMMISSIONERS,

Intervenor/Defendant,  
and Counterclaim  
Plaintiff.

NO. 15-2-00465-9

SUPPLEMENTAL SUMMARY  
JUDGMENT ORDER:

(1) GRANTING THE INTERVENOR'S  
AND DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT;

(2) DENYING THE PLAINTIFF'S  
AMENDED MOTION FOR SUMMARY  
JUDGMENT;

(3) DISMISSING THIS QUO  
WARRANTO ACTION WITH  
PREJUDICE; AND

(4) GRANTING THE INTERVENOR'S  
COUNTERCLAIM FOR  
DECLARATORY RELIEF

~~PROPOSED ALTERNATE~~

The Court, pursuant to RAP 9.12, hereby certifies that the following documents, which were not listed in the January 15, 2016, "Order (1) Granting the Intervenor's and Defendants' Motions for Summary Judgment; (2) Denying the Plaintiff's Amended Motion for Summary Judgment; (3) Dismissing this Quo Warranto Action with Prejudice; and (4) Granting the Intervenor's Counterclaim for Declaratory Relief" were drawn to the Court's attention before the orders on summary judgment:

SUPPLEMENTAL SUMMARY JUDGMENT  
ORDER - 1

ORIGINAL

SHORT CRESSMAN  
& BURGESS PLLC

999 Third Avenue, Suite 3000, Seattle, WA 98104-4088  
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com

Document Name	Filing Date
Affidavit of Gregory M. Banks in Support of Petition for Writ of Quo Warranto and all attachments, supporting documents, and exhibits	Aug. 12, 2015
Affidavit of Gregory Banks in Support of Reply to Response to Plaintiff's Motion for Preliminary Injunction and all attachments, supporting documents, and exhibits	Oct. 13, 2015
Declaration of Susan Drummond and all attachments, supporting documents, and exhibits	Oct. 22, 2015
Plaintiff's Motion to Certify an Adverse Order	Dec. 4, 2015
Drummond's Response and Joinder in County's Response to Banks' Summary Judgment Motion and all attachments, supporting documents, and exhibits	Dec. 7, 2015
Drummond's Joinder in County's Response to Plaintiff's Strike Motion and Submission of Supplemental Briefing	Dec. 11, 2015
Drummond's Joinder in County's Response to Plaintiff's Motion to Certify	Dec. 11, 2015
Island County Board of Commissioners Response to Plaintiff's Motion to Strike Portions of Answer	Dec. 11, 2015
Island County Board of Commissioners Response to Plaintiff's Motion for Certification of Adverse Ruling	Dec. 11, 2015
Declaration of Athan Tramountanas in Support of Island County Board of Commissioners Response to Plaintiff's Motion to Strike Portions of Answer	Dec. 11, 2015
Island County Board of Commissioners' Joinder in Drummond's Response to Plaintiff's (1) Motion for Summary Judgment; (2) Motion to Strike Portions of Answer; and (3) Motion for Certification	Dec. 14, 2015

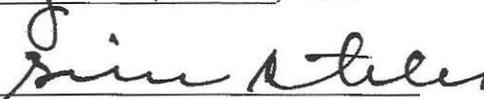
SUPPLEMENTAL SUMMARY JUDGMENT  
ORDER - 2

**SHORT CRESSMAN  
& BURGESS PLLC**

999 Third Avenue, Suite 3000, Seattle, WA 98104-4088  
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Document Name	Filing Date
Plaintiff's Motion to Shorten Time and Motion to Strike the Island County Board of Commissioners' Untimely Joinder in Defendant Drummond's Response to the Amended Motion for Summary Judgment	Dec. 15, 2015
Island County Board of Commissioners' Response to Plaintiff's (1) Motion to Shorten Time; and (2) Motion to Strike the Board's Joinder	Dec. 17, 2015
Declaration of Athan Tramountanas in Support of Island County Board of Commissioners' Response to Plaintiff's (1) Motion to Shorten Time; and (2) Motion to Strike the Board's Joinder	Dec. 17, 2015

DATED this      day of February 19, 2016.

  
 Judge Brian Stiles

Presented by:

SHORT CRESSMAN & BURGESS PLLC

By 

Scott M. Missall, WSBA No. 14465  
 Athan E. Tramountanas, WSBA No. 29248  
 Attorneys for the Island County Board of Commissioners

SUPPLEMENTAL SUMMARY JUDGMENT  
 ORDER - 3

**SHORT CRESSMAN  
 & BURGESS PLLC**  
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# **EXHIBIT 5**

**Appellant Banks' Subpoena  
to Island County Superior Court Bench  
December 22, 2015**

**Responsive Correspondence from Ms. Drummond's Counsel  
December 24, 2015**

**Superior Court Response  
December 31, 2015**

**(CP 43-46, 48-49, and 51-54)**

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**IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON**

STATE OF WASHINGTON, on the  
Relation of Gregory M. Banks,  
Prosecuting Attorney of Island County,

NO. 15-2-00465-9

Plaintiff,

SUBPOENA IN A CIVIL CASE

vs.

SUSAN E. DRUMMOND, and Law  
Offices of Susan Elizabeth Drummond,  
PLLC;

Defendants,

and

ISLAND COUNTY BOARD OF  
COMMISSIONERS,

Intervenor/Defendant,  
and Counterclaim  
Plaintiff.

THE STATE OF WASHINGTON TO:

Name: Island County Superior Court  
Attn: Andrew Somers, Court Administrator  
Honorable Alan Hancock, Judge  
Honorable Vickie Churchill, Judge  
Address: 101 NE 6<sup>th</sup> Street  
Coupeville, WA 98239

1  
2 YOU ARE HEREBY COMMANDED TO APPEAR before the Judge of the above-entitled  
3 court, and there remain until discharged, to testify in this cause for the plaintiff; said appearance to  
4 be as follows:

5 PLACE: ISLAND COUNTY LAW & JUSTICE CENTER  
6 101 NE 6<sup>TH</sup> STREET, ROOM 131  
7 COUPEVILLE, WA 98239

8 DATE: JANUARY 4, 2016  
9 TIME: 9:00 A.M.

10 Any organization not a party to this suit that is subpoenaed for the taking of a  
11 deposition shall designate one or more officers, directors, or managing agents, or other persons who  
12 consent to testify on its behalf, and may set forth, for each person designated, the matters on which  
13 the person will testify. CR 30(b)(6).

14 YOU ARE FURTHER DIRECTED AND COMMANDED to bring with you the following  
15 papers and documents:

16 1. Any and all communication, memoranda, analysis, reports, surveys, correspondence,  
17 e-mails, notices or papers by and between the Island County Superior Court and The Island  
18 County Board of Commissioners, Helen Price Johnson, Richard Hannold, Jill Johnson, Pam Dill,  
19 Elaine Marlowe, Debbie Thompson, and David Wechner and any and all intraoffice  
20 correspondence and e-mails inside the Island County Superior Court during the period of March  
21 1, 2015 through and including December 22, 2015, in any way related to the hiring of outside  
22 counsel, the need for outside counsel, and/or the hiring of Susan Drummond.

23 2. The April 6, 2015, e-mail from Elaine Marlow to Andrew Somers re draft resolution  
24 to employ outside counsel with attachment.

25 3. The April 16, 2015, 10:32 a.m. e-mail from Elaine Marlow to Andrew Somers re draft  
26 resolution to employ outside counsel with attachment.

27 4. The April 16, 2015, 10:28 a.m. e-mail from Elaine Marlow to Andrew Somers re draft  
28 resolution to employ outside counsel.

29 5. The April 16, 2015, 10:24 a.m. e-mail from Elaine Marlow to Andrew Somers re draft  
30 resolution to employ outside counsel.

6. The April 16, 2015, 9:29 a.m. e-mail from Elaine Marlow to Andrew Somers re draft  
resolution to employ outside counsel.

1 7. The April 8, 2015, 12:36 pm. e-mail from Elaine Marlow to Andrew Somers re draft  
2 resolution to employ outside counsel.

3 8. The April 6, 2015, 8:45 a.m. e-mail from Elaine Marlow to Andrew Somers re draft  
4 resolution to employ outside counsel.

5 9. The April 16, 2015, 10:31 a.m. e-mail from Andrew Somers to Elaine Marlow re draft  
6 resolution to employ outside counsel.

7 10. The April 16, 2015, 10:27 a.m. e-mail from Andrew Somers to Elaine Marlow re  
8 draft resolution to employ outside counsel.

9 11. The April 16, 2015, 10:09 a.m. e-mail from Andrew Somers to Elaine Marlow re  
10 draft resolution to employ outside counsel.

11 **You may satisfy this subpoena duces tecum by providing the requested documents and**  
12 **the certification to their authenticity, to the Island County Prosecuting Attorney by December**  
13 **31, 2015, at 4:00 p.m.**

14 Protection of Persons Subject to Subpoena for Production. On timely motion, the court may  
15 quash or modify a subpoena for production if it (A) fails to allow reasonable time for compliance;  
16 (B) requires disclosure of privileged or other protected matter and no exception or waiver applies;  
17 (C) is unreasonable, oppressive, or unduly burdensome; or (D) exceeds the scope of discovery  
18 otherwise permitted under the criminal rules. The court may condition denial of a motion to quash  
19 or modify upon the advancement by the party on whose behalf the subpoena for production is  
20 issued of the reasonable cost of producing the books, papers, documents, tangible things, or  
21 premises. Criminal Rule 4.8(b)(4).

22 Dated this 22<sup>nd</sup> day of December, 2015.

23 GREGORY M. BANKS  
24 ISLAND COUNTY PROSECUTING ATTORNEY

25 By:   
26 PAMELA B. LOGINSKY, WSBA #18096  
27 SPECIAL DEPUTY PROSECUTING  
28 ATTORNEY FOR PLAINTIFF

---

CR 45, Sections (c) & (d):

**(c) Protection of Persons Subject to Subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce and all other parties, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it: (i) fails to allow reasonable time for compliance; (ii) fails to comply with RCW 5.56.010 or subsection (e)(2) of this rule; (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or (iv) subjects a person to undue burden, provided that, the court may condition denial of the motion upon a requirement that the subpoenaing party advance the reasonable cost of producing the books, papers, documents, or tangible things.

(B) If a subpoena: (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

**(d) Duties in Responding to Subpoena.**

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

LAW OFFICE OF  
ROBERT B. GOULD

Edmonds Bay Building  
51 West Dayton Street, Suite 208  
Edmonds, Washington 98020

Phone (206) 633-4442  
Fax (206) 633-4443  
rbgould@nwlegalmal.com

December 24, 2015

*Via Email Only*

Pamela B. Loginsky  
Washington Association of Prosecuting Attorneys  
Special Deputy Prosecuting Attorney for Island County  
206 10<sup>th</sup> Ave SE  
Olympia, WA 98501  
[pamloginsky@waprosecutors.org](mailto:pamloginsky@waprosecutors.org)

*Re: State of Washington v. Susan E. Drummond et al.; Island County Cause no. 15-2-00465-9*

Dear Pamela:

This is to chronicle our conversation of shortly after 3:30 PM yesterday, Wednesday December 23<sup>rd</sup>. You stated that you did not consider our discussion to be a CR 26(i) conference as I had not given you written notice of the subject matter. Scott Missall was on the line with us and we certainly discussed the merits of this matter and on two occasions you clearly and unequivocally stated that you would not be withdrawing the subpoena deuces tecum as it relates to item number 1, page 2 lines 14-19. I do consider our conversation a 26(i) conference.

You asked me to send to you, which I am doing now, the citations of authority that I gave you over the phone. As you to your credit quickly observed, the first one is ER 605. CJC 2.7 is likewise implicated.

With regard to the citations of authority which I gave you over the phone, you asked me to send you those citations which I am doing now. The below two cases stand for the proposition that a party may raise an objection by the adverse party to a subpoena to a non-party:

- (1) *Cabell v. Zorro Prods.*, 294 F.R.D. 604, 607 (W.D. Wash.2013).
- (2) *Olson v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 21404 (W.D. Wash. Feb. 23,2015)

The language in the case of *Carroll v. Junker* 79 Wash.2nd 12 482 P. 2d 775 (1971) is most apt for this current situation. The legal issue of access to juvenile court records was the gravamen of *Carroll*, which was overturned by statute as addressed in *Seattle Times Co. v.*

*Benton County WA* 99 Wash.2nd 251, 661 P.2d 964 (1983). Having said, however, the following language remains good law:

“Only in the rarest of circumstances should a judge be called upon to give evidence as to matters upon which he has acted in a judicial capacity, in these occasions, we think, should be limited to instances in which there **is no other reasonably available way to prove the facts sought to be established**. A record of trial or a judicial hearing speaks for itself as of the time it was made.” P 20 [emphasis added].

Our respective clients as well as the Island County Board of Commissioners, have a disagreement as it relates to RCW 36.32.200. However the clear unambiguous wording of that statute now well over a hundred years old states that the contract must be “...approved by the presiding Superior Court Judge of a County in writing endorsed thereon.” I and Scott view that as a mandatory judicial obligation of the Island County Superior Court. The Island County Superior Court performed their duty in their unanimous 7-page decision of April 20, 2015.

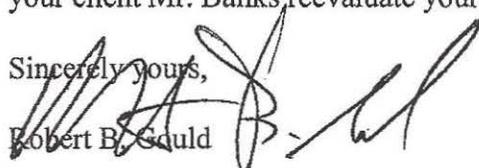
Your subpoena, page 2 paragraph 1 requests a wide variety of documents including but not limited to, “... any and all interoffice correspondence and emails **inside** the Island County Superior Court during a period of March 1, 2015 through and including December 22, 2015, in any way related to the hiring of outside counsel, the need for outside counsel, and/or the hiring of Susan Drummond.”

As I attempted to say in our telephone conversation of December 23<sup>rd</sup>, your subpoena deuces tecum is simply way out of line as it relates to the above paragraph. The Island Court Superior Court bench is not required to give you information surrounding their decision of April 20<sup>th</sup>. Consistent with Washington jurisprudence, it stands on its own.

As stated earlier, you have advised me on two occasions in the course of our telephone conversation that you would not drop the subpoena. I am currently shorthanded here at our office as my paralegal is on a well- deserved three week vacation and I have some time exigencies in two other cases. We have been advised by the Skagit County court administrator Ms. Beaton, that Judge Stiles will hear matters in this case only on the date of the defendant’s currently scheduled summary judgment motions on Friday January 15<sup>th</sup> at 1:30PM.

Accordingly, Pamela, unless you advise me in writing by the close of business this Monday, December 28, 2015 that you will quash and not seek the information in paragraph 1 page 2 of your subpoena, we will file the requisite motion to quash. I would ask that you and your client Mr. Banks reevaluate your position in this regard.

Sincerely yours,

  
Robert B. Gould

Cc: Scott Missall, Esq.  
Cc: Susan Drummond, Esq.  
Cc: Honorable Judge Alan Hancock  
Cc: Honorable Judge Vickie Churchill

**SUPERIOR COURT OF THE STATE OF WASHINGTON**  
**FOR ISLAND COUNTY**

*Law & Justice Facility, 101 NE 6<sup>th</sup> St, PO Box 5000, Coupeville WA 98239-5000*  
*Phone: (360) 679-7361 Fax: (360) 679-7383*

**ALAN R. HANCOCK**  
*Judge*  
**VICKIE I. CHURCHILL**  
*Judge*  
**ANDREW SOMERS**  
*Court Administrator*

December 31, 2015

Pamela B. Loginsky  
Island County Special Deputy Prosecuting Attorney  
206 10<sup>th</sup> Ave. SE  
Olympia, WA 98501

Re: *State ex rel. Banks v. Drummond, et al.*  
Island County Cause No. 15-2-00465-9  
Response and Objection to Plaintiff's Subpoena

Dear Ms. Loginsky:

We are in receipt of your letter, the Notice of Records Desposition [sic] of Island County Superior Court, and the Subpoena in a Civil Case, all dated December 22, 2015, which were delivered to the court administrative office on the same date. Consider this our written objection to your subpoena. We are returning the witness fee, which we will not accept. Our response to the notice and subpoena is as follows.

The Subpoena is Defective and Unenforceable

The subpoena is defective and unenforceable. Among other defects, it fails to set forth the text of subsections (c) and (d) of CR 45, as required by CR 45(a)(1)(D), and it fails to include all of the provisions required by CR 45(h).

You Failed to Consult With Us Concerning an Appropriate Date for the Deposition

We are dismayed that you did not have the professional courtesy to contact us in advance to see if a mutually convenient date for the scheduled records deposition could be arranged. It is standard practice in the legal profession to do this, and you failed to do this. Furthermore, you have a duty to avoid imposing undue hardship or expense on a person subject to that subpoena. Instead, you have scheduled the deposition for Monday, January 4, 2016, at 9:00 a.m. Our regularly scheduled motion calendars are on Mondays at 9:30 a.m. Each of us has a busy civil calendar scheduled for 9:30 a.m. on January 4, 2016. Your client is aware of our calendars and the hardship this poses to us, court staff, attorneys, and litigants.

RECEIVED

DEC 31 2015

ISLAND COUNTY  
PROSECUTING ATTORNEY

### It is an Undue Burden and a Waste of Our Time to Produce Records to Which You Have Other Access

You have demanded “[a]ny and all communication, memoranda, analysis, reports, surveys, correspondence, e-mails, notices or papers by and between the Island County Superior Court and The Island County Board of Commissioners, Helen Price Johnson, Richard Hannold, Jill Johnson, Pam Dill, Elaine Marlowe, Debbie Thompson, and David Wechner.”

It is an undue burden and a waste of our time to produce documents to which you have access by other means. CR 45(c)(1). All such documents can be obtained by means of public records requests to the board, the commissioners, their secretaries, the budget director, and the director of the Planning and Community Development Department. By identifying ten specific emails that you are demanding, it is obvious that you are already aware of such emails, and presumably have copies of them.<sup>1</sup>

As more particularly noted below, Mr. Banks had an obvious conflict of interest in serving us, his own clients, with this subpoena. We have always erred on the side of disclosure when requests for records have been made to the court. But it is not reasonable for us to do so in this case because the records referred to above can be obtained from other sources. The other records demanded in the subpoena are clearly exempt from disclosure. We should not have been subjected to responding to this subpoena, and we should not have been drawn into Mr. Banks’s lawsuit in this way.

### Your Demand for Intraoffice Court Records Undermines the Integrity of the Courts

You have demanded “any and all *intraoffice correspondence and e-mails inside the Island County Superior Court* during the period of March 1, 2015 through and including December 22, 2015, in any way related to the hiring of outside counsel, the need for outside counsel, and/or the hiring of Susan Drummond.” (Emphasis added.)

Your subpoena in this regard requires disclosure of privileged or other protected matter and no exception or waiver applies. CR 45(c)(3)(A)(iii). Any such documents are exempt from public inspection and copying. The Public Records Act does not apply to the courts. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009). Even if it did, these records would be exempt from public inspection and copying. The Washington Supreme Court has promulgated GR 31.1, Access to Administrative Records, which will take effect January 1, 2016. The documents you are seeking in this regard are chambers records, as that term is defined in the rule, and are clearly exempt from disclosure under the rule.

We are astonished that you would have the effrontery to demand these records. A demand of this nature undermines the integrity of the courts. Among other things, we have the right to preserve the confidentiality of our deliberations and thought processes, just as the judges of the Supreme Court and the Court of Appeals do. There is no doubt that the judges of these courts would take a dim view of demands for all of the discussions of the judges leading up to the issuance of a formal opinion, just as we do. There is also no doubt that Mr. Banks, you, and the other deputy prosecuting attorneys would

---

<sup>1</sup> We note that you are demanding that we produce an email described as “2. The April 6, 2015, e-mail from Elaine Marlow to Andrew Somers re draft resolution to employ outside counsel with attachment.” There is no such email. We are aware that there was an email from Elaine Marlow to “zz Bicc” with copies to David Wechner and Elaine Marlow dated April 6, 2015, at 8:45 a.m. There was no such email to Andrew Somers.

take a dim view of a demand that you produce all of the discussions that led to the preparation of a legal brief or other court document.

The presiding judge of our court was called upon to fulfill a statutory duty, i.e., to review a proposed contract of employment between an attorney and the board of county commissioners under RCW 36.32.200. It is our practice to jointly consider such matters, and we did so in the present situation. Mr. Banks sent us a memorandum arguing that the statute was unconstitutional, and we considered it to be our duty to consider his arguments and formulate an opinion in response. Our deliberations on this subject are clearly confidential, and you have no right to obtain records relating to them. Our letter opinion speaks for itself.

#### The Prosecuting Attorney Has Breached His Duty of Fidelity to Us

The prosecuting attorney is *our* attorney. RCW 36.27.020(2); *Neal v. Wallace*, 15 Wn. App. 506, 550 P.2d 539 (1976). As such, he and his deputies owe us a duty of loyalty and fidelity. As the Washington Supreme Court stated in *Tank v. State Farm Fire and Casualty Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986), quoting from *Van Dyke v. White*, 55 Wn.2d 601, 613, 349 P.2d 1960): “[t]he standards of the legal profession require undeviating fidelity of the lawyer to his [or her] client. No exceptions can be tolerated.”

We have the right to counsel to represent us in responding to your demands. The prosecuting attorney should theoretically be representing us in securing our rights. Your demand breaches the prosecuting attorney’s duty of fidelity to us, and it is also a shameful breach of professional courtesy. It requires the production of private communications that are exempt from disclosure under existing law, under prospective GR 31.1, and under the Public Records Act if that applied to the courts, which it does not.

We have been provided with a copy of Mr. Gould’s letter to you dated December 24, 2015. We appreciate Mr. Gould’s defense of our rights as judicial officers, and he has correctly cited the case of *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) for the proposition that judges should not be called upon to give evidence as to matters upon which they have acted in a judicial capacity.

After receiving Mr. Gould’s letter, you sent an email to various persons on December 24, 2015. You did not include us as recipients of this email, though a copy of the email was sent to Mr. Somers. In the email, you state:

“I will clarify what is sought by the subpoena. I am not requesting drafts of the letter, nor internal discussions between Judge Churchill and Judge Hancock. I am seeking the documents that relate to how the request was handled—who sent the request for the approval of the contract with Ms. Drummond, what was sent to the court, who received notice of the request and how, did the court open a superior court file regarding the request or was it treated as an administrative action.”

You weren’t “clarifying” anything. You were expressly retreating from the mandates of the subpoena, which clearly and unambiguously required, among other things, the production of any drafts of our letter that went back and forth and our internal discussions. In light of your “clarification,” you should have formally modified the subpoena and, as a matter of common courtesy, communicated with us directly as to what you were demanding, since the language of the subpoena itself is all-encompassing. It appears that you decided to backtrack on the scope of the subpoena after Mr. Gould pointed out the unreasonable demands contained therein. As it stands, we are still faced with a comprehensive demand

for internal superior court records to which you are not entitled. You have only indicated indirectly that you are not seeking certain records that are clearly included within the subpoena on its face.

We note that on Monday, December 28, 2015, six days after the subpoena was served on us, Mr. Banks sent an email to Mr. Somers belatedly recognizing his "obvious conflict of interest" in this matter, and stating that if we wanted legal advice on the subpoena, we could get the advice of "an [unnamed] Assistant Attorney General in the Solicitor General's office" who can be "a point of contact, and will provide an AAG to advise the judges."

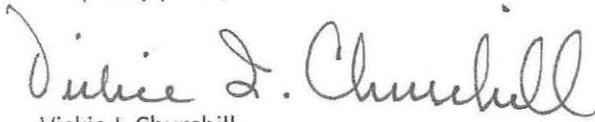
The matter of providing us with legal counsel appears to be an afterthought on Mr. Banks's part following the exchange of Mr. Gould's letter and your email of December 24, 2015.

Conclusion

For all of the foregoing reasons, we object to the subpoena and will not produce any of the documents demanded by it. The subpoena is defective and unenforceable. Furthermore, the prosecuting attorney had no business serving us with this subpoena. It requires the production of records which are either (1) readily obtainable from other sources, or (2) clearly protected from disclosure under settled law. We should not have been placed in the position of responding to this subpoena. Our own attorney has made unreasonable demands on his own clients, and that is unconscionable.

We contemplated the possibility of stating our objections, and then producing the records anyway, even though the records you are seeking are available from other sources. After due consideration, however, we believe that the principle of protecting the judicial branch of government from unreasonable inroads from the executive branch of government is too important to be compromised.

Very truly yours,



Vickie I. Churchill  
Island County Superior Court Judge



Alan R. Hancock  
Island County Superior Court Judge

Copies: Andrew Somers, Court Administrator

Hon. Gregory M. Banks

Robert B. Gould

Athan E. Tramountanas

Scott Missall

# **EXHIBIT 6**

**Discovery Excerpts Re: Concessions of Appellant Banks  
(Unquestioned Constitutionality of RCW 36.32.200 and  
Accurate Superior Court Analysis)**

**(CP 862 and 1126)**

1 Q And as an attorney licensed to practice law in  
2 the state of Washington, is she a speaking agent for you?

3 A Yes, I suppose that's true.

4 Q Could you turn to page 2, lines two and three.  
5 It states, and I quote, "Relator" -- Relator, however it  
6 is pronounced. I'll pronounce it relator, and subject to  
7 being corrected -- "Relator Banks has not requested a  
8 declaration that RCW 36.32.200 is unconstitutional." End  
9 quote. Is that accurate?

10 A Well, and for what it's worth, I believe it's  
11 relator, but I -- I would be willing to be corrected on  
12 the pronunciation as well.

13 Q I'm going to take your suggestion. We're going  
14 to try and call it relator. Is that correct is the  
15 question in front of you.

16 A Well, I mean, it seems to be a statement of  
17 positions that my attorney has taken in the case. So are  
18 you asking -- Well, I would say I have not requested a  
19 declaration that it's facially unconstitutional.

20 Q Okay.

21 A That's correct.

22 Q Does it say facially unconstitutional, or is the  
23 statement "is unconstitutional"?

24 A The word facially does not appear there.

25 Q Thank you. Is it your position as a party to

**From:** Greg Banks <Gregb@co.island.wa.us>  
**To:** "Tom McBride (tmcbride@waprosecutors.org)" <tmcbride@waprosecutors.org>  
**Date:** 4/21/2015 12:13 PM  
**Subject:** Outside Counsel  
**Attachments:** CLJPMF@co.island.wa.us\_20150421\_113330.pdf

Tom,

I thought I had very good relations with my Superior Court judges. I returned to work today to find the attached memo from them to my BOCC. Not only did they approve the contract with outside counsel, which includes an indemnification clause should I sue her, but they devoted a considerable amount of paper to analyzing why our constitutional analysis is wrong, offered an opinion about the likelihood of success of a quo warranto lawsuit, and parroted the BOCC's claims that I am unwilling and unable to perform the work.

I'm stunned.

I'd be interested in having someone look at their legal analysis. I don't think it's wrong. I just think the constitutional infirmity of the statute is more obvious than they do, especially since the statute can be construed to be constitutional if you consider that there must be a disability.

I've about had it, Tom. Seriously.

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# **EXHIBIT 7**

**Washington Statutory and Constitutional Excerpts**

**WASHINGTON STATUTORY AND  
CONSTITUTIONAL EXCERPTS**

(Emphasis Added)

**RCW 36.32.200 Special attorneys, employment of.**

It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, **unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon.** This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

Any contract written pursuant to this section shall be limited to two years in duration.

**RCW 36.32.120 Powers of legislative authorities.**

The legislative authorities of the several counties shall: ... (6) Have the care of the county property and the management of the county funds and business **and in the name of the county prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law;** ...

**RCW 36.27.020 Duties.**

The prosecuting attorney shall: (1) Be legal adviser of the legislative authority, giving it his or her written opinion **when required by the legislative authority or the chairperson** thereof touching any subject which the legislative authority may be called or required to act upon relating to the management of county affairs; ...

**Wash. Const., Art. XI, § 5 COUNTY GOVERNMENT**

**The legislature**, by general and uniform laws, **shall provide for the election** in the several counties of boards of county commissioners, ... prosecuting attorneys ... **and shall prescribe their duties**, and fix their terms of office ....

**Wash. Const., Art. I, § 10 ADMINISTRATION OF JUSTICE.**

Justice in all cases shall be administered openly, and without unnecessary delay.