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NO. 92749-9

ISLAND COUNTY SUPERIOR COURT CAUSE NO. 15-2-00465-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

vs.

SUSAN E. DRUMMOND, and Law Offices of Susan Elizabeth  
Drummond, PLLC; and ISLAND COUNTY BOARD OF  
COMMISSIONERS,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Brian L. Stiles, Judge

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**CORRECTED  
ISLAND COUNTY  
BOARD OF COMMISSIONERS RESPONSE  
TO  
APPELLANTS OPENING BRIEF**

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## I. INTRODUCTION

This case is about the validity of a 111-year old statute, RCW 36.32.200, that allows the 39 boards of county commissioners ("county boards") throughout the State to periodically retain outside counsel when needed to perform the business of their respective county. The statute is straight forward, contains checks and balances that limit its use, and is so unremarkable in its application that there are only two reported decisions that even mention the statute.<sup>1</sup>

The Island County Board of Commissioners ("Board" or "Island County Board") used RCW 36.32.200 in April 2015 to retain Co-Respondent Susan E. Drummond ("Drummond") for the limited purpose of performing legal services for Island County's 2016 Growth Management Act update. As required by the statute, the Island County Superior Court reviewed and approved the proposed 2-year contract, and the Board implemented its decision by adopting a formal resolution.

Appellant Island County Prosecutor Gregory M. Banks ("Banks" or "Prosecutor Banks")<sup>2</sup> was unhappy with the Board's decision and filed a *quo warranto* suit to stop Drummond from providing legal services to the Board. Banks contends that RCW 36.32.200 is unconstitutional as applied, that Banks must be the sole provider of all legal services to the Board and every

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<sup>1</sup> *West v. Thurston County*, 144 Wn. App. 573, 183 P.3d 346 (2008) (a public records act case), and *Hoppe v. King County*, 95 Wn.2d 332, 622 P.2d 845 (1980) (statute held not to apply to the factual circumstances of the case).

<sup>2</sup> While the case is nominally brought by "State ex rel" Banks, that designation is a legal fiction. The Attorney General on behalf of the State has declined to participate. Mr. Banks is so referenced for brevity and clarity of identification.

other part of Island County government, and that the Board must therefore obtain Banks' express consent should it ever need or desire to retain an outside attorney to assist the Board in performing its own duties.

Banks' novel theory of his authority is poorly conceived. His remarkable legal assertions are unsupported by Washington law and by his out-of-state authority. His new theory is highly impractical and would cause severe and disruptive consequences in routine government operations, obstructing the efficient and cooperative work required in today's complex world. Accordingly, he cannot satisfy the heavy burden of proving RCW 36.32.200 unconstitutional.

The trial court recognized all of these problems and ruled in favor of the Board and Drummond on virtually all counts, prompting Banks' direct appeal to this Court. The Board respectfully asks the Supreme Court to affirm the trial court decision granting the Board's summary judgment and declaratory judgment, affirming the validity RCW 36.32.200, and dismissing Banks' *quo warranto* suit.

## **II. RESTATEMENT OF THE ISSUES**

As the prevailing party in the trial court, the Island County Board restates the issues in this appeal as follows:

(1) Should the validity and application of RCW 36.32.200 be upheld when: (i) the statute was duly passed and amended by the Legislature; (ii) the statute has been used by all of Washington's counties and prosecutors since 1905 without any reported difficulty; (iii) the statute

facilitates the efficient and necessary conduct of government for the benefit of the counties and their citizens; and (iv) Banks cannot meet the "beyond a reasonable doubt" standard necessary to overturn the statute?

(2) Should the Board's decision to retain Drummond as a special counsel be upheld when: (i) the Board has plenary authority to manage the affairs of Island County; (ii) the Board acted pursuant to the express statutory authority of RCW 36.32.200; (iii) there is no dispute the Board complied with the requirements of RCW 36.32.200; (iv) substantial Washington legal authority supports the Board's use of RCW 36.32.200; (v) there is no legal support for Banks' assertion that prosecutors are the sole providers of legal services to counties; (vi) no Washington legal authority requires a county board to obtain a prosecutor's consent prior to utilizing RCW 36.32.200; and (vii) Banks is not vested with the authority to control or to assume for himself the exercise of the Board's legislative and executive functions?

(3) Should the dismissal of Banks' *quo warranto* suit be upheld because RCW 36.32.200 is valid and constitutional?

(4) Should the dismissal of Banks' *quo warranto* suit be upheld when: (i) Banks concedes that Drummond is not holding the elected Office of the Prosecuting Attorney for Island County, is not a public officer, and was not appointed to a position of deputy prosecuting attorney by Banks or the Board; and (ii) such status is a necessary prerequisite to bringing a *quo warranto* action?

(5) Should the dismissal of Banks' *quo warranto* suit be upheld because Banks did not appeal the Board's formal Resolution retaining Drummond as required by RCW 36.32.330?

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

Governments in Washington's non-charter counties, including Island County, are composed of a board of county commissioners and various other elected departments, and are operated under "a system of uniform [laws] throughout the state" established by the Legislature. Wash. Constitution Art. XI, Secs. 4 and 5; *see also* RCW Title 36. Under this uniform system, county boards hold and exercise the legislative and general executive powers of the county. RCW Ch. 36.32; RCW Ch. 36.01.

Like every county in Washington, Island County needs a wide range of civil legal services to manage and perform the array of functions assigned to counties. Island County's civil legal needs are frequently served by the Prosecuting Attorney's Office, but there are times the Board recognizes the need to retain other counsel qualified to handle specific legal services on a temporary basis.<sup>3</sup>

Prosecuting attorneys are one of several designated elected offices responsible to manage their own departments. In most prosecuting attorneys' offices, the majority of deputy prosecutors are assigned by necessity to handle the principal function of the office – criminal

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<sup>3</sup> Second Price Johnson Decl. at ¶7 (CP 978); Hannold Decl. at ¶2 (CP 1320); Shelton Decl. at ¶¶12-15 (CP 992-93).

prosecution and enforcement. At present, there are only two deputies assigned by Prosecutor Banks to handle civil legal affairs for Island County.<sup>4</sup> Thus, there are times that Banks' office does not have the necessary staff or capability to provide the services required by the Board.<sup>5</sup> These problems are exacerbated by the routine demands placed on Banks' limited civil staff to perform numerous contract reviews and other day-to-day work required by Island County – a demand that frequently results in delayed response times by Banks' office and which diminish the time available to his civil staff to handle time-sensitive litigation demands and non-routine or larger projects needed by the County.<sup>6</sup>

To deal with these situations, the Board occasionally retains special counsel pursuant to the express grant of authority in RCW 36.32.200.<sup>7</sup> RCW 36.32.200 was adopted into the Revised Code of Washington in 1905, and states in its entirety:

**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

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<sup>4</sup> Second Price Johnson Decl. at ¶5 (CP 978).

<sup>5</sup> Price Johnson Decl. at ¶3 (CP 1339); Hannold Decl. at ¶2 (CP 1320-21); Shelton Decl. at ¶12 (CP 992-93); Second Price Johnson Decl. at ¶¶5-6 (CP 978); Jill Johnson Decl. at ¶¶7-8 (CP 985).

<sup>6</sup> Second Price Johnson Decl. at ¶¶5-10 (CP 978-79); Hannold Decl. at ¶¶7-8 (CP 1322-23); Shelton Decl. at ¶¶11-13 (CP 992-93); Jill Johnson Decl. at ¶¶7-8 (CP 985).

<sup>7</sup> Price Johnson Decl. at ¶ 3 (CP 1339); Hannold Decl. at ¶ 2 (CP 1320-21); Shelton Decl. at ¶7 (CP 991).

prosecuting attorneys in the manner provided by law. Any contract written pursuant to this section shall be limited to two years in duration.

The Board has retained special counsel under RCW 36.32.200 twenty times over the past 16 years, to handle complex financial actions, solid waste management contracts, labor negotiations, and specialized environmental or Growth Management Act issues.<sup>8</sup> Banks has occasionally, but not routinely, complained about such actions by the Board, but prior to filing this *quo warranto* suit, Banks had not formally sued the Board or any other County officer, official, board, department or contractor for any such action.<sup>9</sup>

One of the early uses of RCW 36.32.200 by the Board was to enable the County to meet its then-new Growth Management Act obligations in the 1990s.<sup>10</sup> The Growth Management Act, RCW Ch. 36.70A ("GMA"), was adopted in 1991 to create and implement an entirely new method of statewide, uniform land use planning and management systems. Shortly after that, Island County was required to update its comprehensive land use management plan and related development regulations to comply with GMA's new provisions.<sup>11</sup> The Board initially relied on the lone civil deputy in Banks' office at that time, but he proved unable to provide the specific services needed, either in appearances before the Growth Management Hearings Board ("GMA Board") or in advising the Island County Board on

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<sup>8</sup> Hannold Decl. at ¶2 (CP 1320-21) and Exhibit A thereto (CP 1326).

<sup>9</sup> Price Johnson Decl. at ¶¶ 4 and 6 (CP 1339-40).

<sup>10</sup> Shelton Decl. at ¶¶6-9 (CP 991-92).

<sup>11</sup> Shelton Decl. at ¶5 (CP 990-91).

growth management actions.<sup>12</sup> Because of that, the Board retained an experienced outside attorney under the authority of RCW 36.32.200.<sup>13</sup> That decision was both appropriate and successful in its outcome when the Board obtained approval from the GMA Board for Island County's new GMA comprehensive plan and development regulations in advance of many other jurisdictions, for which Island County's GMA work was held up as a statewide model.<sup>14</sup>

Since then, Island County has experienced a troublesome and costly history of unsuccessful litigation when using Banks' office for the County's GMA programs and legislation.<sup>15</sup> From that history, it was clear to the Board that Banks' office, which has handled all of the County's recent GMA-related legal services, was and would be unable to provide the advice and expertise the Board needed to properly complete the County's 2016 GMA update and reverse the losing litigation trend.<sup>16</sup> At the Board's public work session held on March 18, 2015, Banks was asked whether his office could provide the "strategic advice" needed by the Board to overcome the past history of ineffective help and complete the 2016 GMA update. Banks replied "I'm not sure what that even means,"<sup>17</sup> a telling indication of his inability to understand and perform the work.

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<sup>12</sup> Shelton Decl. at ¶¶3-6 (CP 990-91).

<sup>13</sup> Shelton Decl. at ¶6 (CP 991).

<sup>14</sup> Shelton Decl. at ¶9 (CP 991-92).

<sup>15</sup> Hannold Decl. at ¶3 (CP 1321); Price Johnson Decl. at ¶6 (CP 1340); Jill Johnson Decl. at ¶¶4-5 (CP 984).

<sup>16</sup> See citations at footnote 14; Board Resolution No. C-48-15 (appointing Drummond and outlining the reasons therefore) (CP 1102-09).

<sup>17</sup> Drummond Decl. at 5:19 to 6:8 (CP 1204-05) and Attachment 3 thereto (CP 1232); see also generally CP 1225-44; see also Jill Johnson Decl. at ¶¶4-5 (CP 984).

For those reasons, the Board determined the need to retain qualified counsel to advise the County on, and help the County prepare, its 2016 GMA comprehensive plan update.<sup>18</sup> The Board selected Drummond for that work because of her experience and extensive knowledge of the GMA's complex substantive law and procedures.<sup>19</sup> The Board retained Drummond by resolution and contract, in the same manner as any other County service provider (*e.g.*, architects, engineers, etc.) needed to perform a specified task within a specified timeline for the benefit of the County.<sup>20</sup> Drummond was not appointed to any County office by the Board, was not invested with any County officer's title, was not appointed by Banks as a special deputy prosecutor, and is not a public or County officer.<sup>21</sup>

The Board's decision to retain Drummond for the 2016 GMA update was not a surprise to Banks. Commissioner Jill Johnson had previously communicated to Banks and Banks' office about the Board's dissatisfaction with the GMA-related advice it had received from Banks, and the Board's plans to retain special counsel.<sup>22</sup> The Board also allocated funds to retain special counsel for that work in the two previous budget cycles, in which Banks actively participated.<sup>23</sup> Banks had also been communicating with the Washington Association of Prosecuting Attorneys ("WAPA") about the

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<sup>18</sup> Price Johnson Decl. at ¶2 (CP 1338); Resolution No. C-48-15 (CP 809-817).

<sup>19</sup> Hannold Decl. at ¶4 (CP 1321); Drummond Decl., *passim* (CP1200-10).

<sup>20</sup> Hannold Decl. at ¶4-5 (CP 1321).

<sup>21</sup> *Id.* See also VRP (December 18, 2015) at 9:9-10:1 (Loginsky, counsel for Banks, speaking); VRP (10-15-15) at 4:18-23 (Loginsky; Appellant's Statement of Ground for Direct Review at 3.

<sup>22</sup> Jill Johnson Decl. at ¶¶3-5 and 9 (CP 984-986).

<sup>23</sup> *Id.* at ¶9 (CP 986).

situation and the possibility of filing a lawsuit.<sup>24</sup> And Banks filed a lengthy objection with the Superior Court opposing the Board's proposed action (see next paragraph).

As required by RCW 36.32.200, the Board asked Island County Superior Court Presiding Judge Churchill to review and approve the proposed two-year contract with Drummond.<sup>25</sup> Banks filed a lengthy objection with the Superior Court on March 9, 2015, arguing among other things that his office was able to perform the GMA work, the statute was facially unconstitutional, the Board had no legal right to use the statute, and the proposed contract with Drummond should not and could not be approved.<sup>26</sup> Presiding Judge Churchill, together with Island County's other Superior Court Judge, Alan Hancock, jointly issued a 7-page written decision on April 20, 2015 ("Decision"), evaluating and rejecting Banks' objections and approving the Board's contract with Drummond.<sup>27</sup> The Board then passed Resolution No. C-48-15 authorizing the contract with Drummond on April 28, 2015.<sup>28</sup>

Banks did not appeal the Superior Court's Decision or the Board's approval of the Resolution, but continued consulting with WAPA. Using an attorney loaned to him by WAPA for such purpose, Banks filed this *quo warranto* lawsuit against Drummond three and a half months later on

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<sup>24</sup> Declaration of Susan Drummond Providing Attachments in Support of Summary Judgment Response at Attachment 1 (CP 1126-31).

<sup>25</sup> Price Johnson Decl. at ¶3 (CP 1339).

<sup>26</sup> *Id.* at ¶4 (CP 1339); *See* Banks' March 9, 2015 Objection (CP 1512-18).

<sup>27</sup> *Id.* at ¶4 (CP 1339) and Exhibit A thereto (Superior Court's April 20, 2015 Decision (CP 1342-49)).

<sup>28</sup> *Id.* at ¶5 (CP 1340).

August 12, 2015.<sup>29</sup>

At approximately that same time, Banks' office missed the filing deadline for a GMA appeal to superior court that he had been directed to file by the Board, resulting in dismissal of the appeal. The facts of that event provide a direct, immediate, compelling and concrete example of Banks' inability to provide the GMA legal services required by the Board.

On recommendation of Drummond, the Board directed Banks' office to file an appeal of a GMA Board decision to superior court in order to protect the County's interests while it was preparing its 2016 GMA update.<sup>30</sup> To the County's significant harm, Banks office could not complete the basic and fundamental task of timely serving the necessary parties with the appeal.<sup>31</sup> Thus, in September, the Island County Superior Court dismissed the County's GMA appeal, thwarting the Board's GMA update strategy and goals.<sup>32</sup>

The fact of Banks' failure to timely serve the appeal and its consequent dismissal materially reflects the lack of representation the County has had from Banks' office on GMA-related issues in the past,

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<sup>29</sup> See footnote 24. In addition to not appealing the Board's Resolution, Banks did not name the Board or Island County as a party to this case, even though it clearly implicates the Board's rights and its use of RCW 36.32.200. Price Johnson Decl. at ¶6 (CP 1340); Shelton Decl. at ¶¶12-13 and 15 (CP 992-93); Hannold Decl. at ¶6 (CP 1322).

<sup>30</sup> Hannold Decl. at ¶7 (CP 1322); Drummond Decl. at 9 (CP 1208).

<sup>31</sup> *Id.* The Court's September 23, 2015 written decision explaining the reasons for the dismissal concluded in part: "The GMHB's final decision was served on the County on June 24, 2015, and the county failed to serve the GMHB with its petition for review within thirty days as required by RCW 34.05.542(2) and (4). To this day, the county has not complied with the provisions of the statute." Hannold Decl. at ¶7 (CP 1322) and Exhibit B thereto (CP 1327-37).

<sup>32</sup> *Id.*; Drummond Decl. at 9 (CP 1208).

illustrates what the Board wanted to avoid by seeking "strategic advice" from Banks, and explains why the Board sought to retain GMA-experienced counsel to advise it on the 2016 GMA update. This result was forecasted by the Superior Court's April 2015 Decision, which stated:<sup>33</sup>

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 legal 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. (Emphasis added)

Even though the Board retained special counsel for the GMA work, the Board endeavored to work closely and cooperatively with Banks' office in order that the County's business be efficiently, timely and properly conducted.<sup>34</sup> The Board specifically invited Banks to work with Drummond, both before and after Banks filed his *quo warranto* suit, but to no avail.<sup>35</sup> The Board also asked Banks to appoint Drummond as a special deputy prosecutor in order to facilitate that cooperative approach, but Banks

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<sup>33</sup> April 20, 2015 Decision at 6-7 (CP 1335-36).

<sup>34</sup> Second Price Johnson Decl. at ¶11 (CP 979).

<sup>35</sup> *Id.* at ¶12 (CP 979-80); Drummond Decl. at 8-9 (CP 1207-08); Resolution No. C-48-15 (CP 809-17).

refused.<sup>36</sup> The Board remains willing and desires to work with Banks' office in the completion of the 2016 GMA update.<sup>37</sup>

For unknown reasons, Banks has exhibited problems working with the Board. For example, Banks stated that he disagreed with hiring outside counsel on two occasions, but elected not to challenge one of them (which involved the County's public defense counsel) because the contracts were for a limited amount of time and money.<sup>38</sup> However, the facts of that situation as reflected in contemporaneous emails and text messages by Banks present a far different picture, illustrating a serious disdain and disrespect for the Board and its work.<sup>39</sup>

As a second example, Banks has exhibited conduct that is inconsistent with his position as an elected public official and as the County's chief legal authority.<sup>40</sup> The conduct and statements reflected in Banks' emails and text messages (provided in response to Drummond's discovery requests) indicate a disparaging attitude toward the Office of the Board and its policies and actions. Even more troublesome, they contain several instances of derogatory comments about individuals that are inconsistent with professional ethical standards, State and local nondiscrimination policies and laws, and the fundamental fairness the

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<sup>36</sup> Third Price Johnson Decl. at ¶14 (CP 709). Had Banks agreed to that request, this entire lawsuit would be unnecessary.

<sup>37</sup> Second Price Johnson Decl. at ¶12 (CP 979-80).

<sup>38</sup> Third Price Johnson Decl. at ¶3 (CP 705).

<sup>39</sup> *Id.* at ¶¶2-8 (CP 705-07) and exhibits attached thereto (CP 712-21).

<sup>40</sup> Third Price Johnson Decl. at ¶8 and Exhibits attached thereto (CP 704-09, CP 713-15, CP 720-21 (letter to Editor). *See also* Declaration of Robert Gould in Support of Drummond's Joinder in County's Summary Judgment Motion at Attachment 2 (CP 2481-2509), specifically CP 2502-2509.

public deserves to see from its prosecuting attorney.<sup>41</sup>

As the third and by far most serious example, Banks submitted a lengthy declaration ("Banks' Final Declaration") to the trial court which was objectionable for many reasons, and surprisingly revealing of Banks' actual views about the Board and this case.<sup>42</sup> Banks' Final Declaration contains extensive colloquies of argumentative and unsupported statements about events, makes patently false allegations of secret meetings and illegal activities by the Board, makes pejorative characterizations of and wholly unwarranted personal attacks on the Board and the Commissioners (*e.g.*, calling the Board and County Budget Director "chronically intransigent clients" and accusing them of "engag[ing] in a vague and demagogic diatribe about me [Banks]."), and uses inappropriate, unprofessional and improper language. Rather than detail those here, the Court is referred to Banks' Final Declaration itself (CP 109-33) and the Board's summary of Banks' Final Declaration in its briefing to the trial court.<sup>43</sup>

In summary, Island County has diverse civil legal needs that cannot always be provided by Banks' office. In the particular facts of this case, the County is mandated by law to update its GMA comprehensive plan and related development regulations, and needs and deserves legal services from attorneys qualified to complete that complex task. The Board is authorized to retain special counsel under RCW 36.32.200 for situations just like this.

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<sup>41</sup> *Id.* See footnote 40.

<sup>42</sup> Decl. of Gregory Banks in Opposition to Defendants' Motion for Summary Judgment (CP 109-33).

<sup>43</sup> Island County Board of Commissioners' Reply to Plaintiff's Response on Board's Motion for Summary Judgment at 7-9 (CP 77-80), including responsive declarations noted therein.

Here, the Board used that statute to retain Drummond. Both the Island County Superior Court, and the trial judge who heard this case, evaluated and approved that action. The Supreme Court should do likewise.

**B. Procedural Background and Trial Court Orders**

This case was commenced by Banks' *quo warranto* filing on August 12, 2015 and was fast-tracked<sup>44</sup> by Banks so that he could bring his theory before the Supreme Court as soon as possible. Because Banks was challenging the Board's use of RCW 36.32.200 but did not name the Board as a party, the Board and Drummond had to bring motions for intervention and joinder respectively.<sup>45</sup> Overall there were four hearings and approximately twelve motions decided in 5 months.<sup>46</sup>

At the first hearing held in this case on October 1, 2015, the trial court approved the following three Orders: (1) granting Drummond's

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<sup>44</sup> Banks' filing dates are indicative: On August 27, 2015, fifteen days after filing his suit, Banks submitted a memorandum to the Island County Superior Court opposing appointment of a special deputy prosecutor for the Board to advise the Board about the *quo warranto* case. On September 15, 2015, thirteen days after Drummond filed her Answer, Banks filed his motion for summary judgment on the merits of his suit. When the planned October 15<sup>th</sup> argument date for his motion was continued by the trial court, Banks filed a motion for preliminary injunction to be heard on that date instead.

<sup>45</sup> Those motions are at CP 2415-32 and CP 2397-2402, respectively. Banks opposed those motions vigorously (*see* Banks' Response to the Board's Intervention Motion, CP 2207-16), even though he and his counsel acknowledged that they would be likely be granted (CP 1137-38).

<sup>46</sup> The motions are: Banks' motion for summary judgment of the merits of his *quo warranto* claim; Drummond's motion to join the Board as a necessary party to this case; the Board's motion to intervene in the case as a matter of right; two concurrent motions of Drummond and the Board to continue Banks' then-pending motions; Banks' motion for preliminary injunction; Banks' motion to strike Drummond's affirmative defenses; Banks' motion to strike the Board's affirmative defenses; Banks' amended summary judgment motion; Banks' motion for certification of appeal if Banks' amended summary judgment motion was denied; Banks' motion to strike the Board's joinder in a pleading of Drummond; and Banks' motion to strike county response letters.

motion to join the Board as a necessary party pursuant to Civil Rule 19; (2) granting the Board's motion to intervene as a matter of right pursuant to CR 24; and (3) granting the concurrent continuance motions of Drummond and the Board to postpone Banks' pending summary judgment motion and his motion to strike Drummond's defenses in order to allow for discovery.<sup>47</sup>

At the second hearing on October 15, 2015, the trial court denied Banks' motion for preliminary injunction seeking to immediately stop Drummond from providing legal services to the Board. The trial court entered thorough Findings of Fact and Conclusions of Law underpinning the denial on October 29, 2015.<sup>48</sup>

At the third hearing on December 18, 2015, the trial court heard five motions by Banks (including his amended motion for summary judgment), but deferred all rulings until the Board and Drummond presented argument on their then-pending summary judgment motions.

At the fourth hearing on January 15, 2016, the trial court heard the Board's motion for summary judgment and declaratory judgment, along with Drummond's motion for summary judgment, and issued the trial court's decisions and orders on all of the pending motions.<sup>49</sup> In general, all of the

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<sup>47</sup> The three Orders are at CP 2125-26, CP 2130-32, and CP 2127-29.

<sup>48</sup> The two Preliminary Injunction Orders are at CP 2040-42 and CP 2016-2023.

<sup>49</sup> The Orders issued at the close of the hearing on January 15, 2016 were (i) Order granting summary judgments to Board and Drummond, granting Board's declaratory judgment, denying Banks' summary judgment motion, and dismissing the case (CP 1-10); (ii) Order denying Banks' motion to strike portions of the Answers of the Board and Drummond (CP 1560-64); and (iii) Order denying Banks' motion to strike nonparty county response letters regarding use of RCW 36.32.200 (CP 11-13). A Supplemental Order correcting the record for the Court's review of this appeal was entered February 24, 2016 after hearing by the trial court (CP 1548-1550).

motions in the case were decided adversely to Banks and in favor of the Board and Drummond. Banks' filed his notice of appeal ten days later, on January 25, 2016.

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. Legal Standards**

The trial court ended this case with three major rulings: (i) granting summary judgment to the Board and Drummond that upheld the Board's use of RCW 36.32.200; (ii) granting the Board's declaratory judgment to affirm the validity of RCW 36.32.200 and thus Drummond's contract; and (iii) denying Banks' summary judgment motion seeking to find RCW 36.32.200 unconstitutional based on Banks' novel theory of prosecutorial authority.

##### **1. Summary Judgment Review Standards**

Summary judgment should be granted when the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue of material fact and the moving party can show that it is entitled to judgment as a matter of law. CR 56(c); *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009). In ordinary language, summary judgment will be granted only when "reasonable persons could reach but one conclusion" from all the evidence and the application of the law. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

In reviewing a trial court's summary judgment decision, the Supreme Court sits in the same position and views the matter de novo.

*Internet Community & Entertainment Corp. v. Washington State Gambling Comm'n*, 169 Wn.2d 687, 691, 238 P.3d 1163 (2010).

An appellate court may affirm a trial court decision on any basis presented in the pleadings and record. *LK Operating LLC v. Collection Grp. LLC*, 181 Wn.2d 48, 73 (note 11), 331 P.3d 1147 (2014); *see also* Tegland, 2A Wash Prac., Rules Practice RAP 2. 5, at 254 (8th ed. 2014) ("A trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof.").

## 2. **Proof Burden for Constitutional Challenge to Statute**

Banks challenges the constitutionality of RCW 36.32.200 "as applied,"<sup>50</sup> but faces a high proof burden in doing so:

Statutes are presumed constitutional, and the challenger of a statute must prove *beyond a reasonable doubt* that the statute is unconstitutional. The beyond a reasonable doubt standard when used in this context describes not an evidentiary burden, but rather *a requirement that the challenger convince the court that there is no reasonable doubt that the statute violates the constitution*.

*Welfare of A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015) (citations omitted; emphasis added).

The policy reasons for this high burden exactly reflect the statutory history, facts and issues in this case:

This burden is imposed on the challenger of the statute because of 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. The standard

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<sup>50</sup> In an as applied challenge, the challenger must show "that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 73-74, 316 P.3d 469 (2013).

also stems from the premise that the legislature speaks for the people, and we are hesitant to strike a duly enacted statute unless we are fully convinced, after searching legal analysis, that the statute violates the constitution.

*Welfare of A.W.*, 182 Wn.2d at 701, note 11 (citations and internal quotations omitted).

As explained in the remainder of this brief, Banks' novel legal theory cannot meet the "beyond a reasonable doubt" standard, and its adoption by the Court would violate the judicial policies above.

**B. RCW 36.32.200 is Express, Longstanding Authority Designed to Support the Board's Functions and Duties**

**1. RCW 36.32.200 is Presumed Constitutional**

The State legislature ("Legislature") is directed by the Washington Constitution to "*establish a system of county government which shall be uniform throughout the state.*" Wash. Constitution, Art. XI, Sec. 4 (emphasis added). *See also id.* at Sec. 5 ("the legislature, *by general and uniform laws*, shall provide for the election in the several counties of boards of county commissioners ... [and] prosecuting attorneys ... *and shall prescribe their duties*") (emphasis added).

Pursuant to this mandate, the Legislature adopted RCW 36.32.200 in 1905 and placed it in the enabling chapter describing the powers of county commissioners. RCW 36.32.200 has been "on the books" for 111 years, and during that time has not been challenged in court, has not been overruled or limited, and has been amended twice to its current text. For all those reasons, RCW 36.32.200 is presumed constitutional. *In re Welfare of A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015).

The trial court found the statute presumptively constitutional when it denied Banks' motion for preliminary injunction. After reviewing and weighing the evidence as to the probability of Banks' success on the merits of his theory, the trial court adopted Findings of Fact and Conclusions of Law,<sup>51</sup> stating in part:

As indicated in the Island County Superior Court judges' decision dated April 20, 2015, incorporated herein, the Board is authorized to hire Drummond as special counsel under RCW 36.32.200, a 105-year old [sic] statute that has never been ruled unconstitutional. That statute is thus presumed to be constitutional, and is not challenged on that basis by Banks in this proceeding.

Prosecutor Banks could not meet then, and cannot overcome now, the heavy proof burden necessary to prevail in this appeal.

2. **The Requirements of RCW 36.32.200 are Straight-forward and Were Indisputably Followed in this Case**

Since 1905, county boards have had express statutory authority to retain outside counsel on a limited basis pursuant to 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.

The specified limitations (*i.e.*, checks and balances) on a county

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<sup>51</sup> See CP 2016-23 at Sec.II.3 thereof. See also VRP (October 15, 2015) at 28:4-25.

board's authority require that the contract be in writing, be approved by the local superior court, and last no longer than two years. The Board met these requirements when the Island County Superior Court issued its April 20, 2015 Decision approving the two-year written contract with Ms. Drummond, and acknowledged the Board's adoption on April 28, 2015 of Island County Board Resolution No. C-48-15. Banks does not dispute those facts or their sufficiency under the statute.<sup>52</sup>

The Legislature expressly and unambiguously gave the Board the power to retain outside counsel under RCW 36.32.200 to perform its functions. Had the Legislature intended something different (for example, requiring a prosecutor's consent to retain outside counsel under RCW 36.32.200), it would have so stated and provided. *See* Section IV.C.4 below for a complete discussion of the issue of consent under Banks new theory. That it chose *not to do so* is made clear by the fact that it adopted and twice considered and amended RCW 36.32.200 without doing so. *See* Section IV.B.7 below.

3. **RCW 36.32.200 is Part and Parcel of the Board's Plenary Authority to Manage the Affairs of Island County**

As a county's legislative and executive body, county boards have plenary authority to enter into contracts "as may be necessary to their corporate or administrative powers, *and to do all other necessary acts* in

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<sup>52</sup> *See* Appellant's Opening Brief at 3. Banks labels these "procedural requirements", but of course they are *substantive* steps resulting in an actual contract for services. The Island County Superior Court has in that past declined to approve a requested outside attorney.

relation to all the property of the county." RCW 36.01.010 ("Corporate powers"; emphasis added). Courts construe this statute to mean that "[c]ounties are authorized by statute to make such contracts as may be necessary to their corporate or administrative powers." *Swinomish Indian Tribal Community v. Skagit County*, 138 Wn. App. 771, 776, 158 P.3d 1179 (2007) (listing examples of such contracts).

This authority is mirrored in RCW 36.32.120(6) ("Powers of legislative bodies"), which provides:

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*; (Emphasis added)

Notably, RCW 36.32.200 is "such other power", and it was "conferred by law" for the benefit of all county boards by being placed in the chapter defining and describing the enabling powers of "county commissioners."<sup>53</sup>

All of this enabling authority stands in direct contrast to Banks' asserted "right" as a prosecutor to control the Board's method and manner of performing the County's business. In short, Banks' theory attempts to supersede all of the enabling legislation for county boards with the

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<sup>53</sup> Powers of a county may only be exercised "by the county commissioners, or by agents or officers acting under their authority or authority of law." RCW 36.01.030. Under *Osborn v. Grant County*, 130 Wn.2d 615, 627, 926 P.2d 911 (1996), "the county commissioners are the body that exercises county 'powers,' RCW 36.01.030, and adopts the official county position on legal issues, RCW 36.32.120(6)." (Citations omitted). See also *State ex rel. Bain v. Clallam County Bd. of County Commissioners*, 77 Wn.2d 542, 548, 463 P.2d 617 (1970) (within its sphere of responsibility, a board of county commissioners in Washington exercises the county's legislative and executive powers).

statement of duties for prosecuting attorneys at RCW 36.27.020. The Supreme Court found a similar attempt to do so (in a case concerning a school district's enabling authority) fruitless:

This is a delegation of broad corporate powers [to school districts] and must include the right to employ special counsel when, as here, the prosecuting attorney cannot act and the necessity for legal aid is urgent. *The statute heretofore referred to regarding the prosecuting attorneys is merely a definition of their powers, and does not attempt to restrain, modify, or define the powers of boards of school directors.*

*State ex rel. Dysart v. Gage*, 107 Wash. 282, 285, 181 P. 855 (1919) (emphasis added).

4. **Island County Has a Mandatory Obligation to Plan Under GMA, and the Board Used RCW 36.32.200 to Fulfill that Duty**

Island County is required to conform with the Growth Management Act. *See generally* RCW Ch. 36.70A. RCW 36.70A.040(1) imposes a mandatory obligation to engage in GMA planning:

Each county [required to plan] *shall conform* with all of the requirements of this chapter. [...] Once a county meets either of these sets of criteria, the requirement to conform with all of the requirements of this chapter *remains in effect*, even if the county no longer meets one of these sets of criteria. (Emphasis added)

In *Swinomish Indian Tribal Community v. Skagit County*, 138 Wn. App. 771, 777-78, 158 P.3d 1179 (2007), the court described this GMA planning responsibility and tied it to the fundamental police power authority of counties, emphatically holding that exercise of GMA authority through contractual means was appropriate:

Far from being arbitrary and unreasonable, the MOA

[contract] in the present case has a substantial relation to public health, safety, morals, and general welfare. It represents not a limitation on the County's legislative and police powers but a commitment to follow and enforce specific statutory requirements. There is abundant statutory authority to support a conclusion that the MOA is not contrary to public policy. The GMA itself specifies coordinated planning. "It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning." The GMA mandates countywide planning in cooperation with cities located within the county. Countywide planning policies (CPPs) are the "framework" by which county and city comprehensive plans are developed under the GMA. The CPPs process and framework determine the manner in which the county and the cities agree to all procedures and provisions including but not limited to desired planning policies, deadlines, and ratification of final agreements.

In this case, Island County is exercising the same authority described above to perform the County's GMA obligations and complete all the required tasks. The Board, as Island County's legislative and executive body, relied on its inherent general contracting authority under RCW 36.01.010 and RCW 36.32.120(6), and on its specific contracting authority under RCW 36.32.200, to retain Drummond. The exercise of such authority cannot be reasonably questioned, especially when, as here, Banks' office was demonstrably not able to perform the necessary work and did not understand what the work was that needed to be done.

**5. RCW 36.32.200 is Required By and Consistent With Separation of Powers Principles**

The Washington Constitution does not contain a formal separation of powers clause, but the division of government into three co-equal branches has been presumed throughout the state's history. *Brown v. Owen*,

165 Wn.2d 706, 718, 206 P.3d 310 (2009). Separation of powers issues arise if actions by one branch undermine the operation of another branch, or undermine the rule of law to which all branches are committed to maintain. *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 243, 552 P.2d 163 (1976).

To determine whether a particular action violates separation powers, Washington courts look "not to whether two branches of government engage in coinciding activities, but rather whether the activity of one branch *threatens the independence or integrity or invades the prerogatives of another.*" *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (emphasis added). Significantly, a violation of separation of powers occurs regardless of whether the branches involved consent to the intrusion. *State v. Rice*, 174 Wn.2d 884, 906, 279 P.3d 849 (2012) ("the division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.") (internal quotations and citation omitted).

Whether Banks is considered a judicial officer by virtue of being an officer of the court (*see* Rules of Professional Conduct, *passim*), or a locally elected executive branch officer (*see State v. Rice*, 174 Wn.2d 884), he does not have the authority under separation of powers doctrine to assume and exercise, directly or indirectly, the powers, duties and authority of the Board as the legislative branch of the County.

In addition, "[e]ven though prosecuting attorneys are independently elected county officers ... their powers are limited to those expressly granted

by statute." *Osborn v. Grant County*, 130 Wn.2d 615, 626, 926 P.2d 911 (1996) (citations omitted). In comparison to the Board's broad grant of legislative, executive, management and operational authority for the County, Banks' legal scope of authority is narrow and limited. *See* RCW 36.27.020 and compare with Section IV.B.3 above.

For all the reasons explained herein, Banks' claim that his consent is *required* for the Board's use of RCW 36.32.200 transcends his statutory authority and his role within county government, and requires a complex train of legal assumptions relying on old cases of dubious relevance.<sup>54</sup> *See* Section IV.C below. Such power would create a clear intrusion into the Board's legislative and executive functions, and will severely impair the Board's ability to perform key functions in handling the County's business. The Court should reject that argument.

**6. Rules of Statutory Construction Support the Validity and the Board's Use of RCW 36.32.200**

Washington's statutory construction principles explain RCW 36.32.200 in a plain and straightforward manner that fully supports the statute's constitutionality and the Board's use of the statute. That analysis is also foursquare with the legislative history of the statute as explained in Section IV.B.7 below.

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<sup>54</sup> Counsel for the Board has found no statute or Washington case interpreting RCW Ch. 36.32 or RCW Ch. 36.27 to create or impose a precondition of prosecutorial consent on the Board's authority to retain special counsel. To the contrary, there is authority that the prosecuting attorney enabling statutes cannot effect a change in the Board's enabling statutes. *See State ex rel. Dysart v. Gage*, 107 Wash. 282, 285, 181 P. 855 (1919) in Section IV.B.3 above.

The first rule is that interpretation of RCW 36.32.200 must begin with the words used in the statute because "[s]tatutory construction begins by reading the text of the statute." *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008), quoting *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

RCW 36.32.200 begins with the phrase, "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," followed by the conditional qualifier "*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." (Emphasis added) When a word used in a statute is not specially defined it is deemed to have been intended by the Legislature to be given its common, ordinary meaning – or in other words, its general dictionary definition. *Garrison v. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). *Unless* means "Except on the condition that; except under the circumstances that." American Heritage Dictionary of the American Language (3<sup>rd</sup> ed.) at 1955. See also *Webster's Ninth New Collegiate Dictionary* (1985) at 1292, stating *unless* means "1: except on the condition that; under any other circumstance than."

Applying these rules here yields this conclusion: *Unless* Drummond's contract is in writing and approved by the Superior Court, *then* it is unlawful. Here, the parties are agreed that the *circumstances* in this case are exactly as specified by the statute – the Board obtained the approval

of the Superior Court and adopted Resolution C-48-15 approving a 2-year contract with Drummond to provide the GMA services. For that reason, the Board's use of the statute is precisely as the Legislature intended. and the Board precisely conformed with its statutory requirements.

The second rule applies when a statute, like RCW 36.32.200, is not ambiguous. In that situation, courts may not insert additional requirements into a statute that are not already contained in the text:

We have consistently held that an unambiguous statute is not subject to judicial construction and have declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous. *We will not add to or subtract from the clear language of a statute even if we believe the Legislature intended something else* but did not adequately express it unless the addition or subtraction of language *is imperatively required to make the statute rational.*

*State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) (emphasis added).

The Supreme Court instructs that "courts may not read into [a statute] matters that are not in it and may not create legislation under the guise of interpreting a statute." *Id.* at 956. Banks would have the Court add the clause "but only if the prosecutor consents" into RCW 36.32.200. But there are no words in the statute that require (or even allude to) a prosecutor's consent, and the Court cannot add this requirement where it does not exist. The plain text of RCW 36.32.200 does not support Banks' theory.

Third, because the meaning of the statute is clear from its text, there is no need to do more than read and apply the plain words of RCW 36.32.200. *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239-240, 59 P.3d 655 (2002) ("An unambiguous statute is not subject to judicial

construction."). Here, the only rational reading of RCW 36.32.200's plain language is that the Board can retain special counsel by a contract that is in writing, approved by the Superior Court, and lasts no longer than two years. There are no other requirements in the statute's plain language.

7. **The Legislative History of RCW 36.32.200 Supports its Validity and the Board's Application of the Statute**

Even if the Court were to find that RCW 36.32.200 is ambiguous, the legislative history of its adoption supports the trial court's decision and the Board's position. *See State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) ("If a statute is ambiguous, this court will resort to principles of statutory construction, legislative history, and relevant case law to assist in interpreting it. *We must construe an ambiguous statute to effectuate the intent of the Legislature.*") (emphasis added).

The legislative history shows that RCW 36.32.200 means just what it says – that county boards may retain special counsel when the stated conditions are met. When RCW 36.32.200 was amended and codified in its current form, discussion in the Senate made it clear that the purpose of the statute was to allow county commissioners the *continued right* to retain counsel independent of (and without reference to) the prosecutor's office:

Senator Rasmussen: "Senator Thompson, it indicates that it would be unlawful for the legislative authority to hire an attorney to represent them. It is my understanding that the prosecuting attorney can hire as many special attorneys as he wants without any authority from anybody other than himself. *Why do you restrict the [county commissioners'] legislative authority? They should have the right to have an attorney and I know from my service on the county, the county legislative*

*councils do need an attorney of their own to help in their drafting and to review legislation separate from the prosecuting attorney's office."*

Senator Thompson: "Senator Rasmussen, the prosecuting attorney is limited to the extent in which he can retain attorneys in his office by his budget. I am a little confused as to the purpose of your questioning; but the county commissioners rely on the prosecuting attorney's office to provide them with civil counsel. *Some counties would prefer to retain counsel other than that from the prosecuting attorney's office; but they are prevented from doing so freely. The act before you [Senate Bill No. 3151] would simply open it up a bit more and make it somewhat easier for that arrangement to take place.*"

Senator Rasmussen: "Well, I would want to open it up some more. Would you mind if I held this bill for a day until we can prepare an amendment?"

Senator Thompson: "Senator Rasmussen, I would oppose that, as would the Association of Prosecuting Attorneys. I think it is reasonable to have a limitation on the constitutional charge to this office and I favor the position represented by this bill—in the substitute form."

Journal of the Senate 1983 Vol. 1 at 555-556 (emphasis added).

This exchange shows two important things. First, that the statute as adopted has already balanced the interests of the prosecuting attorneys with the interests of the county boards. Second, that while RCW 36.32.200 begins with the phrase "It shall be unlawful ...", the statute actually, in Senator Thompson's words, was enacted to "open it up" and make it "somewhat easier" for county boards to "retain counsel other than that from the prosecuting attorney's office." That intent is achieved by the Legislature's use of the conditional qualifier "*unless*" for the reasons noted in Section IV.B.6 above.

In sum, the legislative history shows that RCW 36.32.200 was and

is intended to continue to allow county boards the ability to retain outside counsel on certain conditions, and was intended to expand that ability a bit more than before. The statute's plain language makes clear that the check on intruding into Banks' office, and the corresponding balance on facilitating the Board's duties to properly and timely perform the County's business, is handled by requiring the legal services contract to be in writing, not longer than two years' duration, and be approved by the superior court.

The foregoing analysis is entirely consistent with the Supreme Court's analysis in *Harter v. King County*, 11 Wn.2d 583, 594-596, 119 P.2d 919 (1941). There, the Court first quoted Rem. Rev. Stat., §4130, as follows:

Each prosecuting attorney shall be the legal advisor of the board of county commissioners for the county for which he was elected; he shall also prosecute all criminal and civil actions in which the state or his county may be a party, defend all suits brought against the state or his county, and prosecute all forfeited recognizances, bonds, and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county: *Provided, the commissioners of any county may employ other attorneys, when they may deem it for the interest of their county.*

*Harter* at 594-95 (emphasis added).

While the quoted text contains the "legal advisor" language that Banks points to, it more importantly contains the same express statutory authority (now transferred to RCW 36.32.200) allowing the Board to retain

outside counsel when necessary.<sup>55</sup> Based on this language, the Supreme Court then concluded:

By these express provisions, the prosecuting attorney is authorized, and it is made his duty, to appear for and represent his county in its defense of all suits and proceedings brought against it, *with the provision that the board may employ other attorneys when it deems it for the best interest of the county.*

*Id.* at 595 (emphasis added).

It is easy to see from this comparison that the Board's *discretionary* standard of determining the "best interest of the county" in Rem. Rev. Stat. §4130 was replaced in RCW 36.32.200 with the *concrete* standard of a written contract approved by the superior court judges. Notably, language supporting Banks' theory of prosecutorial consent never appears in either statute, nor in the Legislature's "uniform system" of laws, nor in the Washington Constitution.

**8. Washington Attorney General Opinions Support the Validity and the Board's Use of RCW 36.32.200**

In 1974 Attorney General Opinion No. 15, the prosecuting attorney for Clark County posed this question:

1. 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, may that Board hire an attorney to advise the Board on general

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<sup>55</sup> In the legislative history, Rem. Rev. Stat., §4130, is listed as a predecessor statute to RCW 36.27.020 and not to RCW 36.32.200. It is clear from the italicized language above, and the court's analysis, that the proviso allowing County Boards to retain outside counsel for the performance of county business is to the same purpose as RCW 36.32.200. The transference of that authority directly into the county commissioner enabling authority serves to strengthen the Board's position, and correspondingly weaken Banks' theory of consent and control.

matters of its concern?

The Attorney General, after reviewing the text of RCW 36.32.200, concluded it did support the retention of an outside attorney by a county board:

By prohibiting a board of county commissioners from employing a special attorney to perform the foregoing, or any of the other duties of the prosecuting attorney without the approval of a majority of the superior court judges of the county, *this statute, as we read it, impliedly authorizes such an employment with the approval of a majority of those judges. Accordingly, we answer your first question in the affirmative.* (Emphasis added.)<sup>56</sup>

Thus, the Attorney General, though its formal opinion, agrees with the Legislature, the Courts, and the Board that RCW 36.32.200 means what it says and authorizes county boards to retain outside counsel with the limitations stated in the statute. *See also* Section IV.C below.

**C. Banks' New Legal Theory is Untenable and Flawed, and Cannot Satisfy His Burden of Proving RCW 36.32.200 Unconstitutional Beyond a Reasonable Doubt**

**1. Prosecutors are Not Designated as the Sole Providers of Legal Services to Counties**

The powers of prosecuting attorneys "are limited to those expressly granted by statute." *Osborn v. Grant County*, 130 Wn.2d at 626. While some subsections of RCW 36.27.020 provide that the prosecutor is to provide "all" of a certain type of legal service (e.g., "(6) Prosecute all

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<sup>56</sup> The Attorney General went on to explain part of his reasoning for that conclusion by observing:

In accordance with long-standing policy, this office must presume that statute, as any other duly enacted statute, to be constitutional until such time as it is otherwise determined by a court of competent jurisdiction.

criminal and civil actions..." and "(9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge..."), most other sections do not.

In examining such situations, the Legislature is deemed to have created that distinction intentionally to differentiate the scope of legal services assigned to prosecutors. *See State v. Lynch*, 178 Wn.2d 487, 505, 309 P.3d 482 (2013) ("where the legislature includes particular language in one section of a statute but omits it in another, the exclusion is presumed intentional."). This is confirmed by the opening text of RCW 36.27.020(1), which not only *does not* provide that the prosecutor will be a county's *only* legal advisor, but which says the prosecutor is to give his opinion *when asked* by a County Board:

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

RCW 36.27.020(1) (emphasis added). This permissive language implicitly recognizes the fact that RCW 36.32.200 was expressly adopted by the Legislature to allow county boards to retain outside counsel on occasion. And that fact seriously undermines Banks' claim of a *mandatory, legislated charge* that he is the sole and exclusive provider of all legal services to the Board and to Island County.

Sixty years ago, in a 1955 Opinion that construed various statutes describing the county prosecutor's role and duties, the Attorney General

readily saw that the Legislature had specifically and intentionally provided for different categories of attorneys that might provide legal services to county government. Thus, immediately after quoting RCW 36.32.200, the Attorney General said:

*It is necessary here to point out the distinction between deputy prosecuting attorneys appointed to assist in all duties which the prosecuting attorney is authorized to perform and attorneys hired by the county for a special purpose outside the usual scope of the prosecutor's office.*

1955 Attorney General Opinion No. 48 at 3-4 (emphasis added). The Attorney General emphasized and extended this distinction in a 1959 Opinion, reiterating that in addition to a prosecutor's appointment of deputy prosecutors, "special attorneys [can be] appointed either *by the court* (RCW 36.27.020) *or by the county commissioners* (RCW 36.32.200)." 1959 Attorney General Opinion No. 6 at 3 (emphasis added).

Banks' assertion that he is the sole provider of legal services to the Board is simply unsupported by Washington law (and thus explains his need to rely on out-of-state cases for his argument).

2. **Banks' Theory is Not Practical Nor Conducive to the Complexity and Requirements of Modern Government**

"In interpreting and developing the constitution and laws, courts cannot operate in a vacuum." *Houser v. State*, 85 Wn.2d 803, 807, 540 P.2d 412 (1975).

The Attorney General's distinction between deputy prosecuting attorneys and attorneys hired by a county board for a special purpose makes practical sense on a variety of levels. First, the scope of a county's civil

legal matters is complex and varied.<sup>57</sup> Not all counties have the resources to maintain a highly qualified prosecutorial staff waiting for the opportunity every 10, 15 or 20 years to do specialized work such as negotiate a new cable franchise agreement, issue bonds to support a new public facility, or (as in this case) update a county's complex GMA comprehensive plan.<sup>58</sup>

Second, requiring every county prosecutor to provide that level of specialized capability "waiting in the wings" would create an unworkable funding burden for most (if not every) county. Adoption of Banks' theory but without mandating adequate funding to implement it would result in the worst of both worlds – prosecutorial control over county board activities *plus* the inability of county boards to retain qualified counsel *plus* the inability of the prosecutor to actually provide the necessary legal services.

In the end, the practical result of Banks' theory would only disadvantage the Board and the County in the performance of their obligations by creating wholly unnecessary risk and financial liability. Worse, it would do so at the wasteful expense borne by the County's citizens and taxpayers. There is no good reason to incur any of these harmful and unnecessary results.

These points are precisely why RCW 36.32.200 allows county

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<sup>57</sup> Banks himself counted 30 different entities, plus "smaller boards and commissions" within the County, comprising his "clients". See Aff. of Banks at 2-4 (CP 1475-77).

<sup>58</sup> See letters from county boards submitted in support of the Island County Board's position in this case (CP 687-97). While those letters were *not* used or relied on by the trial court to decide this case (VRP (January 15, 2016) at 25:6-21; 37:3-6), they nonetheless illustrate the impractical position taken by Banks in this case. The Supreme Court should consider these in the manner recommended by *Houser v. State*, 85 Wn.2d 803, 807, 540 P.2d 412 (1975) ("The restrictive rules governing judicial notice are not applicable to factual findings that simply supply premises in the process of legal reasoning.")

boards to retain special counsel on a limited basis. That system has worked well for 111 years, and should not be disassembled on the whim of one prosecutor. Banks cannot meet his burden of proving RCW 36.32.200 unconstitutional beyond a reasonable doubt, and his theory should be rejected for that reason.

**3. Banks' 'Core Duty' and Consent Arguments are Untenable and Unsupported by Washington Case Law**

Banks' key argument throughout this case has been that Drummond is performing 'core duties' or 'core functions' of the prosecuting attorney, that only prosecutors are permitted to do so, and that Banks can therefore require the Board to obtain his consent before retaining outside counsel to perform the Board's many duties. The fallacy of the consent argument is dealt with in Sections IV.B.3 and IV.B.4 above. As to the core duty argument, Banks relies primarily on pre-statehood statutes and treatises, and his three principal Washington cases never mention RCW 36.32.200 or its predecessors, nor do they discuss the key issue here – the ability of a county board to retain counsel.

The issue in *Rice v. Washington*, 174 Wn.2d 884, 279 P.3d 849 (2012), was the constitutionality of statutes that (i) authorized special criminal allegations, and (ii) directed prosecuting attorneys to file them. *Id.* at 889. The Supreme Court ultimately held the statutes were constitutional because they were directory rather than mandatory. *Id.* at 907-08. In reaching that result, the Court defined how "public prosecuting attorneys"

arose from the "Jacksonian Democracy" period around 1820 and the role they played in the diffusion of governmental power:

This important movement "strengthened the concept of a decentralized government [...] established greater independence for elected officials, and defined positions that required exercise of discretion." *One such position was that of public prosecuting attorney, now a well-established creation of American law. By adopting article XI, section 5, and ensuring public enforcement of criminal laws by locally elected officials,* the people of Washington provided accountability to local communities and further diffused governmental power.

*Id.* at 904-905 (emphasis added; internal citations omitted).

In defining what the 'core functions' for prosecuting attorneys actually means, *Rice* was not looking at something as mundane as land use law, bond issues, or general civil advice. Rather, the Court looked to "the fundamental and inherent charging discretion of prosecuting attorneys" (*id.* at 906) and the fact that

*[U]nder article XI, section 5, the very concept of a locally elected 'prosecuting attorney' includes the core function of exercising broad charging discretion on behalf of the local community.*

*Id.* at 905 (emphasis added). The importance of this "core function" is so meaningful that

Without broad charging discretion, a prosecuting attorney would cease to be a "prosecuting attorney" as intended by the state constitution. This would be true even if some modicum of charging discretion remained."

This is supported by the Court's description of the role and authority of the Legislature to assign prosecuting attorney functions:

The legislature is *free to establish statutory duties that do not interfere with core prosecutorial functions,* ... but the legislature cannot interfere with the fundamental and inherent charging discretion of prosecuting attorneys,

including discretion over the filing of available special allegations."

*Id.* at 905-06 (emphasis added).

*This explains why prosecuting attorneys are required to give their advice to county boards only when asked – if they were mandated by the Legislature to attend to the multitude of constant civil demands and issues, their prosecutorial 'core function' could be (and no doubt would be) improperly compromised. And so this also explains the reason for RCW 36.32.200 – to spare prosecuting attorneys the burden of having to respond to every civil demand of the Board and County to the detriment of their core prosecuting function.*

In short, the core functions of a prosecuting attorney, and his/her *raison d'etre*, is the charging and prosecuting of criminal cases. The same cannot be said with any seriousness about advising the Board on GMA issues that come around every 15 or 20 years. Further, it cannot be rationally asserted that GMA advice is a "core function", which Banks contends of necessity are derived from pre-statehood days (in order to be baked into the constitution), when there was no such thing as the GMA in the 1820s or later years leading up to statehood in 1889.

Banks unequivocally understands this, and so he *conceded* at the final hearing in this case that the pre-statehood "*civil functions of prosecutors were pretty limited: road vacation, escheats of money, contracts.*"<sup>59</sup> But he went even farther, *conceding* that "*since 1889 things*

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<sup>59</sup> VRP (January 15, 2016) at 26:17-20.

*have gotten more complex*: Public records, open public meetings act, *all the land use*, waiver of sovereign immunity."<sup>60</sup> These statements by Banks actually make the Board's argument, rendering his own arguments to this Court a contrivance and, in the end fallacious.

Banks also argues that *State ex rel Johnson v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937), and *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935), prevent a county board from retaining outside counsel to perform functions that a prosecuting attorney could perform.<sup>61</sup> But the facts of both cases are distinctly different from those in this case, neither mentions RCW 36.32.200, and neither concerns the authority of county boards.

The Supreme Court in *Melton* held unconstitutional a statute that enabled a prosecuting attorney to make an *appointment of a new county officer* titled "investigator" to fill a position having "*the same authority* as the [elected] sheriff of the county." *Melton*, 192 Wash. at 380. The Court determined that the problem with the statute was that its "*definite and express grant of official power*" created a new, appointed public officer,<sup>62</sup> noting:

*The distinguishing characteristic of a public officer is, that the incumbent, in an independent capacity, is clothed with*

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<sup>60</sup> VRP (January 15, 2016) at 26:20-23 (emphasis added).

<sup>61</sup> See Appellant's Opening Brief at 23-25.

<sup>62</sup> *Melton* at 385 (emphasis added). The statute in that case said: "Any and all investigators appointed by a District Attorney shall have the same authority as the sheriff of the county to make arrests anywhere in the county and to serve anywhere in the county, warrants, writs, subpoenas in criminal cases, and all other processes in criminal cases issued by any superior court or justice court in the state, but such investigators shall not be under the authority and direction of the sheriff. . . ." *Id.* It is significant that the authority conferred concerned criminal legal matters and included the power to arrest.

*some part of the sovereignty of the State*, to be exercised in the interest of the public as required by law.

*Id.* at 384 (citation omitted; emphasis added). *Melton* also recognized that each case must be evaluated on its own merits (*id.* at 384), using the test of "[i]f, when appointed, they become, *in fact and in law*, county officers, the [statute] must be held to be unconstitutional." *Id.* at 383 (emphasis added).

Here, the parties agree that Drummond did not become any sort of county officer by law, and she was never vested with any sort of official power, title, station, or prosecutorial authority. Unlike the investigators in *Melton*, Drummond does not possess any "*independent capacity*" or "*sovereignty*" of the State because those qualities inhere in the criminal responsibilities of the *prosecuting* attorney and *deputy prosecuting* attorney. The work Drummond was to perform does not comprise a 'core duty' and is limited to a specific time period. Beyond that, there was no legislative branch authority at issue in *Melton*, which is a fundamental and significant distinction. Because of all these differences, *Melton* establishes nothing about the validity or constitutionality of RCW 36.32.200.

In *State v. Gattavara*, the Supreme Court considered the Department of Labor and Industries' ("L&I") statutory ability to authorize any department employee who was an attorney to appear for the department in an action to collect industrial insurance premiums. *Gattavara*, 182 Wash. at 328. However, the statute defining duties of the Attorney General required that office to "institute and prosecute all actions" on behalf of the State. *Id.* The Court held that, while attorneys employed by L&I could appear for the department in actions to collect insurance premiums, only the

Attorney General could institute those actions. *Id.* Thus, because the proceedings were instituted by the L&I employee/attorney rather than the Attorney General, the case was dismissed. *Id.* at 333.

In this case, unlike *Gattavara*, the Board acted in accordance with, and did not exceed, the authority granted by RCW 36.32.200. *Gattavara* is completely inapposite because it did not involve any statute analogous to RCW 36.32.200, and Banks has not "cease[d] to be a prosecuting attorney" as a result of the Board's action to retain Drummond for GMA work.

Importantly, the Board's retention of Drummond did not prevent Banks' office from also performing work in connection with the County's GMA update. Indeed, the Board sought that very participation but was rebuffed by Banks. To that extent, the problem Banks complains of is his own fault.

Banks cites three other Washington cases, but none of them support his theory on close examination. *Osborn v. Grant County*, 130 Wn.2d 615, is irrelevant because Drummond is not (and does not purport to be) a deputy prosecutor. *Hoppe v. King County*, 95 Wn.2d 332, 622 P.2d 845 (1980), is misapplied because *Hoppe* did not involve a county board retaining special counsel pursuant to RCW 36.32.200. Finally, the antiquated case *Northwestern Improvement Co. v. McNeil*, 100 Wash. 22, 170 P. 338 (1918), turned on the lack of an express grant of power for the board to hire someone to perform the county assessor's job. Here, beyond the fact that an assessor is not analogous to a temporary attorney, RCW 36.32.200

*expressly* grants the Board authority to hire temporary legal counsel like Drummond.

4. **Banks' Out-of-State Authority is Misstated, Inapplicable and Misapplied**

Because Washington law is clear on the subject of this case (*see* Sections IV.B.1 through B.8, and IV.C.1 through C.3 above), Banks turns to largely antiquated, out-of-state cases to try and support his theory. Those cases are no help to Banks in meeting his burden to show that *Washington's* statute, RCW 36.32.200, is unconstitutional beyond a reasonable doubt.

The Supreme Court should rely on Washington law to resolve this Washington question in the first instance. But if the Court is of a mind to review Banks' non-Washington cases, a close look shows defective analysis, misapplied arguments, and disparate constitutional and statutory regimes that render the cases of little value.<sup>63</sup> Here are just three examples:

*Meller v. Board of Commissioners*, 4 Idaho 44, 48 (1894).<sup>64</sup> *Meller* is inapplicable to this case for three obvious reasons. First, the Idaho constitution, unlike Washington's, does not create the office of a county prosecutor nor vest the state legislature with the ability to prescribe the powers and duties thereof.<sup>65</sup> Second, the Idaho constitution directly gives county boards the authority to retain outside counsel "when necessary."<sup>66</sup>

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<sup>63</sup> Indeed, many of the states that Banks' points to (*e.g.*, Kansas, California, Ohio) have statutes similar to RCW 36.32.200 because their state constitutions, like Washington's, vest authority in the state legislature to prescribe the powers and duties of county officers.

<sup>64</sup> Cited in Appellant's Opening Brief at 31-33.

<sup>65</sup> *See* Idaho Const. Art. XVIII, § 6.

<sup>66</sup> *Id.*

And third, for that reason, Idaho does not have (or need) a statute analogous to RCW 36.32.200.<sup>67</sup>

But more important than that, Banks misunderstands and misapplies the case. The Idaho Supreme Court did not decide that the commissioners' contract with outside counsel in *Meller* was unlawful "due to its assigning acts and duties" as Banks states,<sup>68</sup> but because the contract was an unnecessary and unchecked expenditure of county funds.<sup>69</sup> *Meller* does not stand for the proposition that county commissioners cannot retain an attorney to perform general legal work, but precisely the opposite:

The boards of county commissioners may, when the necessity exists, employ counsel, but that necessity must be apparent, and the action of the board in each case is subject to review by the courts.<sup>70</sup>

This result sinks Banks' theory. Even though the constitutional and statutory antecedents of *Meller* are different from those in Washington, the same practical result is reached – county commissioners can retain outside counsel when necessary and such decision is subject to the check and balance of judicial review (not a prosecutor's consent).<sup>71</sup> *Meller* does not

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<sup>67</sup> See Idaho Stat. 31-2603.

<sup>68</sup> See Appellant's Opening Brief at 31.

<sup>69</sup> "We are unwilling to believe that it was the purpose of the framers of our constitution to 'pluck the muzzle of restraint' from the boards of county commissioners throughout the state, and leave them with the sole limit of the vagaries of their own sweet wills in imposing burdens upon the taxpayers of the state." *Meller* at 715.

<sup>70</sup> *Meller* at 715, as quoted in Appellant's Brief at 32.

<sup>71</sup> Modern Idaho cases replicate the *Meller* result. See *Barnard v. Young*, 43 Idaho 382, 390 (1926) (prosecution of civil suits on county's behalf was statutory duty of prosecutor under statute, yet hiring of special counsel was appropriate because "necessity" sufficiently shown). See also 93-8 Op. Idaho Att'y Gen. 91 (1993) (county commissioners do not have authority to hire outside counsel on "a long-term or continuous basis" unless they comply with the constitutionally-mandated standard of "necessity"). Thus, Idaho commissioners could retain outside counsel for longer periods than the two-year limit Washington

support Banks' theory in any respect.

*Salt Lake County Commission v. Salt Lake County Attorney*, 985 P.2d 899 (Utah 1999).<sup>72</sup> Prosecutor Banks devotes two full pages quoting *Salt Lake*, but like *Meller* the case fails to show any congruency between Utah's constitution and statutes and those of Washington. There is no mention in *Salt Lake* of any applicable constitutional provision, and it cites only one Utah case and one general statute during its discussion of general rules relevant to the issue.<sup>73</sup> *Salt Lake* cites no statute like RCW 36.32.200 – a crucial omission that undermines Banks' theory.

*Salt Lake's* analysis is thin, and resorts to McQuillan on Municipal Corporations as authority. McQuillan, however, deals largely with city-oriented entities, not political subdivisions like counties. The specific section cited in *Salt Lake* (10 McQuillan §29.12) does not actually state the general law on this subject. For that, turn to 10 McQuillan §29.15 (3<sup>rd</sup> ed.), stating:

Whether attorneys may be employed in behalf of the municipal corporation will depend upon the proper construction of the law under which employment is sought ..., the nature of the services performed ..., or ... the character of the litigation or controversy involved and the interest which the public corporation has in it.

*The power to employ legal counsel ... is necessarily implied, in order to enable the corporation to ... execute faithfully the trust committed to it.* Unless forbidden by law, when a necessity arises for it and the interests of the municipal corporation require it, the employment of legal services will usually be sanctioned. (Footnotes omitted; emphasis added).

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commissioners are restricted to under RCW 36.32.200, so long as a need for the long-term retention is shown.

<sup>72</sup> See Appellant's Opening Brief at 36-37.

<sup>73</sup> See *Salt Lake* at 20-23.

This also is the rule in Washington when a correct reading is made of Washington legal authority.

*Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975).<sup>74</sup> Maryland law actually supports the validity of RCW 36.32.200. In *Murphy*, the Maryland court of appeals held an act creating an office of 'Special Prosecutor' was unconstitutional because the state General Assembly had no authority to reduce the constitutional powers of the 'State's Attorneys' (*i.e.*, county prosecutors) and the state Attorney General. *Id.* at 494-95, 348 A.2d at 848. After *Murphy* was decided, Maryland Constitution Art. 5, §9 was amended to provide that "the State's Attorney shall perform such duties ... as shall be prescribed by the General Assembly," rather than "as prescribed by law,"<sup>75</sup> thus permitting the General Assembly to thereafter limit the powers of the State's Attorneys.<sup>76</sup>

Banks' analysis merely notes that the Maryland Constitution was amended in the wake of *Murphy*,<sup>77</sup> but without explaining that the amendment endowed the Maryland state legislature with the authority to prescribe the duties of a constitutionally-created office of prosecutor/State's Attorney, and correspondingly reduce the powers of that office. Following that amendment, Maryland Constitution Art. 5, §9 closely resembled Art. XI, Section 5 of the Washington Constitution in that both require the state

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<sup>74</sup> See Appellant's Opening Brief at 33-34.

<sup>75</sup> See 1976 Md. Laws, Chap. 545 (emphasis added); *In re Special Investigation No. 244*, 296 Md. 80, 87, 459 A.2d 1111, 1114 (1983).

<sup>76</sup> See *Special Investigation No. 244*, 296 Md. at 87, 459 A.2d at 1114 (stating that the amendment enabled the General Assembly to pass legislation creating the State Prosecutor).

<sup>77</sup> See Appellant's Opening Brief at 34, n.26.

legislature to prescribe the duties of prosecuting attorneys' offices.

**D. Island County's Voters Have Not Been Disenfranchised**

The right to vote flows from the Washington Constitution Art. I, Sec. 19.<sup>78</sup> Banks argues that anyone performing any duty of the duly elected prosecutor "disenfranchises" the county's voters. But in fact, the question of disenfranchisement goes to *denying* someone the *right* to vote, nothing more. In *Parker v. Wyman*, 176 Wn. 2d 212, 222, 289 P.3d 628 (2012), the Court explained this:

As we explained in *Gerberding*, the common right to participate in government includes both the unqualified right of any eligible person in this state to run for elective office and the *unqualified right of the people to choose from among those running the person who will hold the office*. (Emphasis added)

Thus, the "elective franchise" is comprised of this right to vote, and being disenfranchised relates to being denied the right to vote. *See Foster v. Sunnyside Valley Irrigation District*, 102 Wn.2d 395, 404-08, 687 P.2d 841 (1984); Wash. Constitution, Art. VI, Sec. 1<sup>79</sup>; Wash. Constitution, Art. VI, Sec. 3<sup>80</sup>; and Black's Law Dictionary (9<sup>th</sup> ed.) at 535<sup>81</sup>. No voter is being

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<sup>78</sup> "SECTION 19 FREEDOM OF ELECTIONS. All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

<sup>79</sup> "SECTION 1 QUALIFICATIONS OF ELECTORS. All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, shall be entitled to vote at all elections."

<sup>80</sup> "SECTION 3 WHO DISQUALIFIED. All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the *elective franchise*." (Emphasis added)

<sup>81</sup> "Disenfranchise: To deprive (a person) of the right to exercise a franchise or privilege, esp. to vote." *See also id.* ("Disenfranchisement").

disenfranchised by Drummond's performance of GMA legal services for the Board pursuant to RCW 36.32.200.

**E. Banks' Quo Warranto Action is Mispled**

**1. The Case is Properly Dismissed Because Drummond is Not Occupying or Usurping Banks' Office**

Because this is a *quo warranto* action, it is necessarily directed at removing a usurper from public office. The text of the *quo warranto* statute requires showing the essential element that someone is "usurp[ing], intrud[ing] upon, or unlawfully hold[ing] or exercis[ing] any *public office*...." RCW 7.56.010(1) (emphasis added). Drummond is providing legal counsel to the Board, but is doing so as special counsel under the authority of RCW 36.32.200, not as a purported county prosecutor or deputy prosecutor. Banks does not assert that the requisites of RCW 36.32.200 were not followed, the Board does not contest that Banks is the duly qualified prosecutor for Island County, and no party contends that Drummond was appointed to be a deputy prosecutor or to serve in any other public office.<sup>82</sup>

On the Washington law set forth herein, Drummond is not serving as a "public officer". See Section IV.C.3 above. Banks' *quo warranto* case is without merit from the very start and should be dismissed.

**2. The Case is Properly Dismissed Because it is an Indirect Challenge RCW 36.32.200**

Near the end of the trial court proceedings, Banks admitted that the

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<sup>82</sup> VRP (December 18, 2015) at 9:9-10:1(Loginsky, counsel for Banks, speaking).

real target of his lawsuit was the validity of RCW 36.32.200, not Drummond and not a *quo warranto* claim.<sup>83</sup>

I believed that this quo warranto lawsuit would be about a single binary legal question, to wit: "Whether a Board of County Commissioners has the unfettered legal authority to hire its own lawyer, so long as the written contract is approved by the presiding Superior Court Judge, and is limited to two years in duration." (Quotations in original; no citation or attribution provided)

This admission is important for two reasons. First, because it is fundamentally inconsistent with Banks' *quo warranto* complaint, which never mentions RCW 36.32.200. Second, because it vitiates the asserted motivation behind the suit – Banks is not so concerned with the claimed disenfranchisement of the voters, but rather with his own ability to control the actions of the Board as to the conduct of the County's business and its use of RCW 36.32.200.<sup>84</sup>

**F. The Case is Properly Dismissed Because Banks Did Not Timely Challenge Resolution C-48-15**

Banks failed to appeal Resolution C-48-15 retaining Drummond. RCW 36.32.330 requires an appeal of any decision by a County Board to be initiated within 20 days of the Board's decision:

Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within twenty days after the decision or order, and the *appellant shall within that time*

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<sup>83</sup> Banks' Final Declaration at ¶ 48 (CP 127).

<sup>84</sup> It is also a substantial shift from the "sole question" Banks posed in his Amended Motion for Summary Judgment ("The sole question in this quo warranto action is whether Ms. Drummond has a de jure right to perform the duties of the public office of Island County Prosecuting Attorney.") (CP 1768). *See also* Banks' Response Brief at 6:5-6 (CP 93).

*serve notice of appeal* on the county commissioners. ....  
(Emphasis added.)

The time limit in RCW 36.32.330 applies to "all situations where the board is 'acting on its ordinary and usual duties,' but has been held not to apply when the board is acting pursuant to special statute imposing a different, additional duty, such as when it acts in zoning matters." *Coballes v. Spokane County*, 167 Wn. App. 857, 864, 274 P.3d 1102 (2012) (internal citation omitted). The act of retaining Drummond, like any consultant or professional, is part and parcel of the Board's "ordinary and usual duties." See Section IV.B.3 and IV.B.4 above. See also *State ex rel. Thompson v. Carroll*, 63 Wn.2d 261, 265, 387 P.2d 70 (1963) for a discussion of the distinctions between zoning decisions (to which the requirement to timely appeal does not apply) and decisions concerning a board's authority related to those decisions on the other grounds (to which the requirement to timely appeal does apply).

#### **V. JOINDER IN CO-RESPONDENT DRUMMOND'S RESPONSE BRIEF**

The Board joins in and adopts Co-Respondent Susan E. Drummond's Response Brief.

#### **VI. CONCLUSION**

For the many reasons set forth above, Prosecutor Banks' has not met his burden of proving beyond a reasonable doubt that RCW 36.32.200 is unconstitutional. Banks has not presented even a cursory justification for his novel theories of mandated prosecutorial consent or core functions, and offers no rationale (let alone a compelling one) for making a wholesale

revision in the effective operation of government in Washington State for the last 111 years.

The Board respectfully asks the Supreme Court to affirm the trial court's decisions granting the Board's summary judgment and declaratory judgment on the constitutionality of RCW 36.32.200, affirming the legality of the Board's reliance on that statute, affirming the validity of the resulting contract retaining Drummond as special counsel, and dismissing Banks' *quo warranto* lawsuit.

RESPECTFULLY SUBMITTED this 7<sup>TH</sup> day of April, 2016.

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