



STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112
Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

MEMORANDUM

Date: October 21, 2016

To: Public Disclosure Commission Members

From: Evelyn Fielding Lopez, Executive Director
William A. Lemp III, Lead Political and Finance Investigator

Subject: 45-day Citizen Action Complaint—City of Olympia Officials
PDC Case 8341

I. Complaint and Request for PDC Review

On September 8, 2016, the Attorney General's Office received a 45-day Citizen Action Complaint filed by Knoll Lowney on behalf of his client, Opportunity for Olympia ("OFO"), a registered political committee formed to support a ballot measure for "income tax for funding college tuition." Opportunity for Olympia C-1pc, filed March 26, 2016, **Exhibit 1**.

The Citizen Action Complaint alleged that the Councilmembers of the City of Olympia violated RCW 42.17A.555 by using or authorizing the use of City facilities/funds to oppose OFO's proposed local ballot measure by seeking judicial review of the measure rather than placing it on the November 8, 2016 general election ballot.

RCW 42.17A.555 states in pertinent part:

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of

employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

...

(3) Activities which are part of the normal and regular conduct of the office or agency.

...

In addition, WAC 390-05-273 provides:

Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17A.555, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

As part of his assessment of the complaint, the Attorney General has requested the Public Disclosure Commission ("PDC") to review the issues presented and to make a recommendation regarding the alleged violation of campaign finance laws.

II. Question for the PDC

Was it appropriate for the Olympia City Councilmembers to authorize a lawsuit to determine if a proposed local ballot measure was beyond the scope of the City's initiative power, and if not, to seek an order enjoining the proposed tax initiative from appearing on the November 8, 2016 ballot, or was this action and the resulting lawsuit a

use of public facilities/funds in opposition to a ballot measure prohibited by RCW 42.17A.555?

III. Chronology

In April 2016, The Olympian newspaper published an article with some of the first details about a planned local initiative:

A petition is circulating for a new ordinance that would tax Olympia's wealthiest households to generate college tuition money for all local high school graduates.

Backed by a volunteer group called Opportunity for Olympia, the proposal calls for creating a 1.5 percent tax on household income in excess of \$200,000. Organizers estimate about 750 households in Olympia city limits would be subject to the tax, which would raise about \$2.5 million a year.

The petition needs 4,702 valid signatures by June 16, 2016 to qualify for the November general election ballot. If the law passes, every public high school graduate and GED recipient living inside Olympia's boundaries would be eligible for money to pay for the first year tuition at any community college, or an equivalent amount can be applied to tuition at any public university in Washington.

*Petition calls for taxing Olympia's wealthiest households to create college fund, Andy Hobbs, The Olympian, April 14, 2016, **Exhibit 3.***

During April, May, and June 2016, the Olympia City Council convened study sessions and held open meetings to discuss the issues raised by Opportunity for Olympia. **Exhibits 4, 5, 6.** At the April 19 study session, Hugh Spitzer, Seattle attorney and University of Washington Law School Professor, made a presentation regarding the City's authority with regard to income taxes. **Exhibit 16.**

According to the City of Olympia's Complaint for Declaratory Judgment and Injunctive Relief, on July 6 OFO filed its initiative petition, with signatures, with the City. The petition was titled:

AN ORDINANCE of the City of Olympia, Washington, imposing an excise tax on household income above \$200,000 per year derived from financial transactions, personal activities, business, commerce, occupations, trades, professions and other lawful activities, the revenues therefrom to be dedicated to funding at least one year of free community or technical college for each year's City of Olympia public high school graduates and General Education Development Certificate ("GED") recipients, or an

equivalent amount of money for such public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington.

Exhibit 9, page 3. On July 7, the City forwarded the initiative petition to the County Auditor to verify the signatures.

In anticipation of signature verification on OFO's initiative petition, on July 12 the Olympia City Council voted to seek judicial review in Thurston County Superior Court to determine whether the proposed initiative was lawful and within the scope of the City's initiative power, and if not, to seek an order enjoining the proposed tax initiative from appearing on the November 8, 2016 ballot. **Exhibit 7.**

On July 13, the Thurston County Auditor issued a certificate of sufficiency, signaling that there were enough valid signatures for the proposed initiative to be eligible to be passed without alteration, or placed on the ballot. Once the Auditor certifies that there are sufficient signatures, the City has twenty days to either pass a proposed ordinance or cause the ordinance to be placed on the next general election ballot. RCW 35.17.260. Alternatively, if the City refuses or fails to take action on the initiative, any taxpayer may commence an action in superior court to compel the City to hold an election. RCW 35.17.290. The City had until August 2 (twenty days) to take action, but did not pass the ordinance or place the issue on the ballot.

Instead, on July 22, the City filed an action in Thurston County Superior Court seeking a declaration that the proposed initiative to establish an income tax in the City is beyond the scope of the local initiative power. The City also sought an order enjoining Thurston County and the Thurston County Auditor from placing the proposed income tax initiative on the November 8, 2016 general election ballot. **Exhibit 9.**

On July 26, the Olympia City Council approved a resolution to take no action to pass OFO's proposed ordinance or to order an election. **Exhibit 8.**

The next day, on July 27, OFO filed a lawsuit against the City of Olympia in Thurston County Superior Court, requesting a judicial decree under RCW 35.17.290 compelling the City to place the initiative on the November 8, 2016 ballot.

Both cases were combined for hearing, and on August 24, 2016, Judge Jack Nevin, a visiting Pierce County Superior Court Judge, granted the City's Motion for Declaratory Judgment and Injunctive Relief, finding that OFO's initiative exceeded local initiative powers, and ordering the Thurston County Auditor to not place the initiative on the ballot. Judge Nevin also denied OFO's Petition for Prevention of Election Error and Motion for Injunctive Relief, thereby denying the request to have the initiative placed on the November ballot. **Exhibit 10.**

OFO immediately appealed Judge Nevin’s decision to Division II of the Court of Appeals, and requested a stay of the injunction against placing the initiative on the November ballot. **Exhibit 11.** On September 2, Commissioner Aurora Bearse of the Court of Appeals, granted OFO’s motion to stay the Superior Court’s decision to enjoin the placement of their initiative on the November ballot. The Commissioner’s order also established that any appeal or motion to modify her ruling would be due by September 6. **Exhibit 12.**

The City of Olympia asked a panel of Court of Appeals judges to review the action taken by the Court of Appeals Court Commissioner, but the panel declined to review the ruling. The City did not file any further appeals, and asked the Thurston County Auditor to place the initiative on the November 8, 2016 ballot.

OFO’s 45-day Citizen Action Complaint is dated September 2, 2016, and was received by the Attorney General on September 8. **Exhibit 1.**

IV. Analysis

Olympia City Councilmembers and other City employees and administrators may not use or authorize the use of any City facilities or funds, directly or indirectly, for the promotion of or opposition to any ballot proposition. RCW 42.17A.555.

In his letter to the PDC, Olympia City Attorney Mark Barber described the City’s actions to seek judicial review of the proposed ballot measure as follows:

The City denies violation of RCW 42.17A.555. The City did file a declaratory judgment action in Thurston County Superior Court on July 22, 2016, to request a judicial determination whether the OFO initiative was a lawful, valid exercise of the initiative power granted to Olympia’s citizens under State law, and if not, to obtain an injunction prohibiting the initiative measure from appearing on the November 2016 ballot.

The City’s legal action is consistent with well-established judicial precedent for municipalities where such public agencies have sought judicial review of the legal sufficiency of a proposed initiative. In numerous appellate decisions, such actions were not found to violate RCW 42.17A.555. Neither the City of Olympia nor the Olympia City Council took electioneering or campaign action to influence the vote on the ballot measure. The City’s action in pursuing a legal determination from the Thurston County Superior Court as to the initiative’s validity was not campaigning. Seeking judicial review is not use of public funds for campaign purposes. Filing a lawsuit to determine the legality of a local initiative is not advertising, communicating with voters, campaigning, lobbying or electioneering.

Exhibit 2, page 6.

The Public Disclosure Commission has previously provided guidance in the form of a Commission Interpretation regarding “Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot.” PDC Interpretation 91-02, **Exhibit 15**.

The guidance relates to whether certain legal actions related to ballot measure litigation should be considered campaign contributions, but the reasoning is relevant in the current matter. In relevant part, PDC Interpretation 91-02 provides:

Statement #2

Expenditures made by a government agency to defend its official actions related to whether or not a measure should be placed on a ballot or to the wording of a ballot title are not reportable as campaign expenditures.

Discussion:

The proponents of a proposed ballot measure are clearly acting to support or advance that measure when they take an action to require that it be placed before the voters. It is also in their interest to have the measure stated in terms most favorable to them. The proponents, therefore, have discretion in the action they take regarding the issue. They are also not closely bound by law in the range of actions they may take. The government agency, on the other hand, is closely regulated by law in its actions regarding measures that are presented to it. It first of all is expected to remain neutral in its approach to ballot proposals. The way in which a measure is processed is specified and the government is given little leeway in its actions. If a government agency takes an official action (e.g., to write a ballot title or to refuse to place a measure on a ballot) it must be assumed that the agency is acting in good faith. If the government action is challenged, the agency then has little or no discretion in whether to defend its action. Thus, while the agency's act may serve the ultimate end of opposing a ballot proposal, since the agency lacks discretion in the situation, it has not made a campaign expenditure as envisioned by RCW 42.17A.

(Emphasis added.)

A reasonable extrapolation from Interpretation 91-02 would be for the PDC to decide: If a government agency takes an official action (e.g., to write a ballot title or to refuse to place a measure on a ballot) it must be assumed that the agency is acting in good faith. If the government action is challenged, the agency then has little or no discretion in whether to defend its action. Thus, while the agency's act may serve the ultimate end of opposing a ballot proposal, since the agency lacks discretion in the situation, it has not used public facilities or funds to support or oppose a ballot proposal and has not violated RCW 42.17A.555.

However, even if the PDC adopts that extrapolation and decides to amend Interpretation 91-02 to cover the use of public funds, the Commission will still need to decide if the City's actions regarding the OFO initiative are allowable because the City did not merely defend its actions—it was the moving party seeking judicial review of the proposed initiative.

A. Was OFO's Proposed Initiative a Ballot Measure at the Time of the City's Complaint for Declaratory Judgement and Injunctive Relief?

As an initial issue, the City raises the possibility that its expenditure of city funds to pursue a legal determination regarding the proposed initiative's validity was not an effort to oppose a ballot measure because its actions occurred before the ballot initiative campaign. **Exhibit 2**, page 7.

The State is awaiting a decision by the Washington Supreme Court on its appeal of a case involving a similar issue—at what point a local initiative becomes a ballot measure. However, there is no credible argument that the proposed OFO initiative was not a ballot measure as of July 22, 2016 when the City filed its legal action. The County Auditor had certified that there were sufficient signatures to place the initiative on the ballot on July 13. As of that date, the City's choices, per statute, were to pass the ordinance, place it on the ballot, or take no action and see if someone filed an action to compel the City to place the initiative on the ballot. RCW 35.17.260 and .290.

The ballot measure was ripe for challenge, and that is exactly what the City did by filing its action on July 22. The question is not whether there was a ballot measure—there was. The question is whether the City could use public resources to seek judicial review of the proposed ballot measure.

B. Can the City Challenge a Ballot Measure before the Election?

There is strong precedent supporting challenges to proposed ballot measures before sending it for election IF the challenge is that the measure falls outside the scope of allowable initiative activity.

In such actions, one of the threshold questions is whether the issue is justiciable (whether a matter is suitable for court review). In *Huff v. Wyman*, **Exhibit 13**, the Court explained:

Respondent sponsors argue that because the initiative has not yet been passed, there is nothing on which to rule. In reviewing an initiative, whether or not a case is justiciable depends on the type of review sought. *Coppernoll*, 155 Wn.2d at 300. While this court may not rule on the constitutional validity of a proposed initiative, whether an initiative is beyond the scope of the power the people reserved to themselves in

article II, section 1 of the state constitution is appropriate for preelection review. *Id.* at 299 ("Subject matter challenges do not raise concerns regarding justiciability because postelection events will not further sharpen the issue (i.e., the subject of the proposed measure is either proper for direct legislation or it is not)."). Here the question to be addressed is not the constitutionality of the initiative. Rather, the question is whether the initiative is within the broad scope of the people's reserved power. To be within the scope of this reserved power, an initiative must propose the enactment of a law and not the amendment of the constitution. See *Ford v. Logan*, 79 Wn.2d 147, 156, 483 P.2d 1247 (1971) ("the initiative power set forth in Const. art. 2 does not include the power to directly amend or repeal the constitution itself"); accord *Coppernoll*, 155 Wn.2d at 304; *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000).

184 Wn.2d 664, 650-51 (2015), **Exhibit 13**, (emphasis added).

Similarly, in *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, Exhibit 14, the Court explained how a local ballot measure could be reviewed before the election:

Courts generally avoid reviewing ballot initiatives before they have been enacted into law, but a few limited types of challenges can be appropriately reviewed prior to election: procedural challenges (such as sufficiency of signatures and ballot titles) and challenges asserting that the initiative is not within the scope of the legislative authority granted to local residents.

185 Wn.2d 97 (2016), **Exhibit 14**, page 2.

Therefore, a City may seek judicial review of a proposed initiative if the City believes that the subject matter may fall outside the City's legislative authority.

C. Was the City's Action to Challenge the Ballot Measure Reasonable and Lawful, and Therefore Part of the Normal and Regular Conduct of the City?

The City is responsible for enforcing local ordinances and for responding to legal challenges to ordinances. It has a clear interest in ensuring that local ordinances are lawful and not in conflict with state laws and the state Constitution. The City Councilmembers studied the proposed OFO income/excise tax over the course of several months and sought legal guidance from a prominent expert on state tax laws and local government authority.

The City's complaint for Declaratory Judgment explains the City's concern with the proposed OFO initiative:

The local power of taxation, even when authorized for a city, is reserved to the city's governing/legislative body, and not subject to direct legislation except as specifically authorized by the Legislature. The Legislature has not authorized direct legislation (initiative or referendum) for a city's imposition of an income tax. Indeed, the Legislature has expressly forbidden cities from imposing a tax on net income.

Exhibit 9, page 1, footnote omitted. The City further explained that the proposed OFO initiative was beyond the scope of the local initiative power. **Exhibit 9**, page 2.

If a proposed local initiative is in conflict with state law, it cannot stand. In the *Spokane Entrepreneurial Center* case, the Court reviewed a proposed local measure to change zoning approval laws, water rights, and workplace rights in Spokane. The Court determined that the proposed initiative went beyond the powers of the city:

[T]he local initiative power is limited to legislative matters that are within the authority of the city. In this case, ... all four provisions of the Envision Initiative were outside the scope of the local initiative power, as they either dealt with nonlegislative matters or were outside the authority of the city.

...

Finally, the provisions of a local initiative must be within the scope of the authority of the city itself. As we have explained, "While the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law." *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747. In that case, we reviewed a Seattle initiative that would have halted certain Interstate 90 construction projects. *Id.* at 742. We struck down the initiative--prior to it being put on the ballot--holding that it dealt with matters that the city had no authority to regulate: "the location and construction of state limited access facilities." *Id.* at 749.

Exhibit 14, pages 4-5, (emphasis added).

Given the City's responsibilities for setting up mechanisms for compliance with local ordinances, enforcing local ordinances, and defending local ordinances, it seems reasonable for the City to seek judicial review of a proposed initiative that clearly would implicate state laws and Constitutional provisions.

If it was reasonable for the City to seek review, then such action should be considered part of the normal and regular activities of a city, and therefore not a use of public facilities or funds to oppose a ballot measure.

D. Are the City’s Actions Distinguishable from the Actions of the Port of Tacoma?

Two months ago, in response to another 45-day Citizen Action Complaint, the Attorney General commenced an action against the Port of Tacoma Commissioners¹ for use of public facilities/funds to oppose a local ballot measure by filing a declaratory judgment action to stop the measure from being placed on the November ballot.

The Port of Tacoma case is different from the current City of Olympia matter. The Port is not responsible for managing the ordinances of the City of Tacoma, nor is it responsible for Tacoma’s water system or election activities. Although the Port expected to be impacted if the local initiative passed, it had no responsibility to set up a new Tacoma citizen referendum process, and would not have to defend the local ordinances or systems if the initiative had passed. Therefore, the Port’s use of public facilities and funds to oppose the proposed ballot measure was not the same as the City of Olympia’s actions.

V. Staff Recommendation

Staff recommends that the Commission communicate to the Attorney General that the City of Olympia did not violate RCW 42.17A.555 when it sought judicial review of a proposed ballot measure to determine if the measure was within the scope of the City’s initiative power.

Staff further recommends that the Commission communicate to the Attorney General a recommendation of no action on the 45-day Citizen Action Complaint filed by Knoll Lowney on behalf of Opportunity for Olympia.

In addition, Staff recommends that the Commission review Interpretation 91-02 to determine if it should be amended to cover a public agency’s use of public facilities/funds related to placing, or not placing, a proposition on the ballot.

¹ The action also involves the Tacoma-Pierce County Chamber, and the Economic Development Board, for failing to report expenditures for opposing a ballot measure.

List of Exhibits

- Exhibit 1** Opportunity for Olympia 45-day Citizen Action Complaint filed by Knoll Lowney, received by the AGO September 8, 2016.
- Exhibit 2** City of Olympia response, filed by City Attorney Mark Barber, October 6, 2016
- Exhibit 3** The Olympian article, April 14, 2016
- Exhibit 4** April 19, 2016, City of Olympia Council Meeting, Study Session
- Exhibit 5** May 17, 2016, City of Olympia Council Meeting, Discussion of Administrative Costs and Issues Related to the Opportunity for Olympia Income Tax Initiative
- Exhibit 6** June 14, 2016, City of Olympia Council Meeting, Discussion of a Draft Ordinance Creating a Graduated Income Tax on Wage Earners in the City of Olympia
- Exhibit 7** July 12, 2016, City of Olympia Council Meeting, Approval of a Resolution Concerning Inadequate Public Funding of Higher Education and a Regressive State Tax System
- Exhibit 8** July 26, 2016, City of Olympia Council Meeting, Approval of Ordinance Related to the Opportunity for Olympia (OFO) Initiative Petition, or Approval of Resolution Placing the OFO Petition on the November 8, 2016, General Election Ballot, or Approval of Resolution to Take No Action to Pass OFO's Proposed Ordinance or to Order an Election
- Exhibit 9** City of Olympia Complaint for Declaratory Judgment, July 22, 2016
- Exhibit 10** Ruling by Thurston County Superior Court, August 24, 2016
- Exhibit 11** Opportunity for Olympia Notice of Appeal, August 24, 2016
- Exhibit 12** Court of Appeals Decision Granting Stay, September 2, 2016
- Exhibit 13** *Huff v. Wyman*, Washington Supreme Court, 184 Wn.2d 644 (2015)
- Exhibit 14** *Spokane Entrepreneurial Center*, Washington Supreme Court, 185 Wn.2d 97 (2016)
- Exhibit 15** Public Disclosure Commission (PDC) Interpretation No. 91-02

Exhibit 16 Presentation by Hugh Spitzer, April 19, 2016

Exhibit 17 Opportunity for Olympia Political Committee Registration, C-1pc, March 26, 2016

RECEIVED

SMITH & LOWNEY, P.L.L.C.

2317 E. JOHN ST.
SEATTLE, WASHINGTON 98122
(206) 860-2976, FAX (206) 860-4187

'16 SEP -8 A8:13

September 2, 2016

ATTORNEY GENERAL
STATE OF WASHINGTON
GSE/OLYMPIA

Robert Ferguson
Washington State Attorney General
1125 Washington St SE PO Box 40100
Olympia, WA 98504-0100

Jon Tunheim
2000 Lakeridge Dr S.W., Building 2
Olympia, WA 98502

Re: 1st Notice of Intent to Sue for Violations of RCW 42.17A

Dear elected officials:

We represent Opportunity for Olympia ("OFO") in submitting this statutory notice of intent to sue.

OFO has reason to believe that the City of Olympia and its City Council (collectively "Olympia") have violated RCW chapter 42.17A. The members of the City Council are as follows:

- Position #1 Cheryl Selby - Mayor
- Position #2 Jessica Bateman
- Position #3 Nathaniel Jones
- Position #4 Clark Gilman
- Position #5 Julie Hankins
- Position #6 Jeannine Roe
- Position #7 Jim Cooper

OFO intends to bring a citizens' action against Olympia under RCW 42.17A.765(4) if you do not commence an action against Olympia within the following notice periods specified by statute. At the expiration of 45 days from the date of this letter, a second notice of intent to sue will be sent to you if you have not yet filed suit against Olympia. If after 10 days following receipt of the second notice you still have not filed suit against Olympia, OFO will bring an action in Superior Court.

I. Violations of RCW 42.17A.

Indisputable evidence shows Olympia intentionally violated our campaign laws in using public moneys to oppose a qualified local initiative.

45 Day Notice Letter
September 2, 2016
Page 2

Olympia has used tens of thousands of dollars in taxpayer moneys to challenge OFO's initiative to conduct fundraising and impose an excise tax to fund grants for community college education ("OFO Initiative"). Olympia hired Foster Pepper to attack the OFO Initiative and, on information and belief, has paid tens of thousands of dollars for those services. Those services included having Foster Pepper critique the OFO Initiative and then to prosecute a pre-election challenge to try to strip the qualified initiative from the ballot.

On September 2, 2016, the Court of Appeals Division II ruled that OFO Initiative should be placed on the ballot and, on information and belief, Olympia plans to expend thousands of dollars more in taxpayer funds to further challenge the OFO Initiative.

Olympia's opposition is politically motivated by an animus towards the OFO Initiative. In its meetings, the Olympia City Council critiqued the OFO Initiative for political reasons, including making private universities ineligible for the initiative's grant program. In oral argument before the Court of Appeals, the City's outside counsel admitted that the City Council brought its legal challenge to the OFO Initiative because it did not agree with the policies in the initiative.

The political animus is further shown by the City's coordination of its attack on the OFO Initiative with the Freedom Foundation, which has spearheaded the political opposition to the OFO Initiative. There are numerous emails between Olympia and the Freedom Foundation showing this coordination.

However, political motivation is not necessary. Olympia has violated RCW 42.17A merely by spending tens of thousands of dollars in public funds to attack the initiative. This is the identical violation for which the Attorney General sued the Port of Tacoma and others two weeks ago in *State of Washington v. Economic Development Board for Tacoma-Pierce County et al.* Pierce County Superior Court, No. 16-2-10303. A copy of that complain is attached hereto. The violation in this case is even stronger since here Olympia has coordinated with the political opposition and is motivated by its opposition to the OFO Initiative's policy.

II. Penalty Demand.

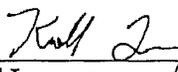
All of the persons and entities described in this letter should pay a penalty for their part in this concealment.

OFO intends to sue for all violations, including those yet to be uncovered and those committed subsequent to the date of this notice of intent to sue. OFO believes that this Notice sufficiently states grounds for filing suit. We intend, at the close of the notice periods or shortly thereafter, to file a citizen's action against the above-named persons and entities under RCW 42.17A.765(4) for violations of the Fair Campaign Practices Act. If you have any questions or concerns regarding this Notice, please contact the undersigned attorney.

45 Day Notice Letter
September 2, 2016
Page 3

Very Truly Yours,

SMITH & LOWNEY, PLLC

By: 

Knoll Lowney
2317 E. John, Seattle, WA 98112
Attorneys for Opportunity for Olympia

ATTACHMENT

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

August 15 2016 4:02 PM

KEVIN STOCK
COUNTY CLERK
NO: 16-2-10303-6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

ECONOMIC DEVELOPMENT
BOARD FOR TACOMA-PIERCE
COUNTY, TACOMA-PIERCE
COUNTY CHAMBER, JOHN WOLFE,
in his official capacity as Chief
Executive Officer for the PORT OF
TACOMA, and CONNIE BACON,
DON JOHNSON, DICK MARZANO,
DON MEYER, and CLARE PETRICH,
in their official capacities as
Commissioners for the PORT OF
TACOMA,

Defendants.

NO.

COMPLAINT FOR CIVIL
PENALTIES AND FOR INJUNCTIVE
RELIEF FOR VIOLATIONS OF RCW
42.17A

I. NATURE OF ACTION

The STATE OF WASHINGTON (State) brings this action to enforce the State's
campaign finance disclosure law, RCW 42.17A. The State alleges that Defendants, the
ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY (EDB) and the
TACOMA-PIERCE COUNTY CHAMBER (Chamber) violated provisions of RCW 42.17A
by failing to properly report independent expenditures they made in opposition to certain local

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF FOR
VIOLATIONS OF RCW 42.17A

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

1 ballot propositions. The State further alleges that Defendant JOHN WOLFE, in his official
2 capacity as Chief Executive Officer of the PORT OF TACOMA, and CONNIE BACON, DON
3 JOHNSON, DICK MARZANO, DON MEYER, and CLARE PETRICH, in their official
4 capacities as Commissioners for the PORT OF TACOMA, violated provisions of RCW 42.17A
5 by authorizing the use of public facilities in opposition to certain local ballot propositions. The
6 State seeks relief under RCW 42.17A.750 and .765, including penalties, costs and fees, and
7 injunctive relief.

8 II. PARTIES

9 1.1 Plaintiff is the State of Washington. Acting through the Washington State
10 Public Disclosure Commission, Attorney General, or local prosecuting attorney, the State
11 enforces the state campaign finance disclosure laws contained in RCW 42.17A.

12 1.2 Defendant, the EDB, is an active nonprofit corporation with a primary place of
13 business in Pierce County, Washington.

14 1.3 Defendant, the Chamber, is an active nonprofit corporation with a primary place
15 of business in Pierce County, Washington.

16 1.4 Defendant, John Wolfe, is the Chief Executive Officer of the Port of Tacoma,
17 which has its primary place of business in Pierce County, Washington.

18 1.5 Defendant, Connie Bacon, is a Commissioner of the Port of Tacoma, which has
19 its primary place of business in Pierce County, Washington.

20 1.6 Defendant, Don Johnson, is a Commissioner of the Port of Tacoma, which has
21 its primary place of business in Pierce County, Washington.

22 1.7. Defendant, Dick Marzano, is a Commissioner of the Port of Tacoma, which has
23 its primary place of business in Pierce County, Washington.

24 1.8 Defendant, Don Meyer, is a Commissioner of the Port of Tacoma, which has its
25 primary place of business in Pierce County, Washington.

26

1 1.9 Defendant, Clare Petrich, is a Commissioner of the Port of Tacoma, which has
2 its primary place of business in Pierce County, Washington.

3 **III. JURISDICTION AND VENUE**

4 2.1 This Court has subject matter jurisdiction over the EDB and the Chamber in
5 accordance with RCW 42.17A. The Attorney General has authority to bring this action
6 pursuant to RCW 42.17A.765.

7 2.2 The actions of the EDB, the Chamber, John Wolfe, Don Johnson, Connie
8 Bacon, John Marzano, Don Meyer, and Clare Petrich which form the basis for the violations
9 alleged below occurred in whole or in part, in Pierce County, Washington.

10 2.3 Venue is proper in this Court pursuant to RCW 4.12.

11 **IV. FACTUAL ALLEGATIONS**

12 3.1 RCW 42.17A.005(4) defines a "ballot proposition" to include any initiative,
13 proposed to be submitted to the voters of any municipal corporation, from and after the time
14 when the proposition has been initially filed with the appropriate election officer of that
15 constituency.

16 3.2 RCW 42.17A.255 defines the term "independent expenditure" to include any
17 expenditure that is made in support of or in opposition to any ballot proposition and is not
18 otherwise required to be reported pursuant to RCW 42.17A.220, .235, and .240. The report is
19 entitled in relevant part, "Reporting Form for: Independent Expenditures" and is designated by
20 the Commission as form C-6, pursuant to WAC 390-16-060.

21 3.3 On February 19, 2016, "Save Tacoma Water" filed a political committee
22 registration form (C1-pc) with the state Public Disclosure Commission for the stated purpose
23 of supporting a ballot proposition on the November 8, 2016 general election ballot. On March
24 7, 2016, Save Tacoma Water filed Charter Initiative 5 with the City of Tacoma Clerk, and then
25 on March 11, 2016, it filed Code Initiative 6 with the City of Tacoma Clerk. Both initiatives
26

1 were approved as to form, and on June 30, 2016, Save Tacoma Water submitted its signatures
2 to the City of Tacoma Clerk.

3 3.4 Tacoma Code Initiative 6 sought to amend the Tacoma Municipal Code by
4 imposing a requirement that any land use proposal requiring water consumption of one
5 millions gallons of water or more daily from Tacoma be submitted to a public vote. Charter
6 Initiative 5 was a companion measure that sought to similarly amend the city charter.

7 3.5 On June 6, 2016, the Port of Tacoma, the EDB, and the Chamber brought a
8 declaratory judgment action in Pierce County Superior Court against the City of Tacoma.
9 Upon information and belief, Defendant Wolfe authorized participation in the lawsuit by the
10 Port of Tacoma. The lawsuit sought to (1) declare that Charter Initiative 5 and Code Initiative
11 6 exceeded the proper scope of local initiative powers and therefore were invalid, (2) enjoin the
12 Initiatives' signatures from being validated, and (3) enjoin the Initiatives from being placed on
13 the November 2016 ballot, or adopted by the City of Tacoma.

14 3.6 On June 16, 2016, Port of Tacoma Commissioners Don Johnson, Connie Bacon,
15 John Marzano, Don Meyer, and Clare Petrich unanimously voted to ratify the Port of Tacoma's
16 legal action described in paragraph 3.5.

17 3.7 On July 1, 2016, the Superior Court enjoined placement of Charter Initiative 5
18 and Code Initiative 6 on the ballot. On July 29, 2016, Save Tacoma Water appealed.

19 3.8 Defendant EDB spent at least \$9,994 as attorneys' fees in conjunction with its
20 participation in the aforementioned lawsuit.

21 3.9 Defendant Chamber spent at least \$10,000 as attorneys' fees in conjunction with
22 its participation in the aforementioned lawsuit.

23 3.10 The Port of Tacoma spent at least \$45,000 in attorneys' fees in conjunction with
24 its participation in the lawsuit.

25 3.11 The EDB and the Chamber should have reported, as independent expenditures, the
26 value of what was expended for legal services in opposition to the respective ballot proposition(s).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

5.4 For such other legal and equitable relief as this Court deems appropriate.

DATED this 15th day of August, 2016.

ROBERT W. FERGUSON
Attorney General


LINDA A. DALTON, WSBA No. 15467
Senior Assistant Attorney General
CHAD C. STANDIFER, WSBA No. 29724
Assistant Attorney General
Attorneys for Plaintiff State of Washington



October 6, 2016

SENT VIA EMAIL

William A. Lemp, III
(william.lemp@pdc.wa.gov)
Lead Political Finance Investigator
State of Washington
Public Disclosure Commission
P.O. Box 40908
Olympia, WA 98504-0908

Subject: PDC Case 8341 – City of Olympia Response to Complaint

Dear Mr. Lemp:

The information and exhibits submitted with this letter are in response to a Citizen Action Complaint (“Complaint”) by attorney, Knoll Lowney, on behalf of the Opportunity for Olympia (“OFO”) citizens’ initiative political campaign. It is my understanding Mr. Lowney submitted his Complaint to the Washington State Attorney General’s Office (“Attorney General”), which in turn provided his Complaint to the Washington State Public Disclosure Commission (“PDC”) on September 8, 2016.

In his Complaint, Mr. Lowney alleges violations of RCW Chapter 42.17A by all seven members of the Olympia City Council. Mr. Lowney alleges he has “indisputable evidence” showing “Olympia intentionally violated our campaign laws in using public moneys to oppose a qualified local initiative.”

As evidence, he attached a copy of the Complaint for Civil Penalties and for Injunctive Relief for Violation of RCW 42.17A filed by the Attorney General in Pierce County Superior Court on August 15, 2016 against the Port of Tacoma, Economic Development Board for Tacoma-Pierce County, Tacoma-Pierce County Chamber and various persons in their official capacities. This attachment is the extent of Mr. Lowney’s “indisputable evidence” provided to the Attorney General and the PDC. As City Attorney for Olympia, I have not received or been provided with any other documentary evidence in support of Mr. Lowney’s Complaint against the City of Olympia and the Olympia City Council.

Mr. Lowney states that “Olympia has violated RCW 42.17A merely by spending tens of thousands of dollars in public funds to attack the initiative. This is the identical violation for which the Attorney General sued the Port of Tacoma and others two weeks ago in *State of Washington v. Economic Development Board for Tacoma-Pierce County et al.*” Apparently, Mr. Lowney is unaware of PDC Interpretation No. 91-02 which concerns legal fees related to placing, or not placing, a proposition on the ballot, or he is attempting to mislead the media and voters about the City of Olympia’s official actions. (See, Exhibit A, PDC Interpretation No. 91-02.)

William A. Lemp, III
Lead Political Finance Investigator
Public Disclosure Commission
PDC Case 8341
October 6, 2016
Page - 2

Simply put, PDC Interpretation No. 91-02 states that “[e]xpenditures made by a government agency to defend its official actions related to whether or not a measure should be placed on a ballot or to the wording of a ballot title are **not reportable as campaign expenditures.**” This has been the position of the PDC since PDC Interpretation No. 91-02 was approved on June 25, 1991, *over 25 years ago*. As a licensed attorney, Mr. Lowney should have conducted his legal research before casting aspersions against the Olympia City Council and the City of Olympia.

The Discussion within PDC Interpretation No. 91-02 states, in part:

If a government agency takes an official action (e.g., to write a ballot title or to refuse to place a measure on a ballot) it must be assumed that the agency is acting in good faith. If the government action is challenged, the agency then has little or no discretion in whether to defend its action. Thus, while the agency’s act may serve the ultimate end of opposing a ballot proposal, since the agency lacks discretion in the situation, it has not made a campaign expenditure as envisioned by RCWA 42.17A.

In his Complaint, Mr. Lowney twice makes reference to OFO’s “qualified . . . initiative.” He further states that “[o]n September 2, 2016, the Court of Appeals Division II ruled that OFO Initiative should be placed on the ballot . . .” This statement without further explanation is grossly, albeit arguably intentionally misleading.

Mr. Lowney neglects to state that on July 22, 2016, the Olympia City Council sought a judicial determination in Thurston County Superior Court whether the OFO initiative was valid under state law. (See, Exhibit B, Complaint for Declaratory Judgment and Injunctive Relief.) On July 27, 2016, OFO answered and counter-claimed against the City of Olympia seeking a decree ordering an election under RCW 35.17.290, and to declare RCW 36.65.030 [prohibition on a city levying a tax on net income] unconstitutional, among other relief. (See, Exhibit C, Defendants-Petitioners’ Opportunity for Olympia’s and Ray Guerra’s Petition and Affidavit for Prevention of Election Error and Counterclaim.)

Both parties submitted motions and briefs to the court. (See, Exhibit D, City of Olympia’s Motion for Declaratory Judgment and Injunctive Relief; and City of Olympia Reply in Support of Declaratory Judgment and Injunctive Relief.) After a hearing on August 24, 2016, visiting Pierce County Superior Court Judge Jack Nevin, entered an order in Thurston County Superior Court (1) granting the City of Olympia’s Motion for Declaratory Judgment and Injunctive Relief; (2) denying OFO’s Petition for Prevention of Election Error and Motion for Injunctive Relief; (3) declaring the proposed OFO initiative, in its entirety, invalid, null, and void because it extends beyond the scope of the local initiative power; and (4) enjoining Thurston County and the Thurston County Auditor from placing the OFO initiative on the State general election ballot in November 2016. (See, Exhibit E, Order Granting Plaintiff’s Motion for Declaratory Judgment and Injunctive Relief and Denying Defendants’ Petition for Prevention of Election Error and Motion for Injunctive Relief.)

Judge Nevin, in his oral ruling, clarified his decision for the parties:

William A. Lemp, III
Lead Political Finance Investigator
Public Disclosure Commission
PDC Case 8341
October 6, 2016
Page - 3

The question posed first is whether the proposed tax initiative seeking to establish an income tax in the City is invalid because it extends beyond the scope of the local initiative power. I find that it does extend beyond that, and therefore it is invalid.

The second question is whether this Court should enter an order enjoining the proposed income tax initiative from appearing on the November ballot, and I am rendering that ruling. (See, Exhibit F, Transcript of Ruling of the Court, August 24, 2016, Judge Jack Nevin, page 4.)

* * *

I find specifically that the City's pre-election challenge to the tax initiative is permissible and is appropriate given the nature of what is presented in this case. I further find that the City has standing to challenge the proposed tax initiative. I believe that declaratory and injunctive relief are proper because the proposed income tax initiative does extend beyond the local initiative power. I believe it involves powers that are granted to the City's governing body and not to the City as a whole. And I emphasize that because I feel as if that proposition lies in large part at the heart of the analysis. I believe that therefore it does conflict with the state law prohibiting income tax [RCW 36.65.030]. (See, Exhibit F, page 5.)

On August 24, 2016, after Judge Nevin's ruling, OFO filed a Notice of Appeal with Division II of the Court of Appeals. (See, Exhibit G, Notice of Appeal.) OFO then presented a Motion for Stay of Judge Nevin's decision to enjoin the placement of its initiative on the November ballot under RAP (Rules of Appellate Procedure) 8.3. The Division II Commissioner issued a written ruling on September 2, 2016, granting OFO's motion for a RAP 8.3 stay of the superior court's decision which enjoined the OFO initiative from appearing on the November 8, 2016 ballot.

The Commissioner stated in her ruling that "[a]lthough in some circumstances, courts will decline to reach the merits of an initiative until after an election, issues relating to the scope of local initiatives will be heard before an election." [Citing, *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005).] (See, Exhibit H, Ruling Granting Stay Pending Appeal, pp. 10-11.) The Commissioner noted that the *merits* of OFO's appeal would not be reached by the appellate court until after the election had passed. "Thus, although it does not appear that the superior court's decision was premature, that does not control the outcome of the present RAP 8.3 motion for a stay pending appeal, when, like *Reed*, this court will not have the opportunity to address the merits of the appeal before November 8, 2016." (See, Exhibit H, pp. 11-12.)

The Commissioner's ruling on September 2, 2016, never reached the merits of Judge Nevin's ruling that OFO's initiative was invalid and in conflict with State law. The Court of Appeals action *only stayed* Judge Nevin's decision enjoining OFO's initiative from the November ballot. The effect of the Commissioner's ruling is to permit the initiative to appear on the ballot. The nuanced and potentially misleading language used by Mr.

William A. Lemp, III
Lead Political Finance Investigator
Public Disclosure Commission
PDC Case 8341
October 6, 2016
Page - 4

Lowney in his Complaint is that the initiative received enough signatures for a Certificate of Sufficiency issued by the Thurston County Auditor. Mr. Lowney does not directly acknowledge that the OFO initiative has been held legally invalid and in conflict with State law, and that Judge Nevin's ruling has never been nullified or overruled.

Among his allegations, Mr. Lowney alleges that the Olympia City Council is politically motivated by an animus towards the OFO initiative. He does not acknowledge that the Olympia City Council and the City of Olympia properly sought a judicial determination whether the OFO initiative was lawful. Instead, Mr. Lowney argues that the Olympia City Council's "political animus" is "further shown by the City's coordination of its attack on the OFO initiative with the Freedom Foundation," citing as evidence numerous emails between the City of Olympia and the Freedom Foundation "showing this coordination."

Apparently, Mr. Lowney is unaware there is no exemption in the Public Records Act which would permit the City of Olympia to refuse to provide public records or public information to OFO's political opponents. The City, by State law, is required to provide public records lawfully requested by any person—including the Freedom Foundation—as well as OFO (which has made several Public Records Act requests of the City of Olympia through its campaign manager). Mr. Lowney's allegation of coordination between the City of Olympia, Olympia City Council, and the Freedom Foundation is false. (See, Exhibit I, emails between the City of Olympia, Olympia City Council and the Freedom Foundation concerning the OFO initiative.)

OFO's initiative involves imposing a City income tax upon households with adjusted gross incomes above \$200,000. OFO should not be surprised that its initiative is opposed by some citizens or groups for their own reasons. The Freedom Foundation filed a Motion for Leave to File *Amicus Curiae* Brief in Thurston County Superior Court. In his oral ruling, Judge Nevin addressed the issue and denied Freedom Foundation's request:

THE COURT: Now, I will be honest with you. Going through the depth of all of this, as I did this past weekend, I have to be honest with you, I did spend a lot of time on this notion of the right of the Freedom Foundation wishing to file an amicus brief. I don't have any opposition to them doing that. I mean, I read their materials.

MR. DIJULIO [City's counsel]: The City takes no position on that, Your Honor. There was an opposition filed by the initial sponsors I believe.

THE COURT: And forgive me from being a person from farther up north out in the country, but I must admit to you, I'm not particularly familiar with the Freedom Foundation, but I get a sense that you are. So what would you like to tell me your position is on that?

MS. TONRY [OFO's counsel]: I'm not intimately familiar with the Freedom Foundation myself, Your Honor, but our opposition to their request to file an amicus brief in the trial court, which is unusual -- as I note, there is no process for it, but moreover, the issues raised in that brief were

William A. Lemp, III
Lead Political Finance Investigator
Public Disclosure Commission
PDC Case 8341
October 6, 2016
Page - 5

completely irrelevant to the issues in this case as Your Honor has decided today. Those issues were not taken up. It's superfluous. We think it should not be allowed.

THE COURT: Well, what I did read -- yes. And there were some submissions from the Freedom Foundation; am I right?

MS. TONRY: There were.

THE COURT: You don't take a position?

MR. DiJULIO: The City takes no position.

THE COURT: You have persuaded me. I mean, I don't mean to be cavalier about this, but it seems to me that both parties have very, very, precise and specific points they are trying to make. It seems to me that if we can efficiently -- if you will pardon the expression -- package this ruling, that will be better for any other entity that is reviewing it. It will be more efficient.

I think I have answered all the questions here. I have read this ruling. This order is consistent with my ruling in this matter. I think that's it.
(See, Exhibit F, pp. 10- 12.)

This exchange between the trial court and legal counsel for the City of Olympia and OFO establishes that the City took no position on the motion by Freedom Foundation to file an *amicus curiae* brief. This is hardly evidence to support Mr. Lowney's allegation that "the City's coordination of its attack on the OFO Initiative with the Freedom Foundation, which . . . spearheaded the political opposition to the OFO Initiative. There are numerous emails between Olympia and the Freedom Foundation showing this coordination."

Mr. Lowney did not attach to his Complaint a *single* email evidencing "coordination" between the City of Olympia and the Freedom Foundation. This failure is possibly because the emails referred to by Mr. Lowney do not evidence or support any coordination between the City of Olympia and the Freedom Foundation concerning the OFO initiative. (See, Exhibit I, emails between City of Olympia and Freedom Foundation.)

In his Complaint, Mr. Lowney also alleges that "[i]n oral argument before the Court of Appeals, the City's outside counsel *admitted* that the City Council brought its legal challenge to the OFO Initiative because it did not agree with the policies in the initiative." (Emphasis added by author.) This allegation is false and is based upon Mr. Lowney's unique and selective interpretation of remarks made in argument by the City's legal counsel, Stephen DiJulio. This allegation is not supported by the verbatim transcript of the oral arguments before Commissioner Aurora Bearse on September 1, 2016. (See, EXHIBIT J, Verbatim Record of Recorded Hearing, pp. 22; 25.)

The City submits that the verbatim transcript of the hearing before Commissioner Bearse should be examined, particularly in context of the questioning from the Commissioner, who inquired about post-election validation

William A. Lemp, III
Lead Political Finance Investigator
Public Disclosure Commission
PDC Case 8341
October 6, 2016
Page - 6

and a recent Tim Eyman initiative. (See, Exhibit J, p. 22.) Mr. DiJulio responded that the Commissioner was correct, referring to the recent Eyman state-wide initiative, but argued that “in the situation here, you have a judgment [that the OFO initiative is invalid],” arguing that the ruling of the trial court affirmed the City Council’s efforts to seek judicial review whether OFO’s initiative was lawful.

Unsurprisingly, Mr. Lowney fails to state in his Complaint that Mr. DiJulio’s response to another query from Commissioner Bearse directly addressed his allegation that the Olympia City Council brought its legal challenge to the OFO initiative because it [the City Council] did not agree with the policies in the initiative. Mr. DiJulio informed the Commissioner that “the City of Olympia is not antagonistic to the defendant’s general proposition for tax relief and tax remediation in our state. We understand - - the city council understands that. The city council supports the issue of better funding for education in this state. It says it in its resolutions.” (See, Exhibit J, p. 25.)

Also contrary to Mr. Lowney’s allegations, the City did not use public facilities for campaign purposes. The City denies violation of RCW 42.17A.555. The City did file a declaratory judgment action in Thurston County Superior Court on July 22, 2016, to request a judicial determination whether the OFO initiative was a lawful, valid exercise of the initiative power granted to Olympia’s citizens under State law, and if not, to obtain an injunction prohibiting the initiative measure from appearing on the November 2016 ballot.

The City’s legal action is consistent with well-established judicial precedent for municipalities where such public agencies have sought judicial review of the legal sufficiency of a proposed initiative. In numerous appellate decisions, such actions were not found to violate RCW 42.17A.555. Neither the City of Olympia nor the Olympia City Council took electioneering or campaign action to influence the vote on the ballot measure. The City’s action in pursuing a legal determination from the Thurston County Superior Court as to the initiative’s validity was not campaigning. Seeking judicial review is not use of public funds for campaign purposes. Filing a lawsuit to determine the legality of a local initiative is not advertising, communicating with voters, campaigning, lobbying or electioneering.

The City of Olympia is a noncharter code city organized under Title RCW 35A, the Optional Municipal Code. It is recognized that laws governing local or state initiatives differ. When the City of Olympia changed from a commission form of city government to become a municipality organized under Title 35A, the Olympia City Council elected to retain the powers of initiative and referendum for qualified electors of the city for purposes of RCW 35A.11.080.

RCW 35A.11.100 specifically provides, in part, that “. . . the powers of initiative and referendum in noncharter code cities [like Olympia] shall be exercised in the manner set forth for the commission form of government in RCW 35.17.240 through 35.17.360, as now or hereafter amended.” The Olympia Municipal Code (OMC) 1.16.010(A) specifically cites RCW 35A.11.080 regarding the retention of powers of initiative and referendum, and OMC 1.16.010(B) provides that powers of initiative and referendum shall be done in the manner for the commission form of government in RCW 35.17.240 through 35.17.360.

William A. Lemp, III
Lead Political Finance Investigator
Public Disclosure Commission
PDC Case 8341
October 6, 2016
Page - 7

These statutory references are important because a local initiative for a municipality organized under the Optional Municipal Code (RCW Title 35A) is controlled by these laws. OFO has claimed that the City of Olympia had only two options upon the county auditor's issuance of a certificate of sufficiency: (1) pass the proposed initiative ordinance; or (2) immediately cause to be called a special election. What OFO has neglected to address is that an initiative under the commission form of government includes a third option, which is specifically addressed in RCW 35.17.290 where "the commission [city] refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court against the city and procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance if the court finds the petition to be sufficient." This is commonly referred to as the "no action" provision.

It is this third option that was exercised by the Olympia City Council's legislative discretion on July 26, 2016. Why is this relevant?

A reading of the language in RCW 35.17.260 states that the "commission" (City of Olympia) has twenty (20) days *after the county auditor's certificate of sufficiency has been received by the "commission"* to either pass the ordinance or to call for a special election. The Thurston County Auditor's Certificate of Sufficiency was issued on July 13, 2016. In accord with the statutory language in RCW 35.17.260, the Olympia City Council had until August 2, 2016, to decide if it would pass the initiative's proposed ordinance. In this instance, the City Council moved to seek a judicial determination whether the initiative was lawful on July 12, 2016, the day before the County Auditor's issuance of the Certificate of Sufficiency, and twenty-one (21) days before the statutory deadline to make its legislative decision. A plain reading of RCW 35.17.260 does not contain *any* provision that shortens this twenty (20) day period for legislative review.

On July 22, 2016, eleven (11) days before the Olympia City Council was required by statute to decide whether it would pass the initiative ordinance, the City of Olympia filed its action in Thurston County Superior Court to seek a judicial determination about the legal validity of the OFO initiative. Five (5) days later, on July 27, 2016, OFO and Ray Guerra, a "taxpayer" and member of OFO, filed their lawsuit against the City of Olympia, requesting a judicial decree under RCW 35.17.290, alleging that OFO was "entitled to a decree ordering an election to be held in the City on November 8, 2016 for the purpose of voting upon the OFO Initiative measure. RCW 35.17.290." (See, Exhibit C, p. 6.) At the hearing in Thurston County Superior Court on August 24, 2016, Judge Nevin entered an order denying OFO's request for a decree ordering an election on OFO's initiative proposal. (See, Exhibit E, p. 2-3.)

It is the City of Olympia's position that any expenditures for legal fees to determine whether OFO's initiative was lawful were made prior to a ballot initiative campaign, and were in fact related to seeking a judicial determination if the OFO initiative was within the initiative power granted to citizens by the Legislature, and whether the initiative was in conflict with a statutory prohibition against levying a tax on net income. The City of Olympia submits that if a proposed local initiative is invalid and in conflict with State law, it can never become a

William A. Lemp, III
Lead Political Finance Investigator
Public Disclosure Commission
PDC Case 8341
October 6, 2016
Page - 8

legitimate ballot initiative campaign. The same is true if a proposed local initiative has not become a "ballot proposition" as defined by RCW 42.17A.005.

RCW 42.17A.005(4) defines the term "Ballot proposition." The statutory definition is in the disjunctive. The statutory definition states that "[b]allot proposition' means any 'measure' as defined by RCW 29A.04.091." RCW 29A.04.091 states "'Measure' includes any proposition or question submitted to the voters." Judge Nevin granted the City of Olympia's request for injunctive relief enjoining OFO's initiative from appearing on the November ballot. However, the definition in RCW 42.17A.005(4) also states in the disjunctive that this term means any "initiative . . . proposition proposed to be submitted to the voters of . . . any municipal corporation ... from and after the time when the proposition has been *initially filed with the appropriate election officer of that constituency before its circulation for signatures.*"

In this instance, OFO never filed its proposed initiative petition with Olympia's City Clerk (the City's "appropriate election officer") before the OFO campaign commenced circulating its petition for signatures. OFO's actions in collecting signatures on its petition *before* filing its initiative petition with the Olympia City Clerk, do not come within the definition of a "ballot proposition" as defined by RCW 42.17A.005. (See, Exhibit K, Declaration of Jane Kirkemo.)

The procedure requiring an initiative petition to be filed with the City Clerk before circulation for signatures is similar to the requirement for state initiatives. RCW 29A.72.010 requires ". . . any legal voter of the state, either individually or on behalf of an organization, [who] desires to petition the legislature to enact a proposed measure, or submit a proposed initiative measure to the people . . . shall file with the secretary of state: (1) A legible copy of the measure proposed, or the act or part of such act on which a referendum is desired . . ." The City of Olympia submits that OFO's initiative petition never became a "ballot proposition" as defined in RCW 42.17A.005(4) when the Olympia City Council took action to seek a judicial determination whether OFO's initiative petition was lawful.

In response to your specific questions, please see the City of Olympia's answers:

1. Who did the City of Olympia pay for legal counsel and other services to challenge OFO's Initiative?

Answer: Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101

2. How much and when did the City of Olympia pay legal counsel and other services to challenge OFO's initiative?

Answer: \$30,149.50. This statement is being processed for payment. The City anticipates receipt of additional invoices for legal services.

William A. Lemp, III
Lead Political Finance Investigator
Public Disclosure Commission
PDC Case 8341
October 6, 2016
Page - 9

3. Please explain whether the City of Olympia plans to continue spending funds to appeal rulings concerning the City's challenge of OFO's Initiative?

Answer: Yes. The City of Olympia is the respondent in an appeal filed by OFO from the trial court's ruling finding the OFO initiative invalid as beyond the initiative power and in conflict with State law. The City of Olympia did not appeal Judge Nevin's ruling of August 24, 2016. OFO did appeal.

4. In oral argument before the Court of Appeals, did the City's outside counsel admit that the City Council brought its legal challenge to the OFO Initiative because it did not agree with the policies in the initiative?

Answer: No. (See, Exhibit J, pp. 22; 25.)

5. Did the City of Olympia coordinate its challenge to the OFO Initiative with the Freedom Foundation? Please submit copies of emails between the City of Olympia and the Freedom Foundation concerning the OFO Initiative.

Answer: No. (See, Exhibit I.)

After review of the information provided herein, together with the exhibits and documentary evidence provided by the City of Olympia, the City respectfully requests the Commission to find that there is no evidence to establish a material violation of any laws or regulation under the jurisdiction of the Commission and to dismiss the Complaint filed by Mr. Lowney and the OFO initiative campaign.

Very truly yours,



Mark Barber
City Attorney

Enclosures: Exhibits A through K

cc: Olympia City Council
Steven R. Hall, City Manager

Table of Exhibits
City of Olympia Response to Complaint
PDC Case No. 8341

Note: Clicking on exhibit reference will link to that exhibit

EXHIBIT A	PDC Interpretation No. 91-02
EXHIBIT B	Complaint for Declaratory Judgment and Injunctive Relief
EXHIBIT C	Defendants-Petitioners Opportunity for Olympia’s and Ray Guerra’s Petition and Affidavit for Prevention of Election Error and Counterclaim
EXHIBIT D	Plaintiff’s Motion for Declaratory Judgment and Injunctive Relief City of Olympia Reply in Support of Declaratory Judgment and Injunctive Relief
EXHIBIT E	Order Granting Plaintiff’s Motion for Declaratory Judgment and Injunctive Relief and Denying Defendants’ Petition for Prevention of Election Error and Motion for Injunctive Relief
EXHIBIT F	Verbatim Report of Proceedings – Ruling of the Court – Thurston County Superior Court No. 16-2-02998-34
EXHIBIT G	Notice of Appeal to the Washington State Court of Appeals, Division II
EXHIBIT H	Ruling Granting Stay Pending Appeal – Court of Appeals, Division II No. 49333-1-II
EXHIBIT I	Emails Between City of Olympia and Freedom Foundation
EXHIBIT J	Verbatim Record of Recorded Hearing Thursday, September 1, 2016 – Court of Appeals Division II No. 49333-1-II
EXHIBIT K	Declaration of Jane Kirkemo

EXHIBIT A

EXHIBIT A

Published on www.pdc.wa.gov (<https://www.pdc.wa.gov>)

Home > Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot

Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot

Statement #1

Expenditures made by a person or political committee to place a measure on a ballot, to influence the wording of a ballot title or to require that a government agency place a measure on the ballot are campaign expenditures reportable under RCW 42.17A.

Statement #2

Expenditures made by a government agency to defend its official actions related to whether or not a measure should be placed on a ballot or to the wording of a ballot title are not reportable as campaign expenditures.

Discussion:

The proponents of a proposed ballot measure are clearly acting to support or advance that measure when they take an action to require that it be placed before the voters. It is also in their interest to have the measure stated in terms most favorable to them. The proponents, therefore, have discretion in the action they take regarding the issue. They are also not closely bound by law in the range of actions they may take. The government agency, on the other hand, is closely regulated by law in its actions regarding measures that are presented to it. It first of all is expected to remain neutral in its approach to ballot proposals. The way in which a measure is processed is specified and the government is given little leeway in its actions. If a government agency takes an official action (e.g., to write a ballot title or to refuse to place a measure on a ballot) it must be assumed that the agency is acting in good faith. If the government action is challenged, the agency then has little or no discretion in whether to defend its action. Thus, while the agency's act may serve the ultimate end of opposing a ballot proposal, since the agency lacks discretion in the situation, it has not made a campaign expenditure as envisioned by RCWA 42.17A.

Cite as PDC Interpretation No. 91-02

Approved: June 25, 1991

Reference: RCW 42.17A.240

Source URL: <https://www.pdc.wa.gov/learn/index-of-interpretations-by-subject/legal-fees-related-placing-or-not-placing-proposition-ballot>

EXHIBIT B

EXHIBIT B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

<input type="checkbox"/> EXPEDITE <input checked="" type="checkbox"/> No Hearing set <input type="checkbox"/> Hearing is set: Date: Time: Judge/Calendar: _____
--

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor,

Defendants.

No.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. INTRODUCTION

The local power of taxation, even when authorized for a city, is reserved to the city's governing/legislative body, and not subject to direct legislation except as specifically authorized by the Legislature. The Legislature has not authorized direct legislation (initiative or referendum) for a city's imposition of an income tax.¹ Indeed, the Legislature has expressly forbidden cities from imposing a tax on net income.

Plaintiff the City of Olympia ("City") brings this action for declaratory and injunctive relief under chapters 7.24 and 7.40 RCW. The City seeks a declaration that a proposed initiative to

¹ "It is well-settled that in the context of statutory interpretation, a grant of power to a city's governing body ("legislative authority" or "legislative body") means exclusively the mayor and city council and not the electorate." *City of Sequim v. Malkasian*, 157 Wash.2d 251, at 265 (2006).

1 establish an income tax in the City is beyond the scope of the local initiative power. The City
2 also seeks an order enjoining the proposed income tax initiative from appearing on the ballot at a
3 City special election to be held in conjunction with the State general election on November 8,
4 2016.

5
6 **2. PARTIES**

7 **2.1** The City of Olympia is a non-charter code city organized and operating under the
8 laws of the State of Washington, including chapter 35A RCW.

9 **2.2** Defendant Thurston County is a political subdivision of the State of Washington.

10 **2.3** Defendant Mary Hall, named here only in her official capacity, is the Thurston
11 County Auditor.

12 **2.4** Defendant Opportunity for Olympia (“OFO”) is a Washington political
13 committee, and sponsor of a proposed City income tax initiative. Attached as Complaint
14 Appendix 1 is Public Disclosure Commission form C1, identifying OFO (“PDC Form”).

15 **2.5** Defendant Ray Guerra is a City and Thurston County resident, and a member and
16 representative of OFO. The PDC Form lists Ray Guerra as OFO’s Campaign Manager or Media
17 Contact.

18 **2.6** Defendant Danielle Westbrook is a City and Thurston County resident; the self-
19 described campaign manager for OFO; a member of OFO; and, the filer of the income tax
20 initiative petition with the City.

21
22 **3. JURISDICTION AND VENUE**

23 **3.1** This Court has subject matter jurisdiction over this action under chapter 7.24
24 RCW and chapter 7.40 RCW.

25 **3.2** Venue is proper in Thurston County, Washington, including under RCW
26 4.12.020.

COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - 2

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

4. FACTUAL BACKGROUND

4.1 On July 6, 2016, OFO through Danielle Westbrook filed an initiative petition with the City. The initiative petition calls for the enactment of an ordinance, entitled:

AN ORDINANCE of the City of Olympia, Washington, imposing an excise tax on household income above \$200,000 per year derived from financial transactions, personal activities, business, commerce, occupations, trades, professions and other lawful activities, the revenues therefrom to be dedicated to funding at least one year of free community or technical college for each year’s City of Olympia public high school graduates and General Education Development Certificate (“GED”) recipients, or an equivalent amount of money for such public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington.

This initiative petition (the “Income Tax Initiative”) would both levy an income tax in the city, and appropriate funds collected by the City from income tax revenues. The Income Tax Initiative is attached as Complaint Appendix 2.

4.2 Consistent with law, the City forwarded the Income Tax Initiative to the County Auditor. On July 13, 2016, the County Auditor advised the City that the Income Tax Initiative “was signed by the requisite number of names of persons listed as registered voters within the city and is hereby certified as sufficient pursuant to the Revised Code of Washington 35A.11.100.” (The “County Auditor’s Certification.”) OFO seeks inclusion of the proposed Income Tax Initiative on a ballot at a City special election to be held in conjunction with the State general election on November 8, 2016 (the “November ballot”).

4.3 The Olympia City Council determined on July 12, 2016, in anticipation of the County Auditor’s Certification, to challenge the Income tax Initiative and directed the City Manager to obtain a judicial determination regarding the validity of the Income Tax Initiative

1 and to prevent the Income Tax Initiative from appearing on the November ballot. The
2 unanimously-adopted motion states:

3 . . . that upon the Auditor's certification of sufficient valid signatures for Opportunity for
4 Olympia's initiative petition, the City Manager be authorized to take all reasonable steps
5 on behalf of the City of Olympia and this Council, to obtain a judicial determination
6 whether the initiative is a lawful, valid exercise of the initiative power granted to
7 Olympia's citizens under state law, and if not, to obtain an injunction prohibiting such
8 initiative measure from appearing on the November ballot. My motion includes
9 authorization for the City Manager to pursue any appeals as may be necessary before the
10 appellate courts of this state.

11 **4.4** The City seeks a declaration that proposed Income Tax Initiative is invalid
12 because it is beyond the scope of the initiative power.

13 **4.5** The City seeks injunctive relief to prevent inclusion of an invalid initiative, the
14 proposed Income Tax Initiative, on the November ballot.

15 **5. FIRST CAUSE OF ACTION - DECLARATORY RELIEF**

16 **5.1** The preceding paragraphs are incorporated by reference as if set forth fully
17 herein.

18 **5.2** Courts review before elections a local initiative or referendum to determine,
19 notably, whether "the proposed law is beyond the scope of the initiative power." *City of Port*
20 *Angeles v. Our Water – Our Choice*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010), citing *Seattle Bldg. &*
21 *Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980) (citing
22 *Leonard v. City of Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976)).

23 **5.3** A controversy exists between the City and Defendants OFO, Guerra and
24 Westbrook regarding whether the subject matter of proposed Income Tax Initiative is within the
25 scope of the initiative power granted to the City's citizens by State law.

26 **5.4** Pre-election review of a city initiative is permitted where, as here, there is a
dispute regarding whether the subject matter of the proposed initiative is beyond the scope of a
city's initiative power. And, the City faces the financial and administrative burden of placing an
unlawful initiative on a ballot.

1 **5.5** The City seeks a declaration the proposed Income Tax Initiative is invalid because
2 it is beyond the scope of the City's local initiative power. Washington law specifically vests the
3 City Council, as the City's local legislative body, with the power to enact ordinances governing
4 taxation as well as appropriations. The Income Tax Initiative would improperly interfere with
5 the exercise of a power delegated by state law exclusively to a local legislative body. *See, e.g.,*
6 RCW 35A.11.020, RCW 35A.11.030 and, 35A.11.090.

7 **5.6** The Income Tax Initiative proposes a local income tax. The City seeks a
8 declaration the proposed Income Tax Initiative is invalid because it violates RCW 36.65.030: "**A**
9 **county, city, or city-county shall not levy a tax on net income.**"

10 **5.7** Under RCW 29A.04.330(1), city general elections are "held throughout the state
11 of Washington on the first Tuesday following the first Monday in November in the **odd-**
12 **numbered years.**" The next City general election is November 2017. A special election may be
13 held in conjunction with a State general election. RCW 29A.04.175. But, under RCW
14 29A.04.330(2), only a city's "governing body" can call a special election. The City Council is
15 the City's governing body and has not yet called for an election on the Income Tax Initiative.

16 **6. SECOND CAUSE OF ACTION - INJUNCTIVE RELIEF**

17 **6.1** The preceding paragraphs are incorporated by reference as if set forth fully
18 herein.

19 **6.2** Because the proposed Income Tax Initiative is not a lawful exercise of the
20 initiative power, the Income Tax Initiative should be enjoined from appearing on the November
21 ballot.

22 **7. RELIEF REQUESTED**

23 WHEREFORE, the City seeks relief as follows:
24
25
26

1 7.1 Entry of judgment declaring that the proposed Income Tax Initiative, in its
2 entirety, is invalid because it is beyond the scope of the local initiative power, and therefore null
3 and void;

4 7.2 Entry of an injunction against Thurston County and the Thurston County Auditor
5 to bar the proposed Income Tax Initiative from appearing on the State general election ballot in
6 November 2016.

7 7.3 Granting such other relief as the Court deems just and equitable.

8 DATED this 22st day of July, 2016.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

OFFICE OF THE CITY ATTORNEY
Mark E. Barber, WSBA No. 8379
Olympia City Attorney,
Annaliese Harksen, WSBA No. 31132
Deputy City Attorney,
Email: mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us
and

s/P. Stephen DiJulio
P. Stephen DiJulio, WSBA No. 7139
FOSTER PEPPER PLLC
1111 Third Avenue
Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: steve.dijulio@foster.com

Attorneys for Plaintiff City of Olympia

APPENDIX 1

 PUBLIC DISCLOSURE COMMISSION 711 CAPITOL WAY RM 206 PO BOX 40908 OLYMPIA WA 98504-0908 (360) 763-1111 Toll Free 1-877-401-2628		Political Committee Registration		C1pc (1/12)	MAR 29 2016
Committee Name (Include sponsor in committee name. See next page for definition of "sponsor." Show entire official name. Do not use abbreviations or acronyms in this box.) Opportunity for Olympia				Acronym: OFO Telephone: (360) 742-0488	
Mailing Address PO Box 1254				Fax: ()	
City Olympia		County Thurston		Zip + 4 98507	
E-mail: info@OpportunityForOlympia.com					
NEW OR AMENDED REGISTRATION? <input checked="" type="checkbox"/> NEW. Complete entire form. <input type="checkbox"/> AMENDS previous report. Complete entire form.			COMMITTEE STATUS <input type="checkbox"/> Continuing (On-going; not established in anticipation of any particular campaign election.) <input checked="" type="checkbox"/> 2016 election year only. Date of general or special election: _____ (Year)		
1. What is the purpose or description of the committee? <input type="checkbox"/> Bona Fide Political Party Committee - official state or county central committee or legislative district committee. If you are not supporting the entire party ticket, attach a list of the names of the candidates you support.					
<input checked="" type="checkbox"/> Ballot Committee - Initiative, Bond, Levy, Recall, etc. Name or description of ballot measure: Income tax for funding college tuition.				Ballot Number _____ FOR <input checked="" type="checkbox"/> AGAINST <input type="checkbox"/>	
<input type="checkbox"/> Other Political Committee - PAC, caucus committee, political club, etc. If committee is related or affiliated with a business, association, union or similar entity, specify name:					
For single election-year only committees (not continuing committees): Is the committee supporting or opposing (a) one or more candidates? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, attach a list of each candidate's name, office sought and political party affiliation. (b) the entire ticket of a political party? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, identify the party:					
2. Related or affiliated committees. List name, address and relationship. <input type="checkbox"/> Continued on attached sheet.					
3. How much do you plan to spend during this entire election campaign, including the primary and general elections? Based on that estimate, choose one of the reporting options below. (If your committee status is continuing, estimate spending on a calendar year basis.) If no box is checked you are obligated to use Full Reporting. See instruction manuals for information about reports required and changing reporting options.					
<input type="checkbox"/> MINI REPORTING Mini Reporting is selected. No more than \$5,000 will be raised or spent and no more than \$500 in the aggregate will be accepted from any one contributor.			<input checked="" type="checkbox"/> FULL REPORTING Full Reporting is selected. The frequent, detailed campaign reports mandated by law will be filed as required.		
4. Campaign Manager's or Media Contact's Name and Address Ray Guerra PO Box 1254, Olympia, WA 98507				Telephone Number: (360) 742-0488	
5. Treasurer's Name and Address. Does treasurer perform only ministerial functions? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> See WAC 390-05-243 and next page for details. List deputy treasurers on attached sheet. <input type="checkbox"/> Continued on attached sheet.				Daytime Telephone Number: (206) 218-3108	
Abbot Taylor 349 16th Ave E #302, Seattle, WA 98112				Treasurer	
6. Persons who perform only ministerial functions on behalf of this committee and on behalf of candidates or other political committees. List name, title, and address of these persons. See WAC 390-05-243 and next page for details. <input type="checkbox"/> Continued on attached sheet.					
Abbot Taylor 349 16th Ave E #302, Seattle, WA 98112				Treasurer	
7. Committee Officers and other persons who authorize expenditures or make decisions for committee. List name, title, and address. See next page for definition of "officer." <input type="checkbox"/> Continued on attached sheet.					
8. Campaign Bank or Depository KeyBank		Branch Capitol Hill		City Seattle	
9. Campaign books must be open to the public by appointment between 8 a.m. and 8 p.m. during the eight days before the election, except Saturdays, Sundays, and legal holidays. In the space below, provide contact information for scheduling an appointment and the address where the inspection will take place. It is not acceptable to provide a post office box or an out-of-area address. Street Address, Room Number, City where campaign books will be available for inspection 350 15th Ave E, Seattle, WA 98112 In order to make an appointment, contact the campaign at (telephone, fax, e-mail): (360) 742-0488					
10. Eligibility to Give to Political Committees and State Office Candidates: A committee must receive \$10 or more each from ten Washington State registered voters before contributing to a Washington State political committee. Additionally, during the six months prior to making a contribution to a state office candidate your committee must have received contributions of \$10 or more each from at least ten Washington State registered voters. <input checked="" type="checkbox"/> A check here indicates your awareness of and pledge to comply with these provisions. Absence of a check mark means your committee does not qualify to give to Washington State political committees and/or state office candidates.				11. Signature and Certification. I certify that this statement is true, complete and correct to the best of my knowledge. Committee Treasurer's Signature  Date 3/28/2016	

SEE INSTRUCTIONS ON NEXT PAGE

APPENDIX 2

INITIATIVE PETITION TO THE OLYMPIA CITY COUNCIL



This measure would establish a city fund dedicated to funding at least one year of free community or technical college for each year's City of Olympia public high school graduates and GED high school equivalency certificate recipients, or an equivalent amount of money for such public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington. 95% of all funds raised must be spent on tuition or related educational services, not administrative costs. The measure would be funded by establishing an excise tax of 1.5% on household income exceeding \$200,000 in the City of Olympia.

INITIATIVE PETITION TO THE OLYMPIA CITY COUNCIL:

We, the undersigned registered voters within the City of Olympia, hereby petition the City Council to adopt the following proposed ordinance or submit it, unaltered, to a citywide vote pursuant to state law:

This measure would establish a fund dedicated to funding one year of free community college for each year's public high school graduates and those students receiving GED high school equivalency certificates who live in the City of Olympia, or an equivalent amount of money for those public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington. 95% of all funds raised must be spent on tuition, not administrative costs. The measure would be funded by establishing an excise tax of 1.5% on household income exceeding \$200,000.00 in the City of Olympia.

WARNING:

Every person who signs this petition with any other than his or her true name, or who knowingly signs more than one of these petitions, or signs a petition seeking an election when he or she is not a legal voter, or signs a petition when he or she is otherwise not qualified to sign, or who makes herein any false statement, shall be guilty of a misdemeanor.

Each signature shall be executed in ink or indelible pencil and shall be followed by the name and address of the signer and the date of signing.

SIGNATURE <small>Please sign as registered to vote</small>	PRINT NAME HERE <small>For positive identification</small>	FULL MAILING ADDRESS <small>Street, City, State and Zip</small>	Date <small>MM/DD</small>
1			□□-□□-□□
2			□□-□□-□□
3			□□-□□-□□
4			□□-□□-□□
5			□□-□□-□□
6			□□-□□-□□
7			□□-□□-□□
8			□□-□□-□□
9			□□-□□-□□
10			□□-□□-□□
11			□□-□□-□□
12			□□-□□-□□
13			□□-□□-□□
14			□□-□□-□□
15			□□-□□-□□

The full text of the ordinance is on the back.

Paid for By Opportunity for Olympia PO Box 1254, Olympia, WA 98507

Opportunity for Olympia Initiative Petition

TO THE OLYMPIA CITY COUNCIL:

We, the undersigned registered voters within the City of Olympia, hereby petition the City Council to adopt the following proposed ordinance or submit it, unaltered, to a citywide vote pursuant to state law:

This measure would establish a city fund dedicated to funding at least one year of free community or technical college for each year's City of Olympia public high school graduates and GED high school equivalency certificate recipients, or an equivalent amount of money for such public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington. 95% of all funds raised must be spent on tuition or related educational services, not administrative costs. The measure would be funded by establishing an excise tax of 1.5% on household income exceeding \$200,000 in the City of Olympia.

AN ORDINANCE of the City of Olympia, Washington, imposing an excise tax on household income above \$200,000 per year derived from financial transactions, personal activities, business, commerce, occupations, trades, professions and other lawful activities, the revenues therefrom to be dedicated to funding at least one year of free community or technical college for each year's City of Olympia public high school graduates and General Education Development Certificate ("GED") recipients, or an equivalent amount of money for such public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington.

WHEREAS the accelerating costs of higher education over the past decade have created significant obstacles for college participation and completion for public high school graduates and GED recipients living in the City of Olympia.

WHEREAS making higher education more affordable and accessible for public high school graduates and GED recipients will lead to opportunities for further education and jobs and to a higher quality of life for all citizens.

WHEREAS free first-year and second-year tuition will allow students to enroll in college, obtain degrees and certificates much sooner and start their professional lives with little or no student debt.

WHEREAS one year of community college tuition costs approximately \$3,846, which is more than 10% of household income for two out of five households in the City of Olympia.

WHEREAS the City of Olympia has a significant interest in making higher education more affordable and accessible for its public high school graduates and GED recipients.

WHEREAS the Legislature authorizes the City of Olympia to assess excises for revenue in regard to all places and kinds of activities, including personal activities, business, production, commerce, entertainment and exhibition, and upon all occupations, trades and professions and any other lawful activity, as those activities take advantage of and use current and future city services.

WHEREAS the City of Olympia has authority to assess excises on personal activities that correlate to greater or more intense utilization of city services.

WHEREAS wealthy residents take advantage of and use a greater proportion of certain city services than do less wealthy residents. These services include without limitation police protection from theft, city utilities, educational programs, neighborhood improvement projects, property protection and other municipal services.

WHEREAS local income taxes are levied by both counties and cities, in 4,983 jurisdictions across the United States.

WHEREAS the average cost of living within the City of Olympia for a married couple with two children is approximately \$60,000, according to the Workforce Development Council of Washington State.

WHEREAS less than 3% of households in the City of Olympia benefit from annual incomes in excess of \$200,000.

WHEREAS residents in Washington with incomes below \$21,000 pay 16.8% of their income in state and local taxes, and residents with income between \$40,000 and \$65,000 pay 10.1% of their income in state and local taxes, while residents with income between \$200,000 and \$500,000 pay only 4.6% of their income in state and local taxes, and residents with income in excess of \$500,000 pay only 2.4% of their income in state and local taxes.

WHEREAS the People in their legislative capacity find that in raising revenue it is appropriate to assess taxes on the disproportionate use by wealthy residents of certain municipal services by imposing a 1.5% tax on household income in excess of \$200,000 a year, and to dedicate those funds to make higher education affordable and accessible for Olympia public high school graduates and GED recipients.

NOW THEREFORE, BE IT ORDAINED BY THE CITY OF OLYMPIA as follows:

Section 1. Legislative Findings and Intent. The People of the City of Olympia adopt and confirm the above recitals. In exercising their direct legislative authority, the People intend to fund at least one year of free community or technical college in the State of Washington for each year's City of Olympia public high school graduates and GED recipients, or an equivalent amount of money for such graduates and GED recipients who choose to attend public universities or public colleges in the State of Washington. The People intend to raise such funds through the exercise of the City of Olympia's power under RCW 35A.82.020 by imposing a 1.5% tax on household income in excess of \$200,000 a year. 95% of all funds raised must be spent on grants and related educational services, not administrative costs.

Section 2. Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) The terms "community college" and "technical college" mean the public community colleges and public technical colleges in the State of Washington governed under chapter 28B.50 RCW.

(2) The terms "university" and "college" mean the public universities and public colleges in the State of Washington governed under chapter 28B.10 RCW.

(3) "Committee" means the Opportunity for Olympia Committee, which shall be comprised of the Mayor Pro Tem and four additional members appointed by the Mayor for three year terms. Members may serve successive terms.

(4) "Department" means the department or departments that the city manager directs to implement the provisions of this chapter.

(5) "Fund" means the Opportunity for Olympia Fund defined in this chapter.

(6) "Gift aid" means financial aid received from federal and state grant and scholarship programs that provide funds for educational purposes with no obligation of repayment. Student loans and work study programs are not included.

(7) "Income" means adjusted gross income as determined under the federal internal revenue code. A federal Individual Income tax return filed with the United States Internal Revenue Service ("IRS") creates a presumption of a taxpayer's income for purposes of this chapter.

(8) "Internal revenue code" means the United States Internal Revenue Code of 1986, and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time, or from time to time, for the taxable year.

(9) "Qualified student" means an individual who:

(a) earned either a high school diploma from a public high school in the State of Washington or a GED as provided under RCW 28A.305.190; and

(b)(i) resided or was domiciled in the City of Olympia at least 50% of the year preceding the date on which he or she received a high school diploma or GED; or

(ii) had no regular, fixed residence but lived in the City of Olympia in a temporary shelter, institution or place not ordinarily used as a residence at least 50% of the year preceding the date on which he or she received a high school diploma or GED; and

(c) enrolled in a community college, technical college, university or college within two years of earning a high school diploma or GED.

(10) "Resident taxpayer" means an individual who:

(a) has resided in the City of Olympia for the entire tax year; or

(b) is domiciled in the City of Olympia unless the individual:

(i) maintains no permanent place of abode in the City of Olympia; and

(ii) maintains a permanent place of abode elsewhere; and

(iii) spends in the aggregate not more than one-hundred and twenty days in the tax year in the City of Olympia; or

(c) is not domiciled in the City of Olympia, but maintains a permanent place of abode in the City of Olympia and spends in the aggregate more than one hundred eighty-three days of the tax year in the City of Olympia unless the individual establishes to the satisfaction of the department that the individual is in the City of Olympia only for temporary or transitory purposes; or

(d) claims the City of Olympia as the tax home for federal income tax purposes.

(11) "Tax" means the excise tax established by this chapter, unless the context requires a different meaning.

(12) "Taxpayer" means (i) an individual who is not married, who is a surviving spouse or who does not make a single return jointly with his or her spouse; or

(ii) a married couple filing jointly for federal income tax purposes.

Section 3. Assessment of Excise Tax.

(1) This act applies to income received on and after January 1, 2017.

(2) For each resident taxpayer, an annual levy is assessed on income exceeding \$200,000 per tax year at the rate of 1.5%.

(3) Each resident taxpayer who is subject to the tax assessed under this chapter shall make and file a return, and pay any tax owed, on or before April 15th of the year following the taxable year. The department may extend this deadline upon the request of the taxpayer for a period not to exceed one year.

(4) Within three months from the final determination of any federal tax liability affecting a taxpayer's liability for the tax assessed under this chapter, such taxpayer shall make and file an amended return based on such final determination of federal tax liability, and pay any additional tax shown due thereon or make claim for refund of any overpayment.

(5) All taxes assessed under the provisions of this chapter and remaining unpaid after they become due shall bear interest at the rate of 1% per month or fraction thereof. At the department's discretion, the department may abate the interest owed, in whole or in part, upon showing of good cause.

Section 4. Establishment of the Opportunity for Olympia Fund.

(1) A new City of Olympia fund called the "Opportunity for Olympia Fund" is hereby created to support grants for higher education to qualified students.

(2) All revenues from the excise tax assessed under this chapter must be deposited in the fund and used exclusively for the purposes set forth in this chapter.

(3) The City of Olympia and the committee may solicit and receive gifts, grants and bequests from other public and private entities, including commercial enterprises, to be deposited in the fund and used exclusively for the purposes set forth in this chapter.

(4) At least 95% of the total revenue received by the fund must be devoted to grants or other related educational services under section 5 of this chapter, not to administrative costs.

Section 5. Opportunity for Olympia Grant Program.

(1) A qualified student shall be eligible for a grant under this section each term that such student is enrolled in one or more courses that are either:

(a) offered at a community college or technical college for one or more credits that can be applied to (i) a one-year or two-year curriculum for students who plan to transfer to another post-secondary institution of education; (ii) an associate's degree; (iii) a program in career and technical education; (iv) Basic Education for Adults; (v) Integrated Basic Education Skills Training I-Base; (vi) the first two years of study for an Upper Division/Applied Bachelor's Degree provided through a community college; or (vii) such other programs as the department determines are appropriate; or

(b) offered for credit at a college or university.

(2) Except as provided in paragraphs (3) and (4) of this section, the amount of a grant shall be the actual cost of tuition and fees for courses satisfying the criteria in paragraph (1) of this section, including tuition and fees as defined in RCW 28B.15.020 and services and activities fees as defined in RCW 28B.15.041, less other gift aid received by the student that is and must be dedicated solely to such tuition and fees. The department, in administering this program, shall take all reasonable steps to minimize the impact of grants awarded under this subsection (2) on other gift aid.

(3) Except as provided in paragraph (4) of this section, the total amount of dollars in grants awarded to a particular student under this chapter shall not exceed the average cost of tuition and fees for one year at a community college, as determined by the department in consultation with the committee.

(4) The total amount of dollars in grants awarded in a tax year under this chapter shall not exceed the amount of dollars deposited in the fund the prior tax year. If funds are insufficient, the department, in consultation with the committee, may determine the priority by which grants are awarded. At the end of a tax year in which more than 10% of the revenues deposited in the fund during the prior tax year are not disbursed, the department, in consultation with the committee, may (i) dedicate the surplus, or any portion thereof, to fund grants for the average cost of up to two years of community college; and/or

(ii) implement or support programs or policies that improve the academic success or completion rates for students who receive or will be eligible for a grant under this chapter.

Section 6. Implementation and Accountability.

(1) The department shall have authority to adopt any rules, procedures, forms and policies, to execute contracts and agreements, to delegate its authority to the committee as the department deems appropriate and to coordinate with any other public entity, including but not limited to the Olympia School District, the Washington Student Achievement Council, the Washington State Department of Revenue, and the IRS, to implement the provisions of this chapter.

(2) The city manager, or his or her designee, shall prepare an annual audit of the moneys deposited in the fund, reporting on how the moneys have been spent and estimating the number of residents benefited. Annual disclosure of tax collection and spending under this chapter must be posted on a web site maintained by the City of Olympia and such disclosure must, at a minimum, include the information set forth in RCW 43.08.150, localized for the City of Olympia.

Section 7. Miscellaneous.

(1) The provisions of this chapter shall be interpreted and implemented in a manner consistent with the United States Constitution, the Washington Constitution and federal and state laws and regulations.

(2) If any section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason, such declaration shall not affect the validity of the remaining parts of this ordinance.

EXHIBIT C

EXHIBIT C

EXPEDITE No hearing set Hearing is set Date: _____ Time: _____ Judge/Calendar: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

CITY OF OLYMPIA,)	No. 16-2-02998-34
Plaintiff-Respondent,)	
vs.)	DEFENDANTS-PETITIONERS
OPPORTUNITY FOR OLYMPIA, et al.,)	OPPORTUNITY FOR OLYMPIA'S AND
Defendants.)	RAY GUERRA'S PETITION AND
)	AFFIDAVIT FOR PREVENTION OF
)	ELECTION ERROR AND
)	COUNTERCLAIM

Defendants and petitioners Opportunity for Olympia and Ray Guerra bring this petition for prevention of election error and counterclaims for declaratory and injunctive relief against Plaintiff City of Olympia (the "City"), and defendants Thurston County and Thurston County Auditor Mary Hall. This petition is supported by the affidavit of Ray Guerra.

I. INTRODUCTION

1. Opportunity for Olympia's proposed initiative petition to fund higher education for the City's students was endorsed by 4,719 registered City voters -- more than enough to qualify the measure for the ballot. The Thurston County Auditor certified the initiative as sufficient. Yet, the City has forced petitioners to file this action by refusing to perform its mandatory duty to either enact Opportunity for Olympia's initiative measure, or put it to a vote of the people on November 8, 2016.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

8. Defendant Thurston County is a political subdivision of the State of Washington.

9. Defendant Mary Hall, named here only in her official capacity, is the Thurston County Auditor.

III. JURISDICTION AND VENUE

10. This Court has personal jurisdiction over all necessary parties for purposes of this petition and counterclaim.

11. This Court has subject matter jurisdiction over this counterclaim pursuant to chapters 7.24 RCW, 7.40 RCW, RCW 29A.68.011, and RCW 35.17.290.

12. Thurston County is a proper venue for this action.

IV. STATEMENT OF THE CASE

The OFO Initiative Endorsed by Thousands of Olympians and Certified by the County

13. The OFO Initiative would establish a fund for public high school graduates and GED recipients in the City of Olympia dedicated to funding one year of free community college or an equivalent amount of money for those who choose to attend public universities and colleges in the State of Washington. The measure would be funded by establishing an excise tax of 1.5% on household income exceeding \$200,000.00 in the City of Olympia.

14. Olympia is a "code city" that chose to retain the powers of initiative and referendum for the qualified electors of the city for purposes of RCW 35A.11.080. OMC 1.16.010(A).

15. Under Olympia's code, the powers of initiative and referendum must be exercised in the manner set forth for the commission form of government in RCW 35.17.240 through 35.17.360. OMC 1.16.010(B).

16. RCW 35.17.260 provides for ordinances by initiative petition. RCW 35A.11.100 identifies the number of signatures required to advance such petitions.

1 17. On July 13, 2016, Defendant Hall, the Thurston County Auditor, issued a certificate
2 of sufficiency verifying that the OFO Initiative petition garnered signatures from more than enough
3 registered City voters to be sufficient under RCW 35A.11.100. This certificate is attached hereto as
4 Exhibit B.

5 18. RCW 35.17.260 mandates that if a petition to the people accompanying a proposed
6 ordinance carries the requisite number of signatures, the City Council “shall either”

- 7 (1) Pass the proposed ordinance without alteration within twenty days after the county
8 auditor's certificate of sufficiency has been received by the commission; or
9 (2) **Immediately** after the county auditor's certificate of sufficiency for the petition is
10 received, **cause to be called a special election to be held on the next election date, as**
11 **provided in RCW 29A.04.330**, provided that the resolution deadline for that election has not
12 passed, for submission of the proposed ordinance without alteration, to a vote of the people
13 unless a general election will occur within ninety days, in which event submission must be
14 made on the general election ballot.

15 RCW 35.17.260 (emphasis added).

16 19. The next election date RCW 29A.04.330 provides for a city council to call a special
17 election is November 8, 2016. *See* RCW 29A.04.330(2)(d) and (3).

18 **The City Council's Refusal to Advance the OFO Initiative to the Voters**

19 20. The City Council met on July 19, 2016, following receipt of the County Auditor's
20 certificate of sufficiency for the OFO Initiative, but failed to either pass the proposed measure or
21 cause a special election on the measure to be called.

22 21. On July 26, 2016, the City Council voted four to two to pass a resolution “deciding
23 against passing or enacting” the OFO Initiative, and deciding against ordering a special election on
24 the OFO Initiative (the “No Action Resolution”). The No Action Resolution is appended to this
25 petition as Exhibit A.

1 22. If the City “refuses either to pass an initiative ordinance or order an election thereon,”
2 any taxpayer may sue the city in this Court, and if the Court determines the petition is sufficient, may
3 obtain a “decree ordering an election to be held in the city for the purpose of voting upon the
4 proposed ordinance.” RCW 35.17.290.

5 23. The City Council, by and through the four council members who voted for the No
6 Action Resolution has willfully disregarded its mandatory, non-discretionary duty under RCW
7 35.17.260, and intentionally violated that statute.

8 **RCW 36.65.030**

9 24. The City contends that the OFO Initiative is “invalid because it violates RCW
10 36.65.030.”

11 25. Title 36 RCW concerns “Counties.”

12 26. Chapter 36.65 RCW, “Combined City and County Municipal Corporations” was
13 enacted in 1984. The explicit intent “of the legislature in enacting this chapter to provide for the
14 implementation and clarification of Article XI, section 16 of the state Constitution, which authorizes
15 the formation of combined city and county municipal corporations.” RCW 36.65.010. “City-
16 county,” as used in Chapter 36.65 RCW, “means a combined city and county municipal corporation
17 under Article XI, section 16 of the state Constitution.” *Id.*

18 27. RCW 36.65.030 – “Tax on net income prohibited” states that “A county, city, or city-
19 county shall not levy a tax on net income.”
20

21 28. Article II, section 19 of the state Constitution mandates “No bill shall embrace more
22 than one subject, and that shall be expressed in the title.”

23 29. The Senate Bill embodying Chapter 36.65 RCW, Substitute Senate Bill No. 4313, is
24 entitled “City-County Municipal Corporations ----- Clarification - An Act Relating to local
25

1 government; and adding a new chapter to Title 36 RCW.” Substitute Senate Bill No. 4313 is
2 appended hereto as Exhibit C.

3 30. Section 1 of Substitute Senate Bill No. 4313 states the Legislature’s intent in enacting
4 Chapter 36.65 RCW, i.e., to provide for the implementation and clarification of Article XI, section
5 16 of the state Constitution, which authorizes the formation of combined city and county municipal
6 corporations.

7 31. Sections 2, 4, 5, and 6 of Substitute Senate Bill No. 4313 concern school districts,
8 allocation of state revenue, fire protection and law enforcement collective bargaining, and municipal
9 employee benefits, respectively, all as they relate to the city-county form of local government.

10 32. Section 3 of Substitute Senate Bill No. 4313 states “A county, city, or city-county
11 shall not levy a tax on net income.”

12 33. The City of Olympia is not and has never been a city-county municipal corporation, or
13 part of a city-county municipal corporation.

14 34. The OFO Initiative would not levy a tax on net income.

15
16 **V. FIRST CAUSE OF ACTION –REQUEST FOR DECREE ORDERING ELECTION**

17 **(RCW 35.17.290)**

18 35. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

19 36. The City has violated its mandatory, non-discretionary duty to either enact the OFO
20 Initiative or order an election thereon to occur in conjunction with the November 8, 2016 general
21 election. RCW 35.17.260; and see, e.g., *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 713-15 (1996).

22 37. Petitioners are entitled to a decree ordering an election to be held in the City on
23 November 8, 2016 for the purpose of voting upon the OFO Initiative measure. RCW 35.17.290.
24
25

1 45. A controversy exists between the OFO and the City as to whether RCW 36.65.030
2 applies to the OFO Initiative, and whether RCW 36.65.030 is unconstitutional and void.

3 46. The Attorney General is being served with a copy of this petition and counterclaim
4 and the City's complaint in accordance with RCW 7.24.110.

5 **VIII. REQUEST FOR RELIEF**

6 WHEREFORE, Opportunity for Olympia and Ray Guerra seek relief as follows:

7 A. A decree ordering an election to be held in the City of Olympia on November 8, 2016
8 for the purpose of voting upon the OFO Initiative measure;

9 B. An order requiring the OFO Initiative be included on the ballots for the November 8,
10 2016 City of Olympia election;

11 C. A declaration that RCW 36.65.030 is inapplicable and irrelevant to the OFO Initiative,
12 unconstitutional, and void;

13 D. Their reasonable attorneys' fees and costs;

14 E. Such other relief as the Court deems just.
15

16 DATED this 27th day of July, 2016.

17 SMITH & LOWNEY, PLLC

18
19 By: 
20 Knoll Lowney, WSBA # 23457
21 Claire Tonry, WSBA # 44497
22 Attorneys for Plaintiffs
23 2317 E. John St., Seattle WA 98122
24 Tel: (206) 860-2883 Fax: (206) 860-4187
25 knoll@igc.org, clairet@igc.org

CITY OF OLYMPIA, WASHINGTON

RESOLUTION NO. _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OLYMPIA, WASHINGTON, RELATING TO A PROPOSED INCOME TAX INITIATIVE; ENTERING RECITALS AND FINDINGS; DECIDING AGAINST PASSING OR ENACTING A PROPOSED INITIATIVE ORDINANCE TO ESTABLISH AN INCOME TAX ON SOME CITY RESIDENTS; AND, EXERCISING ITS LEGISLATIVE DISCRETION AGAINST ORDERING A SPECIAL ELECTION THEREON.

THE OLYMPIA CITY COUNCIL DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. RECITALS AND FINDINGS.

1.1 The City of Olympia is a noncharter code city organized under the Optional Municipal Code in Title 35A Revised Code of Washington.

1.2 RCW 35A.11.100 and Olympia Municipal Code Chapter 1.16 provide authority for Olympia's registered voters to sign a petition for initiative to directly initiate and enact legislation through the initiative process upon obtaining signatures of fifteen percent (15%) of the total number of persons registered to vote within the City of Olympia on the day of the last preceding city general election.

1.3 The powers of initiative and referendum in noncharter code cities such as the City of Olympia shall be exercised in the manner set forth for the commission form of government in RCW 35.17.240 through RCW 35.17.360.

1.4 The local organization known as Opportunity for Olympia (or "OFO") has submitted an initiative petition to the Olympia City Council to adopt an ordinance or submit it unaltered to a city-wide vote pursuant to state law to establish a fund dedicated to funding one year of free community college for each year's public high school graduates and those students receiving GED high school equivalency certificates who live in the City of Olympia, or an equivalent amount of money for those public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington; and where ninety-five (95) percent of all funds raised must be spent on tuition, not administrative costs, and that such measure would be funded by establishing an income tax of 1.5% on household income exceeding \$200,000 in the City of Olympia (the "Income Tax Initiative").

1.5 The OFO Initiative Petition was filed with the City Clerk for the City of Olympia on July 6, 2016.

1.6 On July 7, 2016, the OFO Income Tax Initiative Petition was filed with the office of the Thurston County Auditor to determine pursuant to RCW 35A.01.040 and RCW 35A.11.100 whether the Income Tax Initiative Petition had obtained sufficient signatures of registered voters within the City of Olympia.

1.7 On July 13, 2016, the Thurston County Auditor issued a Certificate of Sufficiency finding that the number of registered voters in the City of Olympia for the 2015 General Election was 31,346; that the initiative's proponents had submitted 8,947 signatures on the initiative petition; that the Auditor's office examined 8,470 signatures; that the minimum number of verified registered voters' signatures for a sufficient initiative petition is 4,702; that 4,719 signatures of registered voters were verified; and 3,751 signatures were rejected. Based upon this examination, the Thurston County Auditor determined that the initiative petition was signed by the requisite number of persons listed as registered voters within the City of Olympia. As a result of this examination, the Thurston County Auditor issued a Certificate of Sufficiency pursuant to RCW 35A.11.100.

1.8 Under law, the City Council may:

1.8.1 Pass the OFO's proposed ordinance without alteration within twenty days after issuance of the Auditor's Certificate of Sufficiency has been received by the City Clerk;

1.8.2 Immediately following receipt of the Auditor's issuance of the Certificate of Sufficiency for the Petition, request that the Auditor place the Petition on the ballot on the next election date as provided in RCW 29A.04.330 (*see* RCW 35.17.260); or

1.8.3 Take no action to pass the OFO's proposed ordinance or to order an election thereon, leaving to any City taxpayer the option to commence an action against the City to obtain a decree ordering an election to be held in the city upon the proposed ordinance attached to the initiative petition (*see* RCW 35.17.290).

1.9 OFO's Income Tax Initiative proposes a local income tax which is contrary to state law, making the Income Tax Initiative invalid because it violates RCW 36.65.030, which provides that: "A county, city, or city-county shall not levy a tax on net income." And the Income Tax Initiative purports to tax "adjusted gross income," which is fundamentally a net income tax concept. Net income tax is not a term of art in the main body of the Internal Revenue Code. The term occurs in a few sections, and each time it is defined differently for the purposes of the specific section. Adjusted gross income, on the other hand, is expressly defined in the Internal Revenue Code as gross income minus certain enumerated deductions. A taxpayer's "taxable income" is then computed by applying certain additional deductions.

While the word "net" does not appear in the definition, there is language elsewhere in the Internal Revenue Code and Treasury Regulations that adjusted gross income is treated as a net concept. Further, similar to the Income Tax Initiative, adjusted gross income is used in the Internal Revenue Code as a benchmark for determining the appropriate income threshold for taxation in some cases. For example, the Patient Protection and Affordable Care Act imposes a "net investment income tax" on certain taxpayers that is pegged to adjusted gross income.

The City Council determines that a City tax on adjusted gross income is a type of net income tax because it is a tax on gross income netted by a number of deductions and adjustments.

1.10 The Olympia City Council has examined the specific mechanisms and content of OFO's Income Tax Initiative and proposed ordinance and has concluded it presents administrative flaws and questionable legal assertions which have not been resolved. The Olympia City Council, recognizing the flaws in OFO's Income Tax Initiative and proposed ordinance, attempted in good faith to find workable solutions to solve the administrative and legal problems posed in the initiative petition and ordinance. The City Council was unable to fully and fairly investigate, study, reflect, deliberate and secure public engagement and dialogue into the complex issues and administrative flaws and legal issues presented by OFO's Income Tax Initiative and ordinance.

1.11 Collaboration between the government of the City of Olympia, its elected officials, and the Olympia community regarding the local impacts of the current public education finance structure and the current state and local tax system depends upon reliable and relevant information. The City Council recognizes that any attempt to address the cost of higher education and public revenue options will require long-term, systemic change based upon adequate study, public engagement, dialogue and deliberation. The Olympia City Council further recognizes the far reaching and significant beneficial impact of improved access to post-secondary education and vocational training and supports efforts to reduce student loan debt and address a regressive state and local tax system which places a larger burden upon those least able to pay.

1.12 Washington case law and RCW 35A.11.020, RCW 35A.11.030, and RCW 35A.11.090, specifically vests the City Council, as the City's local legislative body, with the power to enact ordinances governing taxation as well as appropriations and OFO's Income Tax Initiative would improperly interfere with the exercise of a power delegated by state law exclusively to a local legislative body.

1.13 Under RCW 29A.04.330(1), city general elections are "held throughout the state of Washington on the first Tuesday following the first Monday in November in the odd-numbered years." The next City general election is November 2017. A special election may be held in conjunction with a State general election. RCW 29A.04.175. But, under RCW 29A.04.330(2), only a city's "governing body" can call a special election. The City Council is the City's "governing body" and it exercises its legislative discretion not to call for a special election on the Income Tax Initiative which it believes to be legally invalid and unconstitutional.

1.14 The Olympia City Council recognizes its duties and responsibilities as a legislative and governing body under state law, and that the initiative power is limited by statute, as well as by decisions of the Washington Supreme Court and other appellate courts of this state.

1.15 RCW 35.17.290 contemplates that any taxpayer and resident who feels aggrieved by the decision of the City Council to neither pass nor enact OFO's Income Tax Initiative or to order an election thereon, may commence an action in superior court against the City to procure a decree ordering an election be held in the city for the purpose of voting upon the proposed initiative ordinance, should the court find the petition to be sufficient and should the court also find that the initiative petition is within the initiative power granted to citizens for direct legislation.

SECTION 2. INITIATIVE REJECTED. The income tax ordinance proposed by Opportunity for Olympia's Income Tax Initiative Petition is hereby rejected.

SECTION 3. NO ELECTION ORDERED. As the elected legislative and governing body of the City of Olympia, this Council rejects ordering a special election upon OFO's Income Tax Initiative on the grounds that said initiative is beyond the lawful initiative power granted to citizens for direct legislation; that the initiative petition intrudes upon the exclusive statutory power granted to the legislative or governing bodies of code cities such as the City of Olympia; and that the proposed ordinance in Opportunity for Olympia's Initiative Petition is contrary to state law.

SECTION 4. CONTINUATION OF COUNCIL'S PRIOR DIRECTION. Consistent with the Council's unanimously-adopted motion on July 12, 2016, the City Manager is authorized to take all reasonable steps on behalf of the City of Olympia and this Council, to obtain a judicial determination whether the initiative is a lawful, valid exercise of the initiative power granted to Olympia's citizens under state law and, if not, to obtain an injunction prohibiting such initiative measure from appearing on a ballot. This authorization includes approval of any appeals as may be necessary before the appellate courts of this state.

PASSED BY THE OLYMPIA CITY COUNCIL this _____ day of July, 2016.

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:



CITY ATTORNEY



24599

Mary Hall
AUDITOR

Certificate of Sufficiency
Petition No. 070716P

State of Washington)
County of Washington)

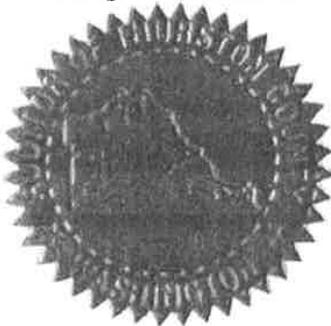
The Undersigned Certifies as Follows:

I am the Thurston County Auditor. The petition entitled "Opportunity for Olympia Initiative Petition: Initiative Petition to the Olympia City Council" was accepted and filed with this office on July 7, 2016.

Pursuant to the Revised Code of Washington 35A.11.100, the petition, to be sufficient, must be signed by fifteen percent of the number of names of persons listed as registered voters within the city, based on the total registered voters in the City of Olympia on the day of the last preceding city general election. I have caused the names of the signers on said petition to be compared against the list of registered voters in the Thurston County Auditor's Office. The results of the examination are as follows:

1. Number of registered voters in the City of Olympia for the 2015 General Election: 31,346
2. Number of signatures on the petition filed by the proponents: 8,947
3. Number of signatures examined: 8,470
4. Number of minimum verified signatures required for a sufficient petition: 4,702
5. Number of verified signatures: 4,719
6. Number of rejected signatures: 3,751

Based upon this examination, it has been determined that said petition was signed by the requisite number of names of persons listed as registered voters within the city and is hereby certified as sufficient pursuant to the Revised Code of Washington 35A.11.100.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the County of Thurston, Washington this 13th day of July, 2016.

MARY HALL
Thurston County Auditor

Elections
2000 Lakeridge Dr SW, Bldg 1, Rm 118
Olympia, WA 98502
Phone: (360) 786-5408
Fax: (360) 786-5223

Ballot Processing Center
2905 29th Avenue SW, Ste E & F
Tumwater, WA 98512
Phone: (360) 786-5408
Fax: (360) 705-3518

Financial Services
929 Lakeridge Dr SW, Rm 226
Olympia, WA 98502
Phone: (360) 786-5402
Fax: (360) 357-2481

Licensing and Recording
2000 Lakeridge Dr SW, Bldg 1, Rm 106
Olympia, WA 98502
Licensing Phone: (360) 786-5406
Recording Phone: (360) 786-5405
Fax: (360) 786-5223

government and its existing public institutions, and shall take effect immediately.

Passed the Senate February 6, 1984.

Passed the House February 22, 1984.

Approved by the Governor March 2, 1984.

Filed in Office of Secretary of State March 2, 1984.

CHAPTER 91

[Substitute Senate Bill No. 4313]

CITY-COUNTY MUNICIPAL CORPORATIONS—CLARIFICATION

AN ACT Relating to local government; and adding a new chapter to Title 36 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. It is the intent of the legislature in enacting this chapter to provide for the implementation and clarification of Article XI, section 16 of the state Constitution, which authorizes the formation of combined city and county municipal corporations.

"City-county," as used in this chapter, means a combined city and county municipal corporation under Article XI, section 16 of the state Constitution.

NEW SECTION. Sec. 2. Recognizing the paramount duty of the state to provide for the common schools under Article IX, sections 1 and 2 of the state Constitution, school districts shall be retained as separate political subdivisions within the city-county.

NEW SECTION. Sec. 3. A county, city, or city-county shall not levy a tax on net income.

NEW SECTION. Sec. 4. The method of allocating state revenues shall not be modified for a period of one year from the date the initial officers of the city-county assume office. During the one-year period, state revenue shares shall be calculated as if the preexisting county, cities, and special purpose districts had continued as separate entities. However, distributions of the revenue to the consolidated entities shall be made to the city-county.

NEW SECTION. Sec. 5. If the city-county government includes a fire protection or law enforcement unit that was, prior to the formation of the city-county, governed by a state statute providing for binding arbitration in collective bargaining, then the entire fire protection or law enforcement unit of the city-county shall be governed by that statute.

NEW SECTION. Sec. 6. The formation of a city-county shall not have the effect of reducing, restricting, or limiting retirement or disability benefits of any person employed by or retired from a municipal corporation,

or who had a vested right in any state or local retirement system, prior to the formation of the city-county.

NEW SECTION. Sec. 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 36 RCW.

Passed the Senate February 7, 1984.

Passed the House February 23, 1984.

Approved by the Governor March 2, 1984.

Filed in Office of Secretary of State March 2, 1984.

CHAPTER 92

[Substitute House Bill No. 69]

MARTIN LUTHER KING, JR.—SCHOOL HOLIDAY

AN ACT Relating to holidays; and amending section 13, chapter 283, Laws of 1969 ex. sess. as last amended by section 2, chapter 24, Laws of 1975-'76 2nd ex. sess. and RCW 28A.02.061.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 13, chapter 283, Laws of 1969 ex. sess. as last amended by section 2, chapter 24, Laws of 1975-'76 2nd ex. sess. and RCW 28A.02.061 are each amended to read as follows:

The following are school holidays, and school shall not be taught on these days: Saturday; Sunday; the first day of January, commonly called New Year's Day; the third Monday of January, being celebrated as the anniversary of the birth of Martin Luther King, Jr.; the third Monday in February, being the anniversary of the birth of George Washington; the last Monday in May, commonly known as Memorial Day; the fourth day of July, being the anniversary of the Declaration of Independence; the first Monday in September, to be known as Labor Day; the eleventh day of November, to be known as Veterans' Day, the fourth Thursday in November, commonly known as Thanksgiving Day; the day immediately following Thanksgiving Day; the twenty-fifth day of December, commonly called Christmas Day: PROVIDED, That no reduction from the teacher's time or salary shall be made by reason of the fact that a school day happens to be one of the days referred to in this section as a day on which school shall not be taught.

Passed the House February 6, 1984.

Passed the Senate February 23, 1984.

Approved by the Governor March 2, 1984.

Filed in Office of Secretary of State March 2, 1984.

EXHIBIT D

EXHIBIT D

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

<input checked="" type="checkbox"/> EXPEDITE <input type="checkbox"/> No Hearing set <input checked="" type="checkbox"/> Hearing is set: Date: August 17, 2016 (Special Set) Time: 3:30 p.m. Judge/Calendar: Anne Hirsch/Civil

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor,

Defendants.

No. 16-2-02998-34

PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

Page

1. INTRODUCTION & REQUESTED RELIEF1

2. STATEMENT OF FACTS1

 2.1. The City Of Olympia.1

 2.2. The Income Tax Initiative Sponsored By OFO.....2

 2.3. The County Auditor’s Certification.....2

 2.4. The City Seeks Declaratory Relief To Bar The Proposed Income Tax Initiative.....3

3. QUESTIONS PRESENTED.....4

4. EVIDENCE RELIED UPON4

5. AUTHORITY4

 5.1. The City’s Pre-Election Challenge To The Proposed Income Tax Initiative Is Both Permissible And Appropriate.....5

 5.2. The City Has Standing To Challenge The Proposed Income Tax Initiative.....5

 5.3. Declaratory Relief And Injunctive Relief Are Proper Because The Proposed Income Tax Initiative Extends Beyond The Local Initiative Power.....5

 5.3.1. The proposed Income Tax Initiative is invalid because it involves powers granted to the City’s governing body and not to the City as a whole.....6

 5.3.2. The proposed Income Tax Initiative is invalid because it conflicts with state law prohibiting income tax.....9

 5.3.3. Court need not address constitutionality of a local income tax.....10

 5.4. Injunctive Relief Is Also Proper Because The Statutory Requirements For Special Elections Have Not Been Satisfied.....11

6. CONCLUSION.....12

PLAINTIFF’S MOTION FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - i

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES

Page(s)

CASES

1000 Friends of Washington v. McFarland,
159 Wn.2d 165, 149 P.3d 616 (2006).....9

American Traffic Solutions, Inc. v. City of Bellingham,
163 Wn.App. 427, 260 P.3d 45 (Div. 1 2011).....5

Citizens Against Mandatory Bussing v. Palmason,
80 Wn.2d 445, 495 P.2d 657 (1972).....6, 9

City of Longview v. Wallin,
174 Wn.App. 763, 301 P.3d 45 (Div. 2 2013).....5, 6

City of Sequim v. Malkasian,
157 Wn.2d 251, 138 P.3d 943 (2006).....6

Culliton v. Chase,
174 Wash. 363, 25 P.2d 81 (1933).....11

Futurewise v. Reed,
161 Wn.2d 407, 166 P.3d 708 (2007).....5

Guthrie v. City of Richland,
80 Wn.2d 382, 494 P.2d 990 (1972).....5

Jensen v. Henneford,
185 Wash. 209, 53 P.2d 607 (1936).....11

Mukilteo Citizens for Simple Government v. City of Mukilteo,
174 Wn.2d 41, 272 P.3d 227 (2012).....6, 7

Port Angeles v. Our Water-Our Choice!,
170 Wn.2d 1, 239 P.3d 589 (2010).....1

STATUTES

26 U.S.C. § 62.....9

RCW 29A.04.030(3).....12

RCW 29A.04.311.....12

PLAINTIFF’S MOTION FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - ii

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1	RCW 29A.04.330(2).....	11, 12
2	RCW 31.17.240 through 35.17.360.....	2
3	RCW 35.21.706	8
4	RCW 35A.....	1, 8
5	RCW 35A.02.030.....	1
6	RCW 35A.11.020.....	7
7	RCW 35A.11.030.....	1, 7
8	RCW 35A.11.080 through 35A.11.100	2
9	RCW 35A.11.090.....	8
10	RCW 35A.11.090 (4) and (7)	8
11	RCW 35A.11.100.....	2
12	RCW 35A.13.190.....	8
13	RCW 36.65.030	1, 10

OTHER AUTHORITIES

16	<i>Olympia Municipal Code Section 1.08.010</i>	1
17	<i>Olympia Municipal Code Section 1.16.010(B)</i>	2
18	Washington Constitution Art. VII, Sec. 1.....	11

19
20
21
22
23
24
25
26

PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - iii

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 **1. INTRODUCTION & REQUESTED RELIEF**

2 There is no constitutional right to direct legislation (initiative and referendum) in
3 Washington cities and counties.¹ Such authority exists only as authorized by the Legislature.
4 And the Legislature has reserved specific powers – particularly the taxing power – to a city’s
5 legislative body: the city council. RCW 35A.11.030.

6 The proposed Income Tax Initiative seeks to have the City of Olympia levy income taxes
7 and appropriate funds collected by the City from income tax revenues. But the proposed Income
8 Tax Initiative is invalid for two independent reasons: because the proposed Income Tax Initiative
9 involves powers specifically granted to the City’s legislative body (which are not subject to
10 direct legislation); and because the proposed Income Tax Initiative conflicts with a statute that
11 expressly prohibits local taxes on net income (RCW 36.65.030).

12 The City respectfully requests that this Court: (1) issue an order declaring that the
13 proposed Income Tax Initiative, in its entirety, is invalid because it extends beyond the scope of
14 the local initiative power; and (2) issue an injunction that bars Thurston County and the Thurston
15 County Auditor from placing the proposed Income Tax Initiative on the State general election
16 ballot on November 8, 2016.

17 **2. STATEMENT OF FACTS**

18 The following facts are undisputed.

19 **2.1. The City Of Olympia.**

20 The City of Olympia (“City”) is a non-charter code city that operates under Title 35A
21 RCW.² The City adopted code city initiative and referendum power as permitted under
22

23
24 ¹ Amendment 7 to the Washington Constitution, authorizing direct legislation on State measures, does not
25 apply to municipal governments. *Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1 , 239 P.3d 589
26 (2010). For example, there is no authority in law for Thurston County’s (or 31 other Washington
counties’) exercise of initiative and referendum. Only a charter county has that option.

² *Olympia Municipal Code at Section 1.08.010* (“There is adopted for the city of Olympia, Washington,
the classification of noncharter code city, pursuant to the provisions of RCW 35A.02.030.”).

1 RCW 35A.11.080 through 35A.11.100.³ Under RCW 35A.11.100, the powers of initiative and
2 referendum must be exercised under RCW 35.17.240 through 35.17.360.

3 **2.2. The Income Tax Initiative Sponsored By OFO.**

4 On July 6, 2016, Opportunity for Olympia (“OFO”) filed a petition with the City seeking
5 to levy an income tax and appropriate funds collected by the City from income tax revenues (the
6 “Income Tax Initiative”).⁴ The ordinance proposed by the Income Tax Initiative is entitled:

7 AN ORDINANCE of the City of Olympia, Washington, imposing an excise tax
8 on household income above \$200,000 per year derived from financial
9 transactions, personal activities, business, commerce, occupations, trades,
10 professions and other lawful activities, the revenues therefrom to be dedicated to
11 funding at least one year of free community or technical college for each year’s
12 City of Olympia public high school graduates and General Education
Development Certificate (“GED”) recipients, or an equivalent amount of money
for such public high school graduates and GED recipients who choose to attend
public universities and colleges in the State of Washington.⁵

13 OFO, a Washington political committee, sponsored the proposed Income Tax Initiative.⁶

14 **2.3. The County Auditor’s Certification.**

15 As required by Washington law, the City forwarded the proposed Income Tax Initiative
16 to the County Auditor.⁷ On July 13, 2016, the County Auditor advised that the proposed Income
17 Tax Initiative “was signed by the requisite number of names of persons listed as registered voters
18 within the city and is hereby certified as sufficient pursuant to the Revised Code of Washington
19 35A.11.100.”⁸

20 OFO seeks to have the proposed Income Tax Initiative placed on a ballot at a City special
21 election to be held in conjunction with the State general election on November 8, 2016 (the

22 ³ *Olympia Municipal Code Section 1.16.010(B)* (“The powers of initiative and referendum shall, when
23 exercised, be done so in the manner set forth for the commission form of government in RCW 31.17.240
through 35.17.360.”).

24 ⁴ Clerk’s Document Declaration at Ex. 1 (Income Tax Initiative).

25 ⁵ *Id.*

26 ⁶ *Id.*

⁷ Clerk’s Document Declaration at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016), Section 1.6.

⁸ Defendants-Petitioners Opportunity For Olympia’s And Ray Guerra’s Petition And Affidavit For
Prevention Of Election Error And Counterclaim at Ex. B (County Assessor’s Certification).

1 “November ballot”).⁹ The City’s legislative body (i.e., the City Council) has not called for a
2 special election on the proposed Income Tax Initiative.¹⁰

3 **2.4. The City Seeks Declaratory Relief To Bar The Proposed Income Tax**
4 **Initiative.**

5 On July 12, 2016, the Olympia City Council authorized legal action against the proposed
6 Income Tax Initiative.¹¹ The City proceeded with this suit to obtain a judicial declaration
7 concerning the validity of the proposed Income Tax Initiative and an injunction preventing the
8 proposed Income Tax Initiative from appearing on the November ballot if the proposed Income
9 Tax Initiative is deemed invalid.¹² The unanimously-adopted motion states:

10 . . . that upon the Auditor’s certification of sufficient valid signatures for
11 Opportunity for Olympia’s initiative petition, the City Manager be authorized to
12 take all reasonable steps on behalf of the City of Olympia and this Council, to
13 obtain a judicial determination whether the initiative is a lawful, valid exercise of
14 the initiative power granted to Olympia’s citizens under state law, and if not, to
15 obtain an injunction prohibiting such initiative measure from appearing on the
16 November ballot. My motion includes authorization for the City Manager to
17 pursue any appeals as may be necessary before the appellate courts of this state.¹³

18 On July 26, 2016, the City Council adopted Resolution No. M-1847, entitled:

19 **A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OLYMPIA,**
20 **WASHINGTON, RELATING TO A PROPOSED INCOME TAX INITIATIVE;**
21 **ENTERING RECITALS AND FINDINGS; DECIDING AGAINST PASSING OR**
22 **ENACTING A PROPOSED INITIATIVE ORDINANCE TO ESTABLISH AN INCOME**
23 **TAX ON SOME CITY RESIDENTS; AND, EXERCISING ITS LEGISLATIVE**
24 **DISCRETION AGAINST ORDERING A SPECIAL ELECTION THEREON.¹⁴**

25 The Resolution rejected the Income Tax Initiative; rejected its referral to the ballot; and,
26 reaffirmed the authority and direction for this suit to invalidate the Income Tax Initiative and to
prevent the Initiative from appearing on the November ballot.¹⁵

⁹ Clerk’s Document Declaration at Ex. 1 (Income Tax Initiative).

¹⁰ *Id.* at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016), Section 3.

¹¹ *Id.* at Ex. 3 (Minutes of the City Council meeting of July 12, 2016).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016).

¹⁵ *Id.*

1 **3. QUESTIONS PRESENTED**

2 *QUESTION:* Whether the proposed Income Tax Initiative seeking to establish an income
3 tax in the City is invalid because it extends beyond the scope of the local initiative power?

4 *ANSWER:* YES.

5 *QUESTION:* Whether this Court should enter an order enjoining the proposed Income
6 Tax Initiative from appearing on the November ballot?

7 *ANSWER:* YES.

8 **4. EVIDENCE RELIED UPON**

9 The City relies on the following to support this motion for declaratory judgment and
10 injunctive relief: (1) the Document Declaration of Jane Kirkemo, City Clerk (“Clerk’s
11 Document Declaration”); and (2) the files on record in this matter. The Clerk’s Document
12 Declaration verifies the following:

- 13 4.1 The Income Tax Initiative (also at Appendix 2 to the Complaint);
- 14 4.2 Opportunity for Olympia’s Political Committee Registration – PDC form C1pc
15 (also at Appendix 1 to the Complaint);
- 16 4.3 Minutes of the City Council meeting of July 12, 2016 (containing record of City
17 Council motion authorizing this suit);
- 18 4.4 City Resolution No. M-1847 (July 26, 2016) (rejecting Income Tax Initiative);
19 and
- 20 4.5 City Resolution No. M-1846 (July 12, 2016) (calling for further study on taxes
21 and on access to higher education and funding).

22 **5. AUTHORITY**

23 The questions presented in this motion are purely issues of law.
24
25
26

1 **5.1. The City’s Pre-Election Challenge To The Proposed Income Tax Initiative Is**
2 **Both Permissible And Appropriate.**

3 In contrast to state-wide measures, “[i]t is well established [] that a preelection challenge
4 to the *scope* of the initiative power is both permissible and appropriate” at the local level.¹⁶ In
5 this case, the City seeks a judicial determination that the scope of the proposed Income Tax
6 Initiative extends beyond the local initiative power. Accordingly, the City’s pre-election
7 challenge to the proposed Income Tax Initiative is both permissible and appropriate.

8 **5.2. The City Has Standing To Challenge The Proposed Income Tax Initiative.**

9 Washington law recognizes that forcing cities to place invalid initiatives on the ballot
10 results in undue financial and administrative burdens. As a result, a city has standing to
11 challenge such initiatives.¹⁷ In this case, the financial and administrative burden of placing the
12 proposed Income Tax Initiative on the November ballot is sufficient injury in fact to confer
13 standing on the City. Furthermore, income tax-related initiatives have significant public
14 importance warranting judicial resolution.

15 **5.3. Declaratory Relief And Injunctive Relief Are Proper Because The Proposed**
16 **Income Tax Initiative Extends Beyond The Local Initiative Power.**

17 As a general rule, the initiative or referendum process allows the people to directly
18 exercise power vested in a city as a corporate entity.¹⁸ But the initiative or referendum process

19 ¹⁶ *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn.App. 427, 432, 260 P.3d 45 (Div. 1
20 2011) (emphasis in original); see also *City of Longview v. Wallin*, 174 Wn.App. 763, 778, 301 P.3d 45
21 (Div. 2 2013) (the city’s challenge to the initiative was ripe for review even though the county auditor had
22 yet to determine whether the initiative had enough signatures to be placed on the ballot); *Futurewise v.*
Reed, 161 Wn.2d 407, 411, 166 P.3d 708 (2007) (“We will therefore consider only two types of
23 challenges to an initiative prior to an election: that the initiative does not meet the procedural
24 requirements for placement on the ballot... and that the subject matter of the initiative is beyond the
25 people’s initiative power.”) (citation omitted).

26 ¹⁷ *City of Longview v. Wallin*, 174 Wn.App. 763, 782-83, 301 P.3d 45 (Div. 2 2013) (“We hold that the
financial and administrative burden of placing a potentially unlawful initiative on the ballot was a
sufficient injury in fact to confer standing on the city. Moreover, even if Longview did not have clear
standing, we would address its claims because they involve significant and continuing matters of public
importance that merit judicial resolution.”) (quotations and citations omitted).

¹⁸ See *Guthrie v. City of Richland*, 80 Wn.2d 382, 384, 494 P.2d 990 (1972) (“It is concededly the general
rule that where a statute vests a power in the city as a corporate entity, it may be exercised by the people
through the initiative or referendum process.”).

1 has limitations. For example, the initiative or referendum process applies only to powers granted
2 to the City as a whole; not to “powers granted by the legislature to the governing body of a
3 city.”¹⁹ As another example, the initiative or referendum process cannot be invoked if it
4 conflicts with state law.²⁰ In this case, both limitations independently invalidate the proposed
5 Income Tax Initiative.

6 **5.3.1. The proposed Income Tax Initiative is invalid because it involves**
7 **powers granted to the City’s governing body and not to the City as a**
8 **whole.**

9 As set forth above, the authority for direct legislation only applies to powers granted to
10 the City itself; it does *not* apply to “powers granted by the legislature to the governing body of a
11 city.”²¹ In *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 272 P.3d
12 227 (2012), for example, the Washington Supreme Court considered whether a proposed
13 initiative attempting to restrict a city’s use of red light cameras extended beyond the local
14 initiative power.²² Recognizing the legislature granted the exclusive power to legislate the use of
15 automated traffic safety cameras to local legislative bodies (as opposed to cities as a whole), the
16 Washington Supreme Court held that the proposed initiative was invalid because it extended
17 beyond the local initiative power.²³

18 In this case, the proposed Income Tax Initiative seeks to have the City levy an income tax
19 to fund higher education for public high school graduates and GED recipients living in
20 Olympia.²⁴ Whether or not this is worthy public policy, under Washington law the power to levy

21 ¹⁹ *City of Longview v. Wallin*, 174 Wn.App. 763, 784, 301 P.3d 45 (Div. 2, 2013), quoting *Mukilteo*
Citizens for Simple Government v. City of Mukilteo, 174 Wn.2d 41, 51, 272 P.3d 227 (2012); *City of*
Sequim v. Malkasian, 157 Wn.2d 251, 138 P.3d 943 (2006).

22 ²⁰ *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 450, 495 P.2d 657 (1972) (“Initiative
23 or referendum procedures can be invoked at the local level only if their exercise is not in conflict with
24 state law.”).

24 ²¹ *City of Longview v. Wallin*, 174 Wn.App. 763, 784, 301 P.3d 45 (Div. 2, 2013), quoting *Mukilteo*
Citizens for Simple Government v. City of Mukilteo, 174 Wn.2d 41, 51, 272 P.3d 227 (2012).

25 ²² *Mukilteo Citizens For Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51-52, 272 P.3d 227
26 (2012).

²³ *Id.*

²⁴ Clerk’s Document Declaration at Ex. 1 (Income Tax Initiative).

1 taxes for local purposes is exclusively vested in the City’s legislative body (i.e., the City
2 Council); it is not vested in the City as a whole. See RCW 35A.11.020 (“Within constitutional
3 limitations, **legislative bodies** of code cities shall have within their territorial limits **all powers of**
4 **taxation for local purposes...**”); and RCW 35A.11.030 (“eminent domain, borrowing,
5 **taxation**, and the granting of franchises may be **exercised by the legislative bodies** of code
6 cities”) (emphasis added). Because the proposed Income Tax Initiative involves powers
7 specifically granted to the City’s legislative body (and not to the City as a whole), the proposed
8 Income Tax Initiative extends beyond the local initiative power, rendering it invalid, null, and
9 void.²⁵

10 The policy background for the Legislature’s delegation of difficult issues to legislative
11 bodies is demonstrated by the process faced by the City with the proposed Income Tax Initiative.
12 As the City Council found, the issues in this State with a regressive tax structure and ongoing
13 issues in funding access to higher education are not easily addressed by a political fix. The City
14 Council in part stated in its Resolution No. M- 1846:

15 **WHEREAS**, the City Council recognizes that any attempt to address the cost of higher
16 education and secure public revenue options will require long-term, systemic change
based upon adequate study, public engagement, dialogue and deliberation; and

17 **WHEREAS**, the Olympia City Council recognizes the far reaching and significant
18 beneficial impact of improved access to post-secondary education and vocational training
19 and supports efforts to reduce student loan debt and address a regressive state and local
tax system which places a larger burden upon those least able to pay;

20 The City Council then provided for a thoughtful legislative, not political, process to “research,
21 investigate, and study local residents’ access to higher, post-secondary and vocational education,
22 and the local impact of the state’s regressive tax policies, while actively engaging Olympia’s
23 citizens in meaningful and constructive dialogue regarding the consequences of existing and
24

25
26 ²⁵ See *Mukilteo Citizens For Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227
(2012) (initiatives that extend beyond the initiative power are invalid).

1 proposed policies.²⁶ It is that legislative process for difficult issues, such as taxation and
2 appropriations that the Legislature reserved to legislative bodies, not the political process of
3 direct legislation.

4 The Legislature's clear authorization to the City Council only, as the city's governing
5 body, is confirmed in RCW 35A.11.090. There, the law ordinarily requires 30 days before an
6 ordinance takes effect in order to allow the people's direct exercise of referendum authority. But
7 that authority for direct legislation is not permitted for "ordinances appropriating money; . . . and
8 ordinances authorizing or repealing the levy of taxes; which excepted ordinances shall go into
9 effect as provided by the general law or by applicable sections of Title 35A RCW." RCW
10 35A.11.090 (4) and (7). As a result, appropriation or tax ordinances are effective 5 days after
11 publication and not subject to referendum. RCW 35A.13.190. Here, the proposed Income Tax
12 Initiative is not only a proposed tax measure, but also an appropriation measure that specifically
13 directs the management of funds collected from the tax (college tuition). Both the authority of
14 taxation and appropriation are outside of the people's limited authority to exercise direct
15 legislation. The proposed Income Tax Initiative is not an authorized subject for direct
16 legislation.

17 When the Legislature has determined that a vote is appropriate for local tax legislation, it
18 has specifically so stated. For example, in RCW 35.21.706 the Legislature requires an election
19 on a city council proposal to increase a utility business and operations tax, above the base-six
20 percent a city is authorized to levy against public utilities (e.g., gas and electric companies). No
21 such authority for an election exists with respect to an income tax or with any appropriation. The
22 proposed Income Tax Initiative is not within the limited authority for direct legislation
23 authorized by the Legislature for the City – it is beyond the scope of the local initiative power.

24
25
26 ²⁶ Clerk's Document Declaration at Ex. 5 (Resolution No. M-1846).

1 **5.3.2. The proposed Income Tax Initiative is invalid because it conflicts with**
2 **state law prohibiting income tax.**

3 As set forth above, “[i]nitiative and referendum procedures can be invoked at the local
4 level *only* if their exercise is not in conflict with state law.”²⁷ In *1000 Friends of Washington v.*
5 *McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2006), for example, the Washington Supreme Court
6 considered whether county ordinances enacted to implement Washington’s Growth Management
7 Act were subject to veto by local initiative or referendum.²⁸ Recognizing how “[i]t would violate
8 the constitutional blueprint to allow a subdivision of the State to frustrate the mandates of the
9 people of the State as a whole,” our Supreme Court held that the proposed local referendum was
10 invalid because it conflicted with Washington’s Growth Management Act:

11 Initiatives or referenda that attempt to graft limits onto a grant of power by the
12 people of the State, or to modify obligations imposed on local legislative or
13 executive authority by the people of the State, are invalid as in conflict with state
14 law.²⁹

15 In this case, the proposed Income Tax Initiative seeks to have the City levy taxes “on
16 household Income above \$200,000 per year derived from financial transactions, personal
17 activities, business, commerce, occupations, trades, professions and other lawful activities...”³⁰
18 The proposed Income Tax Initiative defines “Income,” as the “adjusted gross income as
19 determined under the federal internal revenue code.”³¹ The Internal Revenue Code defines
20 “adjusted gross income” as “gross income minus [] deductions” set forth in 26 U.S.C. § 62 (e.g.,
21 trade and business deductions, retirement savings, interest on students loans, and health savings
22 accounts). This is a net amount of gross income.³² Thus, the proposed Income Tax Initiative
23 seeks to levy a tax on gross income netted by a number of deductions and adjustments; that is, a

24 ²⁷ *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 450, 495 P.2d 657 (1972) (emphasis
25 added).

26 ²⁸ *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 168, 149 P.3d 616 (2006).

²⁹ *Id.*

³⁰ Clerk’s Document Declaration at Ex. 1 (Income Tax Initiative).

³¹ *Id.*

³² 26 U.S.C. § 62.

1 net income tax. The City Council as the legislative authority that would be charged with
2 enforcement of the proposed Income Tax Initiative, if enacted, has appropriately determined that
3 the proposed Income Tax Initiative would create a net income tax:

4 And the Income Tax Initiative purports to tax “adjusted gross income,” which is
5 fundamentally a net income tax concept. Net income tax is not a term of art in the
6 main body of the Internal Revenue Code. The term occurs in a few sections, and
7 each time it is defined differently for the purposes of the specific section.
8 Adjusted gross income, on the other hand, is expressly defined in the Internal
9 Revenue Code as gross income minus certain enumerated deductions. A
10 taxpayer’s “taxable income” is then computed by applying certain additional
11 deductions.

12 While the word “net” does not appear in the definition, there is language
13 elsewhere in the Internal Revenue Code and Treasury Regulations that adjusted
14 gross income is treated as a net concept. Further, similar to the Income Tax
15 Initiative, adjusted gross income is used in the Internal Revenue Code as a
16 benchmark for determining the appropriate income threshold for taxation in some
17 cases. For example, the Patient Protection and Affordable Care Act imposes a
18 “net investment income tax” on certain taxpayers that is pegged to adjusted gross
19 income.

20 The City Council determines that a City tax on adjusted gross income is a type of
21 net income tax because it is a tax on gross income netted by a number of
22 deductions and adjustments.³³

23 Under state law, however, “[a] county, city, or city-county shall **not** levy a tax on net
24 income.” RCW 36.65.030. Because the proposed Income Tax Initiative seeks to levy a local tax
25 on net income, the proposed Income Tax Initiative conflicts with Washington state law; and
26 because the proposed Income Tax Initiative conflicts with Washington state law, the proposed
Income Tax Initiative extends beyond the local initiative power, rendering it invalid, null, and
void.

5.3.3. Court need not address constitutionality of a local income tax.

This Court need not and should not address the potential constitutional issues associated
with an income tax in the State of Washington, including an income tax at the local level. There

³³ Clerk’s Document Declaration at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016), Section 1.9.

1 is a long history regarding income tax measures in the state. In 1933, for example, the
2 Washington Supreme Court struck down an income tax initiative measure for violating the
3 property tax uniformity provisions of our Constitution's Fourteenth Amendment.³⁴ The Court
4 held that income is property under the State Constitution³⁵ and specifically rejected the argument
5 that an income tax is an "excise tax."³⁶ So here, OFO's attempt to characterize the tax in the
6 proposed Income Tax Initiative as an excise tax is directly contrary to controlling Washington
7 Supreme Court precedent.

8 Three years later, the Court again considered an income tax that had been enacted by the
9 Legislature in 1935.³⁷ That income tax was also called an excise tax by the Legislature. But the
10 Court again rejected the characterization of an income tax as an excise tax.³⁸ Whether the tax
11 was on "net income" or the "privilege of receiving net income," this further income tax effort
12 still taxed property and was found unconstitutional.³⁹ Here, these cases are cited only to dispel
13 the notion that the proposed Income Tax Initiative is for an excise tax that is not a tax on net
14 income. Because the authority to levy a tax rests with the City Council, and not with direct
15 legislation, and because an existing statute expressly bans cities from enacting net income taxes,
16 the Court should invalidate the proposed Income Tax Initiative without consideration of
17 constitutional issues.

18 **5.4. Injunctive Relief Is Also Proper Because The Statutory Requirements For**
19 **Special Elections Have Not Been Satisfied.**

20 In order to call for a special election, a city's governing body must first provide a
21 resolution to the county auditor calling for a special election. *See* RCW 29A.04.330(2) ("The

22 ³⁴ *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933); Washington Constitution Art. VII, Sec. 1.

23 ³⁵ *Id.*, 174 Wash at 376 ("It has been definitely decided in this state that an income tax is a property tax
which should set the question at rest here.").

24 ³⁶ *Id.* ("It is asserted an income tax is an excise tax. That is not correct.").

25 ³⁷ *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936).

26 ³⁸ *Id.*, 185 Wash. at 217 ("But the Legislature cannot change the real nature and purposes of an act by
giving it a title or declaring its nature and purpose to be otherwise, any more than a man can transform his
character by changing his attire or assuming a different name.").

³⁹ *Id.*, 185 Wash. at 218-9.

1 county auditor, as ex officio supervisor of elections, upon request in the form of a resolution of
2 the governing body of a city, town, or district, presented to the auditor prior to the proposed
3 election date, shall call a special election in such city, town, or district...”). In this case, the
4 City’s legislative body, the City Council, has not provided a resolution to the County Auditor
5 calling for a special election on the proposed Income Tax Initiative.⁴⁰ To the contrary, the City
6 Council passed Resolution No. M-1847 reaffirming the authority of the City Manager to obtain a
7 judicial declaration confirming that the proposed Income Tax Initiative extends beyond the local
8 initiative power.⁴¹ Because the City Council has not provided the County Auditor with a
9 resolution calling for a special election on the proposed Income Tax Initiative, the statutory
10 requirements for special elections have not been satisfied and the proposed Income Tax Initiative
11 cannot appear on the November ballot. This Court accordingly should enter an order enjoining
12 the proposed Income Tax Initiative from appearing on the November ballot.⁴²

13 **6. CONCLUSION**

14 The City respectfully requests that this Court: (1) issue an order declaring that the
15 proposed Income Tax Initiative, in its entirety, is invalid, null, and void because it extends
16 beyond the scope of the local initiative power; and (2) issue an injunction that bars Thurston
17 County and the Thurston County Auditor from placing the proposed Income Tax Initiative from
18 appearing on the State general election ballot in November 2016. A proposed form of order to
19 that effect is attached for the Court’s consideration.
20
21

22 ⁴⁰ Clerk’s Document Declaration at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016), Section 3.

23 ⁴¹ *Id.*, Section 4.

24 ⁴²For a special election to be held in conjunction with the State general election on November 8, 2016,
25 Washington law requires that a resolution calling for the special election be presented to the county
26 auditor no later than August 2, 2016 (the day of the primary as specified by RCW 29A.04.311). See
RCW 29A.04.030(3). In the absence of a resolution calling for a special election on the proposed Income
Tax Initiative prior to August 2, 2016, therefore, the proposed Income Tax Initiative **cannot** appear on the
November ballot. The Court should enter an order enjoining the Proposed Income Tax Initiative from
appearing on the November ballot for this reason as well.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DATED this 29th day of July, 2016.

OFFICE OF THE CITY ATTORNEY
Mark Barber, WSBA No. 8379
Olympia City Attorney,
Annaliese Harksen, WSBA No. 31132
Deputy City Attorney,
Email: mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us
and

s/ P. Stephen DiJulio
P. Stephen DiJulio, WSBA No. 7139
Jason R. Donovan, WSBA No. 40994
FOSTER PEPPER PLLC
1111 Third Avenue
Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: steve.dijulio@foster.com
j.donovan@foster.com
Attorneys for Plaintiff City of Olympia

PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - 13

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

<input type="checkbox"/> EXPEDITE <input type="checkbox"/> No Hearing set <input checked="" type="checkbox"/> Hearing is set: Date: August 24, 2016 Time: 3:00 p.m. Judge/Calendar: The Hon. Jack Nevin/Civil
--

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,
Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor
Defendants.

Case No. 16-2-02998-34

CITY OF OLYMPIA
REPLY IN SUPPORT OF
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

	<u>Page</u>
1. INTRODUCTION	1
2. THE CITY’S PRE-ELECTION CHALLENGE TO THE PROPOSED INCOME TAX INITIATIVE IS PERMISSIBLE AND APPROPRIATE.	1
3. THE CITY IS ENTITLED TO INJUNCTIVE RELIEF BECAUSE THE PROPOSED INCOME TAX INITIATIVE CLEARLY EXTENDS BEYOND LOCAL INITIATIVE POWER.....	3
3.1 The City’s Right to Bring Preelection Challenges to Unlawful Initiatives.	3
3.2 The City’s Standing to Bring a Preelection Challenge to Unlawful Initiatives.....	4
3.3 The City’s Timely Action on The Unlawful Proposed Income Tax Initiative.	4
4. THE CITY HAS SATISFIED ITS BURDEN TO SHOW THAT THE ENTIRE PROPOSED INCOME INITIATIVE IS INVALID.....	5
5. THE POWER OF LOCAL TAXATION IS VESTED EXCLUSIVELY IN LOCAL LEGISLATIVE BODIES.	6
5.1 The Power To Impose Excise Taxes Is Not Granted To Cities As A Whole.....	6
5.2 The Proposed Income Tax Initiative Does Not Seek To Impose a Business Excise Tax.....	7
6. CHAPTER 91, LAWS OF 1984 IS NOT UNCONSTITUTIONAL.....	8
6.1 Chapter 91, Laws of 1984 Does Not Violate The “Single-Subject Rule.”.....	8
6.2 Chapter 91, Laws of 1984 Does Not Violate The “Subject-In-Title Rule.”.....	9
7. THE PROPOSED INCOME TAX INITIATIVE WOULD TAX NET INCOME.	9
8. CONCLUSION.....	10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES

CASES

Page(s)

Amalgamated Transit Union Local 587 v. State,
142 Wn.2d 183, 11 P.3d 762 (2000).....9

Cary v. Bellingham,
41 Wn.2d 468 (1952).....7

City of Longview v. Wallin,
174 Wn.App. 763, 301 P.3d 45 (Div. 1 2013).....4

City of Seattle v. Yes for Seattle,
122 Wn.App. 382, 93 P.3d 176 (2004).....2, 3

City of Wenatchee v. Chelan County PUD No. 1,
181 Wn. App. 326, 325 P.3d 419 (Div. 3 2014).....6

Coppernoll v. Reed,
155 Wn.2d 290, 119 P.3d 318 (2005).....1, 2

Filo Foods v. City of Sea-Tac,
183 Wn.2d 770, 357 P.3d 1040 (2015).....9

In re Estate of Hambleton,
181 Wn.2d 802, 335 P.3d 398 (2014).....7

Sch. Districts’ All. for Adequate Funding of Special Educ. v. State,
170 Wn.2d 599, 244 P.3d 1 (2010).....8

Spokane Entrepreneurial Ctr. v. Spokane Moves,
185 Wn.2d 97, 369 P.3d 140 (2016).....1, 3, 4

Washington State Labor Council v. Reed,
149 Wn.2d 48, 65 P.3d 1203 (2003).....2

STATUTES

RCW 26.19.07110

RCW 35A.02.050.....7, 9

RCW 35A.11.020.....6

REPLY IN SUPPORT OF PLAINTIFF’S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - ii

CITY OF OLYMPIA
City Attorney’s Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1	RCW 35A.11.090 (4)	5
2	RCW 35A.11.090 (7).....	5
3	RCW 35A.13.190.....	5
4	RCW 35A.82.....	6, 7, 9
5	RCW 35A.82.010.....	6
6	RCW 35A.82.020.....	6, 7
7	RCW 35A.83.....	9
8	RCW 36.65.030	3, 8, 9

OTHER AUTHORITIES

10	<i>Initiative and Referendum Guide for Washington Cities and Charter Counties</i>	
11	(Municipal Research and Services Center of Washington, 2015), available at	
12	www.mrsc.org/publications/publications.aspx	6

13
14
15
16
17
18
19
20
21
22
23
24
25
26

REPLY IN SUPPORT OF PLAINTIFF’S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - iii

CITY OF OLYMPIA
City Attorney’s Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 **1. INTRODUCTION**

2 The City of Olympia asks this Court to apply well-established law on the limits of direct
3 legislation, and the Legislature’s clear prohibition against city net income taxes. Defendants’
4 opposition mischaracterizes facts, misconstrues firmly-established Washington law, and asserts a
5 series of false accusations intended to deflect this Court’s attention away from the fact that the
6 proposed Income Tax Initiative is beyond the authority for direct legislation and invalid, null,
7 and void. The Defendants’ hyperbole and political arguments in opposition are without merit,
8 and the City’s Motion for Declaratory Judgment and Injunctive Relief should be granted.

9 **2. THE CITY’S PRE-ELECTION CHALLENGE TO THE PROPOSED INCOME
10 TAX INITIATIVE IS PERMISSIBLE AND APPROPRIATE.¹**

11 Established Washington Supreme Court precedent confirms that pre-election challenges
12 to local initiatives are permissible and appropriate.² There are no constitutional issues present in
13 this matter.³ The power of local direct legislation (initiative and referendum) is controlled by the
14 Legislature. Here, the City seeks a judicial determination that the scope of the proposed Income
15 Tax Initiative extends beyond the scope of that local initiative power. Accordingly, the City’s
16 pre-election challenge to the proposed Income Tax Initiative is permissible and appropriate.
17 Defendants’ arguments that this Court should refrain from ruling on the scope of the proposed
18 Income Tax Initiative must be rejected.⁴ The very cases cited by Defendants support the City.

19 *Coppernoll v. Reed* specifically recognizes the right to pre-election challenges concerning
20 the scope of local initiatives, such as the proposed Income Tax Initiative.⁵ Defendants’ reliance
21 on *Coppernoll* is misplaced.

22
23 ¹ The City explains this and other issues in greater detail in the City’s Opening Brief.

24 ² See City’s Opening Brief at p. 5:1-7.

25 ³ *Spokane Entrepreneurial Ctr. v. Spokane Moves*, 185 Wn.2d 97, 104, 369 P.3d 140 (2016) (“[T]he right
26 to file a *local* initiative is not granted in the constitution. Instead, state statutes governing the
establishment of cities allow the cities to establish a local initiative process.” (Emphasis by the Court)).

⁴ See Defendants’ Opposition at pp. 9-11. In fact, Defendants argue that substantive pre-election review
is “never” appropriate. But that argument defies firmly-established precedent.

⁵ *Coppernoll v. Reed*, 155 Wn.2d 290, 297-98, 119 P.3d 318 (2005).

REPLY IN SUPPORT OF PLAINTIFF’S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - 1

CITY OF OLYMPIA
City Attorney’s Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 *Washington State Labor Council v. Reed* does not bar pre-election challenges to local
2 initiatives.⁶ In *Reed*, the Washington Supreme Court initially declined to issue a pre-election writ
3 of mandamus prohibiting certification of Referendum 53 on a **state referendum** because the
4 Court did not have sufficient time to decide whether Referendum 53 was constitutional prior to
5 the election, and instead issued a writ of mandamus prohibiting the secretary of state from
6 certifying the votes on Referendum 53 pending a ruling on the constitutionality of Referendum
7 53.⁷ While the Court temporarily deferred issuing injunctive relief, the Court **never** deferred its
8 ruling on the pre-election challenge (as Defendants ask this Court to do in this case).
9 Defendants' reliance on *Reed* is misplaced.⁸

10 *City of Seattle v. Yes for Seattle* further supports the timing of this action. In *Yes for*
11 *Seattle*, the trial court ruled that the local initiative was invalid.⁹ On appeal, the initiative
12 proponent advanced the exact argument that Defendants here advance (i.e., that the trial court's
13 pre-election review of local initiatives is premature).¹⁰ The Court of Appeals flatly rejected that
14 argument:

15 Generally, courts will not review initiatives before they are adopted by voters
16 because courts do not want to interfere with the political process of issue advisory
17 opinions. But an established exception to the general rule is that a court will
18 review an initiative to determine if it is within the scope of the initiative power. . .
19 Therefore, pre-election review was proper for the limited purpose of determining
20 whether I-80 was within the initiative power.¹¹

21
22 ⁶ See Defendants' Opposition at p. 10:4-9.

23 ⁷ *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 53-54, 65 P.3d 1203 (2003).

24 ⁸ In *Reed*, the Washington Supreme Court was asked to decide a complex legal issue: the constitutionality
25 of EHB 2901. The legal issue in this case, on the other hand, is simple and straight-forward. The reason
26 for Defendants' lack of confidence in this Court's ability to decide a simple and straight-forward legal
issue in advance of the November election remains a mystery.

⁹ *City of Seattle v. Yes for Seattle*, 122 Wn.App. 382, 386, 93 P.3d 176 (2004).

¹⁰ *Id.*

¹¹ *Id.* (citations and quotations omitted).

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - 2

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 *Yes for Seattle* confirms that the City's pre-election challenge of the proposed Income Tax
2 Initiative is proper.¹² And our Supreme Court, most recently on February 4, 2016, reaffirmed the
3 long line of authority recognizing the propriety of preelection challenges to local direct
4 legislation. *Spokane Entrepreneurial Ctr. v. Spokane Moves*, 185 Wn.2d 97, 369 P.3d 140
5 (2016).¹³ This action is properly before this Court for action prior to the 2016 general election.

6 **3. THE CITY IS ENTITLED TO INJUNCTIVE RELIEF BECAUSE THE**
7 **PROPOSED INCOME TAX INITIATIVE CLEARLY EXTENDS BEYOND**
8 **LOCAL INITIATIVE POWER.**

9 The proposed Income Tax extends beyond the scope of local initiative power.¹⁴ None of
10 Defendants' three arguments has merit. This Court should not defer ruling on the validity on the
11 proposed Income Tax Initiative or refrain from issuing injunctive relief

12 **3.1 The City's Right to Bring Preelection Challenges to Unlawful Initiatives.**

13 The proposed Income Tax Initiative involves powers expressly granted to the City's
14 legislative body alone; and, the proposed Income Tax Initiative conflicts with RCW 36.65.030
15 which unambiguously prohibits city taxes on net income. Contrary to Defendants' first
16 argument,¹⁵ the City **does** have a clear legal or equitable right to prevent the proposed Income
17 Tax Initiative from appearing on the ballot.¹⁶

18
19
20 ¹² The Court of Appeals went on to explain how the initiative proponent's argument also failed under
21 *Reed*, even though that was not the basis for the Court's holding. Without citing to any legal authority,
22 Defendants also argue that courts should only conduct pre-election reviews if "final appellate decisions"
23 can be reached prior to elections. But none of the cases cited by Defendants stand for that proposition.
24 Considering how "final appellate decisions" can take years to obtain, Defendants' suggestion would
25 effectively eliminate pre-election review entirely.

26 ¹³ And, reconsideration was denied on April 1, 2016. 2016 Wash. LEXIS 465 (Wash., Apr. 1, 2016)

¹⁴ See City's Opening Brief.

¹⁵ Defendant's Opposition at pp. 11-14.

¹⁶ *Spokane Entrepreneurial Ctr. v. Spokane Moves* ("courts will review local initiatives and referendums
to determine, notably, whether 'the proposed law is beyond the scope of the initiative power.'") citing
City of Port Angeles v. Our Water-Our Choice!, 170 Wn.2d 1, 7, 239 P.3d 589 (2010) (quoting *Seattle*
Bldg. & Constr. Trades Council, 94 Wn.2d 740, 746, 620 P.2d 82 (1980)).

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - 3

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 **3.2 The City’s Standing to Bring a Preelection Challenge to Unlawful Initiatives.**

2 Defendants’ second argument neglects to mention *City of Longview v. Wallin* (and
3 similar cases).¹⁷ The reason is that *City of Longview* completely undermines Defendants’
4 argument. There the Court affirmed the trial court’s order enjoining invalid portions of the
5 proposed city initiative from appearing on the ballot after finding that the financial burden of
6 placing an invalid initiative on the ballot was sufficient injury in fact to warrant injunctive relief.
7 Accordingly, Defendants’ second argument is without merit.¹⁸

8 **3.3 The City’s Timely Action on The Unlawful Proposed Income Tax Initiative.**

9 The City of Olympia expeditiously filed this action within 10 days of the County
10 Auditor’s Certification of the proposed Income Tax Initiative.¹⁹ Here is the chronology:

- 11 • July 6, 2016: Defendants filed the proposed Income Tax Initiative and
12 the City forwarded the proposed Income Tax Initiative to the County
13 Auditor;
- 14 • July 12, 2016 (six days later): the City Council authorized seeking a
15 judicial declaration that the proposed Income Tax Initiative was invalid;
- 16 • July 13, 2016 (one day later): the County Auditor certified the proposed
17 Income Tax Initiative;
- 18 • July 22, 2016 (nine days later): the City filed its Complaint; and
- 19 • July 29, 2016 (seven days later): the City filed its Motion for Declaratory
20 Judgment and Injunctive Relief.²⁰

21 ¹⁷ See *City of Longview v. Wallin*, 174 Wn.App. 763, 301 P.3d 45 (Div. 1 2013). *And, see, Spokane*
22 *Entrepreneurial Ctr. v. Spokane Moves* (Court declines to adopt heightened standing requirements for this
23 type of action).

24 ¹⁸ See Defendants’ Opposition at pp. 13:11 – 14:4.

25 ¹⁹ Defendants’ argument implies that the proposed Income Tax Initiative was filed in April. But that is
26 patently false. As the evidence on record confirms, the City was only provided with a draft of the
proposed initiative in April 2016, and that draft initiative was not even the version of the proposed
Income Tax Initiative filed on June 6, 2016. Moreover, the City could not have sought declaratory relief
in April because there was no actual justiciable controversy at that time.

²⁰ See City’s Opening Brief at pp. 2-3. Similarly unwarranted is Defendants’ accusation that the City
somehow “forced” Defendants’ former counsel from representing Defendants in this matter. The City did
not create the Rules of Professional Conduct, and the City is not responsible for Defendants’ failure to
confirm that Defendants’ former counsel conducted a conflicts check.

1 Defendants argument that the City has unclean hands is unfounded.²¹ Defendants absurdly
2 accuse the City of “flouting the rule of law to gain a political advantage” by delaying this legal
3 proceeding for **100 days**.²² The uncontested facts speak for themselves. There was no delay.
4 The City acted timely based on a filed initiative, not on a hypothetical proposal.

5 **4. THE CITY HAS SATISFIED ITS BURDEN TO SHOW THAT THE ENTIRE**
6 **PROPOSED INCOME INITIATIVE IS INVALID.**

7 Defendants ask this Court to parse the Initiative and sever provisions unrelated to the
8 illegal income tax. But the entire proposed Income Tax Initiative is about the levying and
9 appropriation of the proposed income tax:

- 10 • Section 1 sets forth the proposed ordinance enacting **the income tax**;
- 11 • Section 2 defines terms enacting **the income tax**;
- 12 • Section 3 assesses **the income tax**;
- 13 • Section 4 establishes a fund to deposit **the income tax**;
- 14 • Section 5 sets for qualifications for appropriation of **the income tax**; and
- 15 • Section 6 concerns implementation and accountability for the levying and
16 appropriation of **the income tax**.

17 Stated otherwise, severing the income tax components from the proposed Income Tax Initiative
18 leaves nothing left (as confirmed by Defendants’ failure to specify whatever “remainder” would
19 remain). Accordingly, the Defendants’ argument fails.

20 Further, the appropriation portion (for college tuition) of the proposed Income Tax
21 Initiative is invalid for two separate reasons. First, without a source of funds, there is no fund and
22 no source for an appropriation. And, most significantly, the power of appropriation, just as the
23 power of taxation, is not subject to direct legislation. That power is vested by the Legislature in a
24 city’s local legislative body alone. *See* RCW 35A.11.090 (4) and (7); RCW 35A.13.190.

25 _____
26 ²¹ *See* Defendants’ Opposition at p. 14:5-24.

²² *See id.*

1 **5. THE POWER OF LOCAL TAXATION IS VESTED EXCLUSIVELY IN LOCAL**
2 **LEGISLATIVE BODIES.**

3 The local initiative power is available only to cities “corporate” powers; it does not apply
4 to powers granted local legislative bodies.²³ RCW 35A.11.020 unambiguously establishes that
5 the power of local taxation for code cities is vested exclusively in local legislative bodies:
6 “Within constitutional limitations, **legislative bodies** of code cities **shall have** within their
7 territorial limits **all powers of taxation for local purposes....**” Accordingly, it follows that
8 initiative power cannot apply to local taxation and that the proposed Income Tax Initiative
9 (which seeks to impose a local income tax) extends beyond the scope of local initiative power.²⁴

10 Defendants argue that the power of local taxation is not vested exclusively in local
11 legislative bodies because RCW 35A.82.020 grants the power to impose excise taxes to cities as
12 a whole (as opposed to their legislative bodies), thereby legitimizing the proposed Income Tax
13 Initiative.²⁵ But Defendants’ argument fails for at least two reasons: (1) Defendants misconstrue
14 the statutory framework for local taxation; and (2) the proposed Income Tax Initiative does **not**
15 seek to impose an excise tax on businesses, the type of tax authorized by RCW 35A.82.020.

16 **5.1 The Power To Impose Excise Taxes Is Not Granted To Cities As A Whole.**

17 “[M]unicipal corporations are without any inherent power of taxation, being dependent
18 upon legislative grant for their enjoyment of such power.”²⁶ The state Legislature granted local
19 legislative bodies the exclusive power to impose local taxes under RCW 35A.11.020 (“Within
20 constitutional limitations, **legislative bodies of code cities** shall have within their territorial
21 limits all powers of taxation for local purposes”). Chapter 35A.82 RCW authorizes the local
22 taxes that legislative bodies are empowered to enact (e.g., state shared excise taxes in RCW
23 35A.82.010; regulation excise taxes in RCW 35A.82.020; and taxes on certain business activities

24 ²³ Attached to this brief at Appendix I is a list showing corporate powers subject to direct legislation, at
25 *Initiative and Referendum Guide for Washington Cities and Charter Counties* (Municipal Research and
26 Services Center of Washington, 2015), available at www.mrsc.org/publications/publications.aspx .

²⁴ See City’s Opening Brief at pp. 6 -8.

²⁵ See Defendants’ Opposition at pp. 16-21.

²⁶ *City of Wenatchee v. Chelan County PUD No. 1*, 181 Wn. App. 326, 335, 325 P.3d 419 (Div. 3 2014).

REPLY IN SUPPORT OF PLAINTIFF’S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - 6

CITY OF OLYMPIA
City Attorney’s Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 in RCW 35A.02.050). Under this statutory framework, therefore, the local taxes enumerated in
2 Chapter 35A.82 RCW can be imposed **only** by local legislative bodies. Because local legislative
3 bodies have the exclusive power to impose such taxes, they are **not** subject to local initiatives
4 (such as the proposed Income Tax Initiative). Defendants' argument to the contrary fails.²⁷

5 **5.2 The Proposed Income Tax Initiative Does Not Seek To Impose a Business**
6 **Excise Tax.**

7 Defendants argue that the proposed Income Tax Initiative seeks to impose an "excise" tax
8 because it "taxes the privileges of disproportionate use and benefit from city services enjoyed by
9 wealthy residents, such as proximity to city parks which enhance private property enjoyment and
10 values, and higher value police and fire protection services."²⁸ No matter how many different
11 ways Defendants re-characterize the proposed tax, the proposed Income Tax Initiative does not
12 seek to impose an "excise" tax on business, the only type of tax authorized in Chapter 35A.82
13 RCW. Instead, the proposed Income Tax Initiative unambiguously seeks to tax individual's
14 earned "household income."

15 An "excise" tax is tax imposed for the "particular use or enjoyment of property or the
16 shifting from one to another of any power or privilege incidental to the ownership or enjoyment
17 of property."²⁹ As one example, OMC 3.36.010 imposes an excise tax for "occupying or using
18 publicly owned real and personal property within the city." As another example, the Estate and
19 Transfer Tax Act imposes an excise tax for the transfer of property from a decedent's estate.³⁰
20 The proposed Income Tax Initiative's tax on "household income" is **not** an "excise" tax because
21 the proposed tax would **not** be imposed for the use, ownership, or enjoyment of property;
22 instead, the proposed tax would be based exclusively on an individual's earned "household

23 ²⁷ And even if RCW 35A.82.020 was somehow subject to local initiatives, the statute only involves
24 imposing a business tax; it does not – and cannot – serve as a basis for taxing an individual's income. *See*
25 *Cary v. Bellingham*, 41 Wn.2d 468 (1952) (business taxes cannot be imposed on an individuals' right to
26 earn a living by working for wages).

²⁸ *See* Defendants' Opposition at p. 20:3-6.

²⁹ *In re Estate of Hambleton*, 181 Wn.2d 802, 811, 335 P.3d 398 (2014).

³⁰ *See id.*

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - 7

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 income” **without** regard to whether that individual uses, owns, or enjoys any property within the
2 City limits. Accordingly, even if an excise tax is not within the exclusive control of a city
3 legislative body, this Court should reject Defendants’ attempt to bring the proposed Income Tax
4 Initiative within the scope of the local initiative power by simply re-characterizing the tax as an
5 “excise” tax (which it is not).

6 **6. CHAPTER 91, LAWS OF 1984 IS NOT UNCONSTITUTIONAL.**

7 Because the proposed Income Tax Initiative clearly conflicts with RCW 36.65.030,
8 Defendants claim RCW 36.65.030’s enabling legislation violates the “single-subject rule” and
9 the “subject-in-title rule.”³¹ Chapter 91, Laws of 1984 (a portion of which is codified at RCW
10 36.65.030) is **not** unconstitutional.³²

11 **6.1 Chapter 91, Laws of 1984 Does Not Violate The “Single-Subject Rule.”**

12 Chapter 91, Laws of 1984 is entitled “AN ACT relating to local government; and adding
13 a new chapter to Title 36 RCW.” The title is a general title (as opposed to a restrictive title), and
14 the “rational unity” requirement is satisfied because the substantive provisions of Chapter 91,
15 Laws of 1984 are all directly related to the general subject set forth in the title (i.e., “local
16 governments”).³³ Accordingly, there can be no reasonable suggestion of logrolling legislation by
17 attaching it to other legislation.

18 Defendants mistakenly argue that Chapter 91, Laws of 1984 violates the “single-subject
19 rule” because “prohibiting cities and counties from levying a tax on net income is a different
20 subject than the primary subject of establishing the city-county form of municipal
21 government.”³⁴ But, again, Defendants mischaracterize the title of Chapter 91, Laws of 1984.

22
23 ³¹ See Defendants’ Opposition at pp. 21-23.

24 ³² This Court recognizes that the Defendants bear the burden of proof beyond a reasonable doubt that a
25 statute is unconstitutional. *Sch. Districts’ All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d
26 599, 605, 244 P.3d 1 (2010) (“In Washington, it is well established that statutes are presumed
constitutional and that a statute’s challenger has a heavy burden to overcome that presumption; the
challenger must prove that the statute is unconstitutional beyond a reasonable doubt.”)

³³ See City’s Opposition at pp. 6-9.

³⁴ Defendants’ Opposition at p. 22:3-4.

1 Chapter 91, Laws of 1984 is “AN ACT relating to local government;” not an act relating to city-
2 county government, and the prohibition of net income taxes by cities, counties, and city-counties
3 is directly related to “local government.”

4 **6.2 Chapter 91, Laws of 1984 Does Not Violate The “Subject-In-Title Rule.”**

5 The title of Chapter 91, Laws of 1984 (i.e., “AN ACT relating to local government”)
6 gives notice that would lead to an inquiry into the body of the act (which consists of substantive
7 provisions that are directly related to “local government”).³⁵ Chapter 91, Laws of 1984 does not
8 violate the “subject-in-title rule.” Defendants again misrepresent the title of Chapter 91, Laws of
9 1984 claiming the title relates only to city-county governments. But the Act’s title clearly gives
10 notice that the act contain provisions concerning “local governments” (e.g., cities, counties, and
11 city-counties alike). Defendants’ “subject-in-title rule” argument is wrong.

12 **7. THE PROPOSED INCOME TAX INITIATIVE WOULD TAX NET INCOME.**

13 As a final resort, Defendants argue that the proposed Income Tax Initiative does not
14 conflict with RCW 36.65.030 because the proposed Income Tax Initiative would not levy a tax
15 on net income.³⁶ More specifically, Defendants argue that “net income” necessarily refers to a
16 type of business tax, and not a tax on an individual’s income.³⁷ But Defendants’ argument is
17 without merit for at least two reasons.

18 Chapter 35A.82 RCW authorizes cities to levy various local business taxes.³⁸
19 Defendants’ interpretation of “net income” in RCW 36.65.030 (i.e., as applying to business taxes
20 only) would prohibit cities from levying such local business taxes (including those specifically
21 authorized by Chapter 35A.83 RCW). Accordingly, Defendants’ interpretation of “net income”
22 must be rejected because it would render other local tax statutes meaningless.

23
24 ³⁵ See City’s Opposition at p. 9, citing to *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183,
207, 11 P.3d 762 (2000); see also *Filo Foods v. City of Sea-Tac*, 183 Wn.2d 770, 357 P.3d 1040 (2015)
25 (The language of the title “is sufficiently broad to place voters on notice of its contents.”).

26 ³⁶ Defendants’ Opposition at pp. 23:8 – 24:9.

³⁷ *Id.*

³⁸ See, e.g., RCW 35A.02.050 (authorizing local tax on certain business activities).

REPLY IN SUPPORT OF PLAINTIFF’S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - 9

CITY OF OLYMPIA
City Attorney’s Office
P.O. Box 1967/601 – 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 Defendants' argument also fails because the plain meaning of "net income" is not
2 restricted to business income under Washington law or other law.³⁹ As Defendants even
3 concede, "net income" is used in Washington statutes as applying to an individual's income. *See*,
4 *e.g.*, RCW 26.19.071 (calculating child support obligations based on an individual's "net
5 income"). Accordingly, Defendants' argument fails because it defies the plain meaning of "net
6 income" as applied in other Washington statutes.

7 **8. CONCLUSION**

8 The Olympia City Council is not blind to this State's issues regarding both taxation and
9 education funding:

10 The City Council recognizes that any attempt to address the cost of higher
11 education and public revenue options will require long-term, systemic change
12 based upon adequate study, public engagement, dialogue and deliberation. The
13 Olympia City Council further recognizes the far reaching and significant
14 beneficial impact of improved access to post-secondary education and vocational
15 training and supports efforts to reduce student loan debt and address a regressive
16 state and local tax system which places a larger burden upon those least able to
17 pay.⁴⁰

18 But the Council also recognized that the proposed Income tax Initiative is unlawful. As a result,
19 it asks this Court to enjoin the proposed Income Tax Initiative.⁴¹

20 The City respectfully requests that this Court: (1) issue an order denying Defendant-
21 Petitioners' Petition For Prevention Of Election Error And Motion For Injunctive Relief;
22 (2) issue an order declaring that the proposed Income Tax Initiative, in its entirety, is invalid,
23 null, and void because it extends beyond the scope of the local initiative power and conflicts with
24 state law; and (3) issue an injunction that bars Thurston County and the Thurston County Auditor
25 from placing the proposed Income Tax Initiative from appearing on the State general election
26 ballot in November 2016.

³⁹ For example, under federal law on state taxation of interstate commerce (15 U.S. Code Subchapter I, in particular Section 381) the term "net income tax" refers to state or local income taxes on corporations or individuals.

⁴⁰ Clerk's Document Declaration at Ex. 4 (Resolution No. M-1847 at 1.11, July 26, 2016).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DATED this 22nd day of August, 2016.

OFFICE OF THE CITY ATTORNEY
Mark Barber, WSBA No. 8379
Olympia City Attorney,
Annaliese Harksen, WSBA No. 31132
Deputy City Attorney,
Email: mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us
and

s/ P. Stephen DiJulio
P. Stephen DiJulio, WSBA No. 7139
Jason R. Donovan, WSBA No. 40994
FOSTER PEPPER PLLC
1111 Third Avenue
Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: steve.dijulio@foster.com
j.donovan@foster.com
Attorneys for Plaintiff City of Olympia

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - 11

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

Appendix I

Examples of specific statutory grants of power to municipal corporations

These topics may be subject to initiative and referendum powers if the other statutory and judicial limitations on the powers are satisfied.

Statutory Grants	RCW
Petition for Reduction of City Limits	35.16.010
Power to Provide Auxiliary Water System for Fire Protection	35.21.030
Power to Create Equipment Fund	35.21.088
Power to Establish, Construct and Maintain Dikes and Levees	35.21.090
Power to Accept Donations of Property	35.21.100
Authorization to Construct, Acquire and Maintain Ferries	35.21.110
Power to Establish Solid Waste Handling System	35.21.120
Power to Establish Sewers, Drainage and Water Supplies	35.21.210
Power to Regulate Sidewalks	35.21.220
Authority to Require Removal of Debris/Plants	35.21.310
Authority to Establish Lake Management Districts	35.21.403
Authority to Establish Youth Agencies	35.21.630
Authority to Assist Development of Low Income Housing	35.21.685
Authority to Own/Operate Professional Sports Franchise	35.21.695
Authority to Acquire/Construct Multi-Purpose Community Center	35.59.030
Authority to Participate in World Fairs and Expositions	35.60.030
Authority to Construct Sidewalks, Gutters, Curbs, etc.	35.68.010
Authority to Erect/Maintain Draw Bridges	
Authority to Regulate and License Bicycles	35.75.010
Authority to Provide Off-Street Parking Facilities	35.86.010
Authority to Acquire and Operate Municipal Utilities Generally	35.92.010
Authority to Require Conversion to Underground Utilities	35.96.030
Authority to Establish Heating Systems	35.97.020
Power to Adopt Code City Status	35A.02.010
Power to Adopt Charter Code City Status	35A.07.010
Authority for Library, Museum and Historical Activities	35A.27.010
Authority for Joint Acquisition of Land for Schools	35A.28.010
Authority for Joint Facilities and Agreements Intergovernmental Relations Civic Center, Jails, Armories	35A.35.010

Statutory Grants

	RCW
Authority for Emergency Services Participation	35A.38.010
Authority for Granting of Property for Highways and Streets	35A.47.010
Authority for Local Regulatory Option on Sale of Liquor	Ch.35A.66
Authority to Acquire Recreational Facilities	Ch.35A.67
Authority to Acquire Cemeteries/Morgues	Ch.35A.68
Authority to Regulate Food and Drugs	Ch.35A.69
Authority to Regulate Health and Safety	Ch.35A.70
Authority to Provide for the General Welfare	Ch.35A.74
Power to Acquire, Use and Manage Property and Materials	Ch.35A.79
Authority to Provide Public Utilities	Ch.35A.80
Authority to Regulate Harbors and Navigation	Ch.35A.88

EXHIBIT E

4

EXHIBIT E

16-2-02998-34
OR
Order
548112



FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2016 AUG 24 PM 4:25

Linda Myhre Enlew
Thurston County Clerk

<input type="checkbox"/> EXPEDITE
<input type="checkbox"/> No Hearing set
<input checked="" type="checkbox"/> Hearing is set: Date: August 24, 2016 Time: 3:00 p.m. Judge/Calendar: Honorable Jack Nevin/Civil

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor,

Defendants.

No. 16-2-02998-34

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF

THIS MATTER came on specially pursuant to: (a) Plaintiff's Motion For Declaratory Judgment And Injunctive Relief; and (b) Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim. The Court reviewed and considered the records and files herein, including:

1. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief;
2. Document Declaration Of Jane Kirkemo, City Clerk (with attached exhibits);
3. Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim (with attached exhibits);
4. Affidavit Of Ray Guerra;
5. Defendants-Petitioners' Brief In Support Of Petition For Prevention Of Election Error And Motion For Injunctive Relief;

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 1

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

- 1 6. Declaration Of Claire Tonry (with attached exhibits);
- 2 7. City Of Olympia's Answer To Petition And Affidavit For Prevention Of Election
- 3 Error And Counterclaim;
- 4 8. Plaintiff's Opposition To Defendants/Petitioners' Petition For Prevention Of
- 5 Election Error And Motion For Injunctive Relief;
- 6 9. Second Declaration Of Claire Tonry (with attached exhibits);
- 7 10. Defendant Thurston County And Thurston County Auditor's Motion For
- 8 Accelerated Review And Response To Opportunity For Olympia's Petition For Prevention Of
- 9 Election Errors;
- 10 11. Plaintiff's Reply In Support Of Plaintiff's Motion For Declaratory Judgment And
- 11 Injunctive Relief; and

- 12 12. Opportunity For Olympia's And Ray Guerra's Reply To Plaintiff's Opposition
- 13 Brief. 13. ~~DOCUMENT DECLARATION OF ANNALIESE MARKS~~ *9. h*

- 14 In addition, the Court reviewed:
- 15 1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief;
 - 16 2. [Proposed] Freedom Foundation's Amicus Curiae Brief; and
 - 17 3. Opportunity For Olympia's Opposition To Freedom Foundation's Motion For
 - 18 Leave To File Amicus Curiae Brief.

19 Having considered the pleadings and submissions in this case, it is hereby ORDERED,
 20 ADJUDGED and DECREED that:

- 21 1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief is
- 22 ~~(GRANTED) DENIED~~;
- 23 2. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief is
- 24 **GRANTED**; and
- 25 3. Defendants' Petition For Prevention Of Election Error And Motion For Injunctive
- 26 Relief is **DENIED**.

ORDER GRANTING PLAINTIFF'S MOTION FOR
 DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
 DENYING DEFENDANTS' PETITION FOR PREVENTION OF
 ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 2

CITY OF OLYMPIA
 City Attorney's Office
 P.O. Box 1967/601 - 4th Ave. E.
 Olympia, Washington 98507-1967
 Telephone: (360) 753-8338

opportunity for Olympia

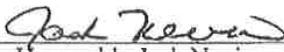
1 Accordingly, this Court:

qk

2 1. Declares that the proposed ~~Income~~ Tax Initiative, in its entirety, is invalid, null,
3 and void because it extends beyond the scope of the local initiative power; and

4 2. Enjoins Thurston County and the Thurston County Auditor from placing the
5 proposed ~~Income~~ Tax Initiative on the State general election ballot in November 2016.

6 DATED: August *24*, 2016.

7
8 
9 The Honorable Jack Nevin
Superior Court Judge (Visiting)

10 Presented by:

11 OFFICE OF THE CITY ATTORNEY
12 Mark Barber, WSBA No. 8379
13 Olympia City Attorney,
14 Annaliese Harksen, WSBA No. 31132
15 Deputy City Attorney,
16 Email: mbarber@ci.olympia.wa.us
17 Email: aharksen@ci.olympia.wa.us
18 and

19 
20 P. Stephen DiJulio, WSBA No. 7139
21 Jason R. Donovan, WSBA No. 40994
22 FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
23 Seattle, Washington 98101-3292
24 Phone: (206) 447-4400 / Fax: (206) 447-9700
25 Email: steve.dijulio@foster.com
26 Email: j.donovan@foster.com
Attorneys for Plaintiff City of Olympia

23 ///
24 ///
25 ///

ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 3

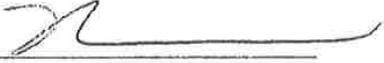
CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 Copy Received:

2 SMITH & LOWNEY PLLC

3

4

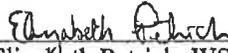
5 
6 Knoll Lowney, WSBA No. 23457
7 Claire Tonry, WSBA No. 44497
8 2317 E. John Street
9 Seattle, WA 98122
10 Tel: (206) 860-2883
11 Email: knoll@igc.org
12 Email: clairet@igc.org
13 Attorneys for Defendants Opportunity For Olympia;
14 Ray Guerra; and Danielle Westbrook

11

12 JON TUNHEIM
13 PROSECUTING ATTORNEY

13

14

15 
16 Elizabeth Petrich, WSBA No. 18713
17 Chief Civil Deputy Prosecuting Attorney
18 2000 Lakeridge Drive SW, Bldg No. 5
19 Olympia, WA 98502
20 Tel: (360) 786-5574
21 Email: petrice@co.thurston.wa.us
22 Attorneys for Defendants Thurston County; and
23 Mary Hall, Thurston County Auditor

20

21

22

23

24

25

26

ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 4

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

EXHIBIT F

EXHIBIT F

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

CITY OF OLYMPIA,)	
)	
Plaintiff,)	NO. 16-2-02998-34
)	
vs.)	COA NO. 49333-1-II
)	
OPPORTUNITY FOR OLYMPIA, a)	
Washington Political Committee;)	
RAY GUERRA; DANIELLE WESTBROOK;)	
THURSTON COUNTY; and MARY HALL)	
Thurston County Auditor,)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
Ruling of the Court

BE IT REMEMBERED that on August 24, 2016,
the above-entitled and numbered cause came on for motion
hearing before the HONORABLE JACK NEVIN, visiting judge
of Pierce County Superior Court, appearing at Thurston
County Superior Court, Olympia, Washington.

Cheri L. Davidson
Official Court Reporter
Thurston County Superior Court
Olympia, Washington 98502
(360)786-5570
davidsc@co.thurston.wa.us

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

For the Plaintiff: P. STEPHEN DiJULIO
Attorney at Law
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101-3292

MARK E. BARBER
ANNALIESE HARKSEN
Attorneys at Law
Office of the City of Olympia
PO Box 1967/601
Olympia, WA 98507-1967

For the Defendants: KNOLL LOWNEY
(OFO/Guerra/
Westbrook) CLAIRE TONRY
Attorneys at Law
Smith & Lowney, P.L.L.C.
2317 East John St.
Seattle, WA 98112

For the Defendant: ELIZABETH PETRICH
(County) Chief Civil DPA
Thurston County Prosecutor's Office
Civil Division
2000 Lakeridge Drive SW, Bldg. 5
Olympia, WA 98502

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

AUGUST 24, 2016

THE HONORABLE JACK NEVIN, PRESIDING

* * * * *

(After hearing argument, the Court ruled as follows.)

THE COURT: I have spent a substantial amount of time on this matter in preparing for today's hearing. And counsel is right when they say that this is different than the prior initiative case that I heard and the answer is it is. And I think, moreover, every one of these cases has a commonality of processes and commonality of issues that present, yet one has to appreciate the differences. One always has to appreciate the differences.

I think that there is a notion that sometimes gets lost in these kinds of cases and that is that each side is committed through admittedly different avenues and different ways to the public good. I think counsel for the City has acknowledged that this is a good cause. This is a noble cause. This is, as they have correctly pointed out, however, not something in which we are deciding or not deciding how the State of Washington handles education, specifically community college education, but, rather, it is for the Court not the nobility of the

1 cause or perhaps what some people argue to be the
2 shortcomings in funding of public education in the
3 state of Washington, and specifically community
4 college education, but instead, it is a question of
5 whether the law allows this.

6 I am first going to state my decision in this
7 matter, and then I am going to more specifically set
8 forth not in great detail but in greater detail than
9 just what my finding is.

10 The question posed first is whether the proposed
11 tax initiative seeking to establish an income tax in
12 the City is invalid because it extends beyond the
13 scope of the local initiative power. I find that it
14 does extend beyond that, and therefore it is invalid.

15 The second question is whether this Court should
16 enter an order enjoining the proposed income tax
17 initiative from appearing on the November ballot, and
18 I am rendering that ruling.

19 Now, more specifically, I am relying upon the
20 cases cited by all parties in their initial
21 authorities. I am also including the Spokane County
22 *Spokane Entrepreneurial* case, which I had on a
23 computer here until apparently a few minutes ago, as
24 well. I am looking at the income tax initiative that
25 was an appendix to the Opportunity for Olympia's

1 political committee registration, the minutes from
2 the City Council, City Resolution M-1847, City
3 Resolution M-1846.

4 I find specifically that the City's pre-election
5 challenge to the tax initiative is permissible and is
6 appropriate given the nature of what is presented in
7 this case. I further find that the City has standing
8 to challenge the proposed tax initiative. I believe
9 that declaratory relief and injunctive relief are
10 proper because the proposed income tax initiative
11 does extend beyond the local initiative power. I
12 believe it involves powers that are granted to the
13 City's governing body and not to the City as a whole.
14 And I emphasize that because I feel as if that
15 proposition lies in large part at the heart of the
16 analysis. I believe that therefore it does conflict
17 with the state law prohibiting income tax.

18 I just don't find that there is a constitutional
19 issue here. I don't find that this is a matter of
20 the constitutionality of income tax. I find that I
21 am persuaded, to the extent that the City has
22 responded to that issue -- I don't think this is a
23 matter of constitutionality; perhaps I will stand to
24 be corrected on that, but I simply do not.

25 I am not sure that I need to address the issue of

1 the statutory requirements for special elections. I
2 am not rendering a finding on that, but I am issuing
3 an order based upon what I have indicated prior, that
4 I am going to issue an order declaring the proposed
5 tax and the initiative in its entirety is invalid
6 because it does extend beyond the scope of the local
7 initiative power.

8 I am going to issue an injunction that bars
9 Thurston County and the Thurston County Auditor from
10 placing the proposed tax initiative from appearing on
11 the state general election ballot in November of
12 2016.

13 Now, I am prepared to sign an order to that
14 effect. If counsel wish instead to craft an order
15 and extend it to me in my courtroom, they can do
16 that.

17 MR. DiJULIO: Your Honor, I am handing to the
18 Court what is a plain vanilla form of order for the
19 Court's consideration. The proposed form of order
20 lists the documents, including a document filed
21 today, Declaration of Annaliese Harksen. The Court
22 did not address the Freedom Foundation's motion and
23 amicus brief, and we left that open for the Court's
24 consideration of whether or not that is granted or
25 denied.

1 THE COURT: I will -- I mean, I have read it
2 in its totality. I did not include that here in my
3 finding. I did allow for that to occur.

4 MR. DiJULIO: So that motion is to be granted?

5 THE COURT: Yes.

6 MR. DiJULIO: The order goes on to say,
7 "Plaintiff's motion for declaratory judgment and
8 injunctive relief is granted and defendant's petition
9 for prevention of election error and motion for
10 injunctive relief is denied. Accordingly, this Court
11 declares that the proposed income tax initiative, in
12 its entirety, is invalid, null, and void because it
13 extends beyond the scope of the local initiative
14 power and enjoins Thurston County and the Thurston
15 County Auditor from placing the proposed income tax
16 initiative on the state general election ballot in
17 November 2016."

18 And I do believe it's in all parties' interest to
19 have the Court enter an order as soon as practicable
20 in light that there is further action in light of the
21 timing.

22 THE COURT: I agree. I can look at your
23 proposed order right now. I'm not going anywhere, so
24 just bear with me. I am very sensitive to the notion
25 that time is of the essence here, and I don't want

1 any party to be disadvantaged in any way because of
2 some sort of a delay by the Court signing an order,
3 so I intend to take care of this right now.

4 MS. TONRY: Your Honor, if I may? Petitioners
5 object to the use of the phrase "income tax" in the
6 proposed order. We believe that the given name for
7 the initiative should be used or simply initiative.
8 It's prejudicial to our positions here, and it hasn't
9 been found today.

10 THE COURT: Mr. DiJulio?

11 MR. DiJULIO: If the Court wishes to -- we
12 believe it's an accurate statement.

13 THE COURT: Well, I believe it's an income tax
14 as well, to be honest, but I also don't want to be
15 misleading in the record and misstating what it's
16 titled. So I may believe that it's for all intents
17 and purposes an income tax, but I certainly want to
18 be fair to the responding party as to what it is
19 titled, if you see the distinction that I'm trying to
20 draw there.

21 MR. DiJULIO: I recognize it, Your Honor. The
22 Court can certainly strike the phrase or the word
23 "income" from both the order sections one and two,
24 before the signature line and initial both as well as
25 the other interlineations that you're initialing.

1 THE COURT: Okay. So would you say that
2 again? I want to make sure I'm following here.
3 Let's do that one more time so I can understand.

4 MR. DiJULIO: Ms. Tonry will correct me if I'm
5 mistaken, but in terms of edits that the Court would
6 initial, it would be the reference to the document,
7 Declaration of Annaliese Harksen, item 13 on page two
8 of the proposed order.

9 THE COURT: Well, I have read that and I read
10 that as you were making your presentation, Mr.
11 DiJulio, so it is part of what I have considered. I
12 have initialed that.

13 MR. DiJULIO: And then below that with respect
14 to the Freedom Foundation --

15 THE COURT: Granted.

16 MR. DiJULIO: I've stricken "denied" on that
17 and initialed that.

18 THE COURT: Granted.

19 MR. DiJULIO: And on the third page of the
20 proposed form of order, the Court will strike the
21 word "income" in the first line of item, well,
22 paragraph two and also in the second line of the
23 second paragraph. I've initialed those as well.

24 MS. TONRY: Counsel, I need to correct
25 something that is wrong. The official title of this

1 initiative is given in the Thurston County Auditor's
2 certification - and it's a long title - but it's the
3 Opportunity for Olympia Initiative, and that's the
4 proper name that should be used, capitalizing income
5 tax initiative just as an official name.

6 THE COURT: Opportunity for Olympia Initiative
7 as opposed to tax initiative. I mean, the record
8 speaks for itself. I have said what my take is on
9 this.

10 Now, I will be honest with you. Going through the
11 depth of all of this, as I did this past weekend, I
12 have to be honest with you, I did spend a lot of time
13 on this notion of the right of the Freedom Foundation
14 wishing to file an amicus brief. I don't have any
15 opposition to them doing that. I mean, I read their
16 materials.

17 MR. DiJULIO: The City takes no position on
18 that, Your Honor. There was an opposition filed by
19 the initial sponsors I believe.

20 THE COURT: And forgive me from being a person
21 from farther up north out in the country, but I must
22 admit to you, I'm not particularly familiar with the
23 Freedom Foundation, but I get a sense that you are.
24 So what would you like to tell me your position is on
25 that?

1 MS. TONRY: I'm not intimately familiar with
2 the Freedom Foundation myself, Your Honor, but our
3 opposition to their request to file an amicus brief
4 in the trial court, which is unusual -- as I note,
5 there is no process for it, but, moreover, the issues
6 raised in that brief were completely irrelevant to
7 the issues in this case as Your Honor has decided
8 today. Those issues were not taken up. It's
9 superfluous. We think it should not be allowed.

10 THE COURT: Well, what I did read -- yes. And
11 there were some submissions from the Freedom
12 Foundation; am I right?

13 MS. TONRY: There were.

14 THE COURT: You don't take a position?

15 MR. DiJULIO: The City takes no position.

16 THE COURT: You have persuaded me. I mean, I
17 don't mean to be cavalier about this, but it seems to
18 me that both parties have very, very precise and
19 specific points they are trying to make. It seems to
20 me that if we can efficiently - if you will pardon
21 the expression - package this ruling, that will be
22 better for any other entity that is reviewing it. It
23 will be more efficient.

24 I think I have answered all the questions here. I
25 have read this ruling. This order is consistent with

1 my ruling in this matter. I think that's it.

2 MS. TONRY: There is one more thing, Your
3 Honor. I apologize to take our time this afternoon,
4 but it's very important to my clients. I would like
5 to make an oral motion pursuant to civil rules, if
6 Your Honor would permit.

7 THE COURT: You are free to make your record.
8 You can proceed.

9 MS. TONRY: Thank you.

10 Opportunity for Olympia and Ray Guerra
11 respectfully move for limited injunctive relief
12 pending appeal in this case. We specifically request
13 only that the Court order the City to issue the
14 ballot title that it has already prepared and that it
15 has stipulated in the record to issuing today if the
16 Court had ruled in our favor. This requested relief
17 is necessary to preserve Opportunity for Olympia's
18 rights on appeal, and it will also permit the Court
19 of Appeals from having to hear an immediate motion
20 for emergency relief this week.

21 The County Auditor, again, must have the final
22 ballot title by September 14th, which leaves -- which
23 is 14 court days from today, and there must be a 10
24 court day ballot title appeal period between the
25 issuance of the ballot title and the finalization of

1 the ballot title through that appeal process. So
2 thus, unless the City issues a ballot title in the
3 next two days, it will be impossible to comply with
4 the ballot title appeal statute and ensure that the
5 measure can meet the printing deadline.

6 Again, this will irreparably injure Opportunity
7 for Olympia, petitioners, First Amendment protected
8 free speech rights if an appellate court should
9 decide that the measure should be on the ballot.

10 If the Court would like, I have a copy of the
11 stipulation from the City to hand up as well as a
12 proposed order.

13 THE COURT: Okay. Mr. DiJulio?

14 MR. DiJULIO: Your Honor, I recall arguing a
15 case once where the trial court had issued an
16 injunction and then following hearing on the merits
17 determined to lift the injunction. The question
18 before the Court of Appeals on an emergency motion is
19 should we now -- what is the standard? Well, a
20 similar situation is presented here.

21 The Court Commissioner has already decided the
22 issue once, albeit on a shortened consideration and a
23 more limited record. This Court has now given full
24 consideration to the matter and determined that the
25 initiative is not lawful. Absent a likelihood of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

prevailing on the merits, you cannot issue injunctive relief exercising the Court's equity jurisdiction.

Here, they cannot show a substantial likelihood of prevailing on the merits because the Court has already determined that you cannot. As a result, there is no appropriate method or measure at this time for injunctive relief.

THE COURT: I think that the Court of Appeals is in a position to hear this on an emergency basis. Whether they choose to do so or not obviously is up to the Court of Appeals.

I am going to deny your request and place this totally, to the extent we possibly can, in the hands of the Court of Appeals to decide in its entirety and on an emergency basis, should they decide to do so. Therefore, I respectfully deny the request.

I believe we will be in recess. Thank you all very much.

(Proceedings were concluded.)

EXHIBIT G

EXHIBIT G

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

<input type="checkbox"/> EXPEDITE <input type="checkbox"/> No hearing set <input type="checkbox"/> Hearing is set Date: _____ Time: _____ Judge: _____

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

CITY OF OLYMPIA, A Washington
municipal corporation,

Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a
Washington Political Committee; RAY
GUERRA; DANIELLE WESTBROOK;
THURSTON COUNTY; and MARY HALL,
Thurston County Auditor,

Defendants.

No. 16-2-02998-34

**NOTICE OF APPEAL TO THE
WASHINGTON STATE COURT
OF APPEALS, DIVISION II**

Defendants Opportunity for Olympia, Ray Guerra, and Danielle Westbrook seek review
by the Washington State Court of Appeals, Division II, of the attached Order, entered on August
24, 2016, in the above captioned matter.

Plaintiff, City of Olympia, is represented by:

Mark E. Barber, WSBA No. 8379
Annaliese Harksen, WSBA No. 31132
Office of the City Attorney
P.O. Box 1967/601 - 4th Ave. E.

No. 16-2-02998-34
NOTICE OF APPEAL - 1

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

Olympia, Washington 98507-1967
Telephone: (360) 753-8338
Email: mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us

P. Stephen DiJulio, WSBA No. 7139
Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Email: steve.dijulio@foster.com

Defendant, Mary Hall, Thurston County Auditor, is represented by:

Elizabeth Petrich, WSBA No. 18713
2000 Lakeridge Dr. SW, Bldg. 5
Olympia, WA 98502
Telephone: (360) 786-5540
Email: petrice@co.thurston.wa.us

RESPECTFULLY SUBMITTED this August 24, 2016

SMITH & LOWNEY, PLLC

By 
Knoll Lowney, WSBA # 23457
Claire Tonry, WSBA # 44497
Attorneys for Defendants Opportunity
for Olympia, Ray Guerra, and Danielle
Westbrook
2317 E. John St., Seattle WA 98122
Tel: (206) 860-2883
E-mail: knoll@igc.org,
clairet@igc.org

No. 16-2-02998-34
NOTICE OF APPEAL - 2

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1
2
3
4 EXPEDITE
5 No Hearing set
6 Hearing is set:
Date: August 24, 2016
Time: 3:00 p.m.
Judge/Calendar: Honorable Jack Nevin/Civil

7 SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

8 CITY OF OLYMPIA, a Washington municipal
9 corporation,

10 Plaintiff,

11 v.

12 OPPORTUNITY FOR OLYMPIA, a
13 Washington Political Committee; RAY
14 GUERRA; DANIELLE WESTBROOK;
15 THURSTON COUNTY; and MARY HALL,
Thurston County Auditor,

16 Defendants.

No. 16-2-02998-34

ORDER GRANTING PLAINTIFF'S
MOTION FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF
AND DENYING DEFENDANTS'
PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR
INJUNCTIVE RELIEF

17 THIS MATTER came on specially pursuant to: (a) Plaintiff's Motion For Declaratory
18 Judgment And Injunctive Relief; and (b) Defendant-Petitioners Opportunity For Olympia's And
19 Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim. The
Court reviewed and considered the records and files herein, including:

- 20 1. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief;
- 21 2. Document Declaration Of Jane Kirkemo, City Clerk (with attached exhibits);
- 22 3. Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And
23 Affidavit For Prevention Of Election Error And Counterclaim (with attached exhibits);
- 24 4. Affidavit Of Ray Guerra;
- 25 5. Defendants-Petitioners' Brief In Support Of Petition For Prevention Of Election
26 Error And Motion For Injunctive Relief;

ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 1

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

6. Declaration Of Claire Tonry (with attached exhibits);
7. City Of Olympia's Answer To Petition And Affidavit For Prevention Of Election Error And Counterclaim;
8. Plaintiff's Opposition To Defendants/Petitioners' Petition For Prevention Of Election Error And Motion For Injunctive Relief;
9. Second Declaration Of Claire Tonry (with attached exhibits);
10. Defendant Thurston County And Thurston County Auditor's Motion For Accelerated Review And Response To Opportunity For Olympia's Petition For Prevention Of Election Errors;
11. Plaintiff's Reply In Support Of Plaintiff's Motion For Declaratory Judgment And Injunctive Relief; and
12. Opportunity For Olympia's And Ray Guerra's Reply To Plaintiff's Opposition Brief.
13. **13. DOCUMENT DECLARATION OF ANNALIESE HARKSEN. 9/2**

In addition, the Court reviewed:

1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief;
2. [Proposed] Freedom Foundation's Amicus Curiae Brief; and
3. Opportunity For Olympia's Opposition To Freedom Foundation's Motion For Leave To File Amicus Curiae Brief.

Having considered the pleadings and submissions in this case, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief is ~~(GRANTED) (DENIED)~~.
2. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief is **GRANTED**; and
3. Defendants' Petition For Prevention Of Election Error And Motion For Injunctive Relief is **DENIED**.

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 2

CITY OF OLYMPIA
 City Attorney's Office
 P.O. Box 1967/601 - 4th Ave. E.
 Olympia, Washington 98507-1967
 Telephone: (360) 753-8338

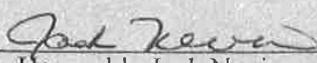
opportunity for Olympia

1 Accordingly, this Court:

2 1. Declares that the proposed ~~Income~~ Tax Initiative, in its entirety, is invalid, null,
3 and void because it extends beyond the scope of the local initiative power; and

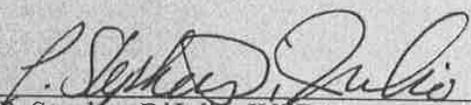
4 2. Enjoins Thurston County and the Thurston County Auditor from placing the
5 proposed ~~Income~~ Tax Initiative on the State general election ballot in November 2016.

6 DATED: August 24, 2016.

7
8 
9 The Honorable Jack Nevin
Superior Court Judge (Visiting)

10 Presented by:

11 OFFICE OF THE CITY ATTORNEY
12 Mark Barber, WSBA No. 8379
13 Olympia City Attorney,
14 Annaliese Harksen, WSBA No. 31132
15 Deputy City Attorney,
Email: mbarber@ci.olympia.wa.us
Email: aharksen@ci.olympia.wa.us
and

16
17 
18 P. Stephen DiJulio, WSBA No. 7139
19 Jason R. Donovan, WSBA No. 40994
FOSTER PEPPER PLLC
20 1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
21 Phone: (206) 447-4400 / Fax: (206) 447-9700
Email: steve.dijulio@foster.com
Email: j.donovan@foster.com
22 Attorneys for Plaintiff City of Olympia

23 ///
24 ///
25 ///

26 ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 3

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

DECLARATION OF SERVICE

I, Jessie Sherwood, declare under penalty of perjury of the laws of the State of Washington, that I am a citizen of the United States and a resident of the State of Washington, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on August 24, 2016 I caused the foregoing Notice of Appeal to The Washington State Court Of Appeals, Division II to be filed with the Clerk of the Thurston County Superior Court, and a true and correct copy of the same to be sent to the following in the manner indicated:

Table with 3 rows and 2 columns. Each row contains contact information for a recipient and their preferred method of service (Messenger, U.S. Mail, or E-mail).

DATED this 24th of August 2016 in Seattle, Washington.

Jessie Sherwood (handwritten signature)

No. 16-2-02998-34
NOTICE OF APPEAL - 3

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

EXHIBIT H

EXHIBIT H

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF OLYMPIA, a Washington
municipal corporation,

Respondent,

v.

OPPORTUNITY FOR OLYMPIA, a
Washington Political Committee; RAY
GUERRA; DANIELLE WESTBROOK,

Petitioners,

THURSTON COUNTY; and MARY
HALL, Thurston County Auditor,

Respondents.

No. 49333-1-II

RULING GRANTING STAY
PENDING APPEAL

FILED
COURT OF APPEALS
DIVISION II
2016 AUG 33 PM 12:22
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Petitioners, Opportunity for Olympia, Ray Guerra, and Danielle Westbrook (collectively, OFO), move for a stay of the superior court's decision to enjoin the

placement of their initiative (the OFO initiative) on the November ballot.¹ RAP 8.3. Respondent, the City of Olympia (the City), opposes the motion.² The motion is granted.

BACKGROUND

The OFO initiative would establish a fund to pay for one year of community college (or the equivalent, for other in-state public colleges or universities) for public high school graduates and general equivalency diploma (GED) recipients in the City of Olympia. Mot. for Stay and Injunctive Relief, App. B, Ex. 1. According to OFO:

The measure would be funded by gifts, grants, and bequests, and by establishing an excise tax on household adjusted gross income ("AGI") exceeding \$200,000.00 in the City of Olympia.³ The initiative contains a severability clause and provides a mechanism for scaling back the grants if the income is insufficient.

Mot. for Stay and Injunctive Relief at 5 (citations omitted).

OFO worked to obtain enough signatures to place the OFO initiative on the November 8, 2016 ballot⁴ and, on July 13, 2016, the Thurston County Auditor issued a certificate of sufficiency for the OFO initiative. RCW 35A.11.100; Mot. for Stay and Injunctive Relief, App. D, Ex. 1. The City Council then met and failed to either pass the

¹ OFO's motion to file an overlength stay motion is granted.

² Thurston County and Thurston County Auditor Mary Hall filed an answer to the stay motion. They request accelerated review of this matter because the "Thurston County Auditor needs to receive the final decision in this appeal by **September 12, 2016.**" Thurston County Response to Stay Motion at 1.

³ Referred to herein as the "taxation provision."

⁴ The Motion for Stay and Injunctive Relief, App. D (Declaration of Mary Hall), sets out the relevant dates.

proposed measure or call a special election. Mot. for Stay and Injunctive Relief, App. B, Ex. 2.

On July 22, 2016, the City filed a complaint seeking a declaration that the OFO initiative is invalid and to enjoin placement of the OFO initiative on the November ballot. Mot. for Stay and Injunctive Relief at 6. The Thurston County Auditor is required to have a final ballot title for the OFO initiative by September 14, 2016, to meet ballot printing deadlines. RCW 29A.36.071; RCW 29A.36.090; Mot. for Stay and Injunctive Relief at 7.

On August 24, 2016, the superior court held a hearing. It concluded the taxation provision extended beyond the scope of local initiative power. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 4 (Report of Proceedings (RP) Aug. 24, 2016 at 4). Specifically, it ruled, "[the initiative] involves powers that are granted to the City's governing body and not to the City as a whole" and "it does conflict with the state law prohibiting income tax." City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 5 (RP Aug. 24, 2016 at 5). It enjoined the initiative from appearing on the November 2016 ballot. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 4-6 (RP Aug. 24, 2016 at 4-6). OFO moved for the trial court to "order the City to issue the ballot title that it has already prepared" due to the September 14 deadline. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 12 (RP Aug. 24, 2016 at 12). The trial court denied the motion.

ANALYSIS

RAP 8.3 provides:

Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review or in an original action under Title 16 of these rules, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security. A

party seeking the relief provided by this rule should use the motion procedure provided in Title 17.

RAP 8.3 permits this court to “stay an injunction if the movant can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation.” *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986) (citing *Purser v. Rahm*, 104 Wn.2d 159, 702 P.2d 1196 (1985), *cert. dismissed sub nom. Department of Soc. and Health Servs. v. Purser*, 478 U.S. 1029 (1986)). As a practical matter,

courts apply a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the appeal. Indeed if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit.

Boeing, 43 Wn. App. at 291.

Debatable Issues on Appeal

Severability

Before addressing whether it is debatable that the OFO initiative’s taxation provision is valid, OFO argues that the additional funding sources are clearly valid. Mot. for Stay and Injunctive Relief at 9. It notes that the City challenged only the taxation provision and never argued that this provision is not severable from the remainder of the initiative. Mot. for Stay and Injunctive Relief at 10. It adds that the superior court did not engage in a severability analysis despite that OFO raised it. Mot. for Stay and Injunctive Relief at 10.

The City responds that the taxation provision is not severable because it is central to the OFO initiative. City’s Resp. to Mot. for Stay and Injunctive Relief at 7 (citing

Leonard v. City of Spokane, 127 Wn.2d 194, 202, 897 P.2d 358 (1995), for the proposition that a provision that is the “heart and soul” of a law is not severable). It adds that *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (2013), supports that the City would be harmed if forced to place invalid portions of a potentially severable initiative on a ballot.⁵

A law's provisions are not severable if

the constitutional and unconstitutional provisions are so connected . . . that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.

Leonard, 127 Wn.2d at 201 (quoting *Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982) (quoting *State ex rel. King Cy. v. State Tax Comm'n*, 174 Wash. 336, 339-40, 24 P.2d 1094 (1933))). Severability clauses in (passed) initiatives, however, are generally “conclusive as to the circumstances asserted.” *League of Educ. Voters v. State*, 176 Wn.2d 808, 827, 295 P.3d 743 (2013) (quoting *McGowan v. State*, 148 Wn.2d 278, 296, 60 P.3d 67 (2002) (quoting *State v. Anderson*, 81 Wn.2d 234, 239, 501 P.2d 184 (1972))).

In *Leonard*, our Supreme Court concluded that the funding source for law intended to encourage cities to constrict public improvements unlawfully diverted tax dollars from common schools to public improvements. 127 Wn.2d at 199. It does not appear, however, that the act contained additional lawful funding sources. Thus, the *Leonard* court concluded, “As the Act's funding mechanism, it represents the heart and soul of the

⁵ In *Wallin*, the proposed initiative was eventually invalidated in its entirety. 174 Wn. App. 782-83.

Act. This being so, the Act would be virtually worthless without it." 127 Wn.2d at 201-02; see also *League of Women Voters v. State*, 184 Wn.2d 393, 411-12, 355 P.3d 1131 (2015) ("Without a valid funding source the charter schools envisioned in I-1240 are not viable.").

Here, although the City argues that serving the taxation provision "leaves nothing remaining," the OFO initiative includes additional funding sources and permits college grants to be scaled back if income is insufficient. City's Resp. to Mot. for Stay and Injunctive Relief at 17. Thus, the severability issue is debatable.

Legislative Body

With respect to the other potential issues presented on appeal, OFO next argues that the legislature has not precluded local tax initiatives despite that RCW 35A.11.020 and .030⁶ grant taxation powers to the "legislative body" of each code city.⁷ Mot. for Stay

⁶ RCW 35A.11.030 provides, in relevant part:

Powers of eminent domain, borrowing, taxation, and the granting of franchises may be exercised by the legislative bodies of code cities in the manner provided in this title or by the general law of the state where not inconsistent with this title; and the duties to be performed and the procedure to be followed by such cities in regard to the keeping of accounts and records, official bonds, health and safety and other matters not specifically provided for in this title, shall be governed by the general law.

⁷ At oral argument, the City added that even a severed initiative (removing the taxation provision) infringes on the City's appropriations power, which is also vested in a legislative body. RCW 35A.11.090. RCW 35A.11.090 provides, in relevant part:

Ordinances of noncharter code cities the qualified electors of which have elected to exercise the powers of initiative and referendum shall not go into effect before thirty days from the time of final passage and are subject to referendum during the interim except:

-
- (4) Ordinances appropriating money;
-

and Injunctive Relief at 19. It primarily argues that these laws do not demonstrate a clear legislative intent to preempt the initiative rights of the people. Mot. for Stay and Injunctive Relief at 20. See also RCW 35A.11.080 (granting code cities the right of initiative); *1000 Friends v. McFarland*, 159 Wn.2d 165, 177, 149 P.3d 616 (2006). The City responds by relying on the language of RCW 35A.11.020 and .030. City's Resp. to Mot. for Stay and Injunctive Relief at 4.

Decisions support that "initiative or referendum rights do not exist where the legislature has delegated power to a city or county legislative authority." *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 575, 103 P.3d 203 (2004) (citing cases). In *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976), for example, the court found that RCW 35A.11.020 vested the city council the power to adopt and modify a zoning code. It concluded, "[t]his grant of power precludes a referendum election" pursuant to RCW 35A.11.080. 87 Wn.2d at 853. See also City's Resp. to Mot. for Stay and Injunctive Relief at 4 n.5 (citing *Wallin*, 174 Wn. App. at 784; *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227 (2012); and *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006)).

As identified by OFO, these cases relied upon by the City address initiatives that sought to limit a city's exercise of authority granted to it by the legislature. Mot. for Stay and Injunctive Relief at 20 n.6. In *Mukilteo Citizens*, for example, the initiative sought to

(7) Ordinances authorizing or repealing the levy of taxes; which excepted ordinances shall go into effect as provided by the general law or by applicable sections of Title 35A RCW as now or hereafter amended. Although the City cites RCW 35A.11.090 in its response to the stay motion, it presented no argument that a severed initiative violates this law. City's Resp. to Mot. for Stay and Injunctive Relief at 4. This argument will not be addressed further herein.

limit the legislative body's power to enact red light cameras by requiring a two-thirds vote of the electorate. 174 Wn.2d at 51-52. See also *Malkasian*, 157 Wn.2d at 255 ("The proposed initiative would impose additional requirements on revenue bonds" by "requir[ing] the city council of Sequim to obtain ratification by the voters before issuing citywide revenue bonds."); *Wallin*, 174 Wn. App. at 785-86 (prohibiting traffic safety cameras unless two-thirds of the council and voters approved and placing other limits on camera use). OFO attempts to distinguish these cases by arguing that "[t]he OFO [i]nitiative seeks to enact substantive legislation by *exercising* the power that the citizens and the City Council both hold in common." Mot. for Stay and Injunctive Relief at 20 n.6 (emphasis theirs).

Although the City is correct that "[a]n initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself," *Wallin*, 174 Wn.2d at 51, this court also recognizes that *1000 Friends* sets out that simply because a statute purports to give powers to a legislative authority or body, it does not automatically mean that the legislature intended to exclude "the people acting in a legislative capacity" from exercising the same powers. *1000 Friends*, 159 Wn.2d at 177-78. Accordingly, although the City prevailed on this issue in the superior court—and may be successful here on the merits of this issue—it qualifies as debatable. *Shamley v. City of Olympia*, 47 Wn.2d 124, 127, 286 P.2d 702 (1955).

Income/Excise Tax

The superior court also concluded that the OFO initiative conflicts with state law prohibiting the establishment of a net income tax by a city. City's Resp. to Mot. for Stay

and Injunctive Relief, App. 1 at 4 (RP Aug. 24, 2016 at 5). RCW 36.65.030 provides, "A county, city, or city-county shall not levy a tax on net income."

OFO contends, however, that the taxation provision is a permitted excise tax and not a prohibited net income tax. Mot. for Stay and Injunctive Relief at 23-25. According to OFO:

The OFO Initiative taxes the privileges of disproportionate use and benefit from city services enjoyed by wealthy residents, such as proximity to city parks which enhance private property enjoyment and values, and higher value police and fire protection services, by assessing a tax on the portion of AGI [adjusted gross income] in excess of \$200,000. Tony Decl., Ex. Ex. 1.8.

Mot. for Stay and Injunctive Relief at 24-25.

Chapter 35A.82 RCW addresses excise taxes. It, however, does not define them. According to *Estate of Hambleton*, 181 Wn.2d 802, 811, 335 P.3d 398 (2014), which involved a challenge to an amendment of the Estate and Transfer Act:

A tax is an "excise" or "transfer" tax if the government is taxing "a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property." *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945).

In addition, *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004), which addressed an assessment to fund ambulance services, states:

Our cases establish that an assessment is a valid excise tax if (1) the obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise tax, and (2) the element of absolute and unavoidable demand is lacking. *Covell*, 127 Wn.2d [874,] 889, 905 P.2d 324 [(1995)]; *High Tide Seafoods v. State*, 106 Wn.2d 695, 699, 725 P.2d 411 (1986); *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965).

These cases support that the taxation provision does not resemble a conventional excise tax. The payment of an excise tax "must be based on a voluntary act."⁸ *Covell*, 127 Wn.2d at 889 (discussing *Emerson College v. Boston*, 391 Mass. 415, 462 N.E.2d 1098 (1984)); see also *Arborwood*, 151 Wn.2d at 367. Here, the taxation provision is not premised upon any voluntary action of the person taxed. All citizens of Olympia use fire services, police services, other city services, and city parks.

However, because of the unique structure of the OFO initiative's taxation provision, which echoes the *Estate of Hambleton* language and imposes a "tax[on] the privileges of disproportionate use and benefit from city services enjoyed by wealthy residents," this court cannot say that OFO's argument is devoid of merit.⁹ Mot. for Stay and Injunctive Relief at 24-25; *Boeing*, 43 Wn. App. at 291.

Equities

Timing of Action

The parties argue as to whether our courts should decide this matter before the election, or after. Although in some circumstances, courts will decline to reach the merits of an initiative until after an election, issues relating to the scope of local initiatives will be

⁸ In addition, *Covell*, in its analysis of whether a residential street utility charge was an excise tax, relied on *Emerson College*. *Emerson College* addressed whether a fire protection service charge was an excise tax. *Covell* noted that *Emerson College* rejected an argument that "the charge qualified as an excise on the 'privilege' of receiving an extra level of fire protection." *Covell*, 127 Wn.2d at 890 (citing *Emerson College*, 391 Mass. 415, 427-28, 462 N.E. 2d 1098 (1984)). The taxation provision here appears also to tax the "privilege" of receiving more or better city services.

⁹ Because the issue whether the tax is an excise tax, as opposed to an income or a net income tax, is debatable, this court will not reach this issue whether the taxation provision qualifies as a net income tax that is prohibited by RCW 36.65.030 in this ruling.

heard before an election.¹⁰ *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005).

Nevertheless, as pointed out by OFO, the merits of this appeal will not be reached by this court until after the election has passed. This situation resembles the circumstances in *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 52-53, 65 P.3d 1203 (2003). In *Reed*, the petitioners sought a declaration that a referendum was unconstitutional and they sought to bar the secretary of state from certifying a ballot containing the referendum. 149 Wn.2d at 53. The *Reed* court declined to bar the secretary of state from adding the measure to the ballot because there was “insufficient time to engage in the deliberations that a case of this magnitude demands’ and because an immediate decision was not required by the dates of implementation of those sections of EHB 2901 included in Referendum 53.”¹¹ 149 Wn.2d at 53. The election was held. The matter returned to the courts and the secretary of state was prevented from certifying the election results until the *Reed* court ruled on the merits of the appeal. 149 Wn.2d at 53.

Thus, although it does not appear that the superior court’s decision was premature, that does not control the outcome of the present RAP 8.3 motion for a stay pending

¹⁰ *Yes For Seattle*, relied upon by the City, addressed whether pre-election review was the scope of an initiative was premature and decided it was not. In that case, however, although an appeal was filed from the superior court’s August decision to strike an initiative from a September ballot, it does not appear that any RAP 8.3 stay was requested or issued. The Court of Appeals decided the merits of the appeal the following June. 122 Wn. App. at 386-87.

¹¹ OFO also emphasizes that the taxation provision allows for “18 months for post-election review before any tax payments are due.” Mot. for Stay and Injunctive Relief at 18-19.

appeal, when, like *Reed*, this court will not have the opportunity to address the merits of the appeal before November 8, 2016.

Balancing Harms

Given that OFO presents at least one debatable issue, this court must analyze whether a "stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." *Boeing*, 43 Wn. App. at 291.

Here, the concrete cost to the City will be the printing of a supplemental voters' pamphlet.¹² The deadline for adding the initiative to the original pamphlet was August 2. Mot. for Stay and Injunctive Relief, App. D (Declaration of Mary Hall) (OFO, however, notes that the City knew of the ballot measure's language and possible legal challenges before this deadline and should have performed its ministerial duty to advance the ballot measure while any legal challenge was pending, which would have gotten the OFO initiative into the original pamphlet. Mot. for Stay and Injunctive Relief at 12). The asserted harms to OFO are (1) missing a high voter turnout presidential election and (2) impairment of the First Amendment rights of the signatories to the OFO petition, who expressed their views that the OFO initiative should be put to a vote this November. Mot. for Stay and Injunctive Relief at 13-15.

The City and OFO disagree as to the harm caused to OFO by not having the initiative included on the November 2016 ballot. The City stipulates OFO will not have to re-collect signatures if they succeed on appeal and, therefore, can present the initiative

¹² At oral argument, the City also referenced a charge it is billed a percentage of the costs of holding an election and that this charge is calculated based on the number of issues on the ballot.

in a future special election. OFO responds that it planned for this initiative to appeal on the November ballot and obtained signatures for this purpose because of the high voter turnout in this specific election. This court agrees with OFO that it has an interest in having the initiative appear on the ballot that it sought and gained approval for and is now working to get passed, and that it would be harmed by deferring any election on its initiative. See Mot. for Stay and Injunctive Relief at 13 n.2. See generally *Small v. Avanti Health Sys. LLC*, 661 F.3d 1180, 1195 (9th Cir. 2011) (remedy of holding a new union election was insufficient to prevent harm).

Because this court has concluded that at least the severability issue is debatable and that a balancing of the equities favors OFO, this court determines to stay at least the portion of the superior court's decision that enjoined the *entire* initiative from appearing on the November 8, 2016 ballot.

The remaining issue is the harms to the parties if the taxation provision is included on the ballot. Although the court views the severability issue as more debatable than the remaining issues, it cannot conclude that the others are devoid of merit. Moreover, given that the City now will incur its additional costs regardless whether the taxation provision is included, this court concludes that a balancing of the equities favors having the full measure appear on the ballot regardless whether the additional issues meet the RAP 8.3 debatability requirement.

Supersedeas Bond or Other Security

RAP 8.3 provides, "The appellate court will ordinarily condition the order on furnishing a bond or other security." Neither OFO nor the City discussed the issuance of a bond. The primary financial harm to the City is the need to print a supplemental voters'

pamphlet. Mot. for Stay and Injunctive Relief, App. D, at 4 (Declaration of Mary Hall). This court sets the supersedeas amount at 50 percent of the reasonable cost to the City to print this pamphlet. The City has until 5:00 p.m. on September 6, 2016, to provide the printing cost information to OFO. Supersedeas must be posted with the Thurston County Superior Court Clerk no later than 5:00 p.m. on September 9, 2016. RAP 8.1(d).

Accordingly, it is hereby

ORDERED that OFO's motion for a RAP 8.3 stay of the superior court's decision, which enjoined the OFO initiative from appearing on the November 8, 2016 ballot, is granted. It is further

ORDERED that OFO must comply with the supersedeas portion of this ruling by 5:00 p.m. on September 9, 2016. It is further

ORDERED that any motion to modify this ruling is due by 5:00 p.m. on Tuesday, September 6, any answer is due by 5:00 p.m. on Wednesday, September 7, and any reply is due by noon on Thursday, September 8, 2016.

DATED this 2nd day of September, 2016.



Aurora R. Bearse
Court Commissioner

cc: Eric Lowney
Claire E. Tonry
P. Stephen DiJulio
Mark E. Barber
Annaliese Harksen
Elizabeth Petrich
Hon. Jack Nevin

EXHIBIT I

EXHIBIT I

Kari Pitharoulis

From: Matthew Hayward <MHayward@myfreedomfoundation.com>
Sent: Friday, July 01, 2016 3:38 PM
To: Cheryl Selby
Subject: Meeting

Dear Mayor Selby,

Several members of the Freedom Foundation are also residents of the city of Olympia and we were hoping you would be willing to have a meeting with one of us to discuss the current proposals for a local income tax.

The Freedom Foundation was recently involved in several lawsuits involving local initiatives. We argued that after citizens gathered the required number of valid signatures, the initiatives should be allowed on the ballot. In three separate cases, the city refused to put the measures on the ballot, and in all three cases the city won the right to keep them off the ballot.

This is just one or a couple of issues we are interested in discussing.

Please let me know when you are available, we can be flexible.

Happy 4th of July

Matthew Hayward

Washington Coordinator | *Freedom In Action*

MHayward@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

Kari Pitharoulis

From: James Phillip Turpin <jamesphillipturpin@gmail.com>
Sent: Monday, July 11, 2016 4:46 PM
To: Jami Lund; CityCouncil
Subject: Re: Tuesday Olympia Council meeting - input needed

I discussed this issue of a city income tax to fund higher education at length with one of the petitioners. The petitioners were misleading people to believe that this money would go towards local community colleges, while it would actually go to large universities around the state with bloated administrative fees. I believe in market economies and that colleges should compete by providing better affordable services, not by plundering tax payers.

On Mon, Jul 11, 2016 at 4:05 PM, Jami Lund <JLund@myfreedomfoundation.com> wrote:

Hello James Turpin

Perhaps you have heard that the City of Olympia has been targeted by the union-backed "Economic Opportunity Institute" of Seattle for an experiment to impose a city income tax.

On Friday the activists turned in the signatures to get a city income tax initiative on the November ballot if allowed by the council.

Freedom Foundation has fought on behalf taxpayers for twenty five years, and this scheme is no exception. Not surprisingly, government unions play a key role in this plan to plunder some Olympia citizens to fund public higher education institutions.

Freedom Foundation policy fellow, Amber Gunn, penned an opinion editorial expressing concerns in the Olympian newspaper. The Freedom Foundation is working to educate people about the injustice of unconstitutional selective income harvesting.

But Olympia residents need to make their voice heard, and now is the time. Before this Tuesday, July 12th city council meeting, please contact all city council members regarding this unconstitutional income tax initiative.

Reach them all at once at: citycouncil@ci.olympia.wa.us

Will you send a note to the city council expressing your thoughts about forcing a minority of citizens in Olympia to fund the public college tuition of others?

I am also looking for several to join me at the hearing. Please reply if you would consider lending support on Tuesday evening at 7:00. You can bet that the other side is going to be there.

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com

360.956.3482 | PO Box 552 Olympia, WA 98507

myFreedomFoundation.com

From: James Phillip Turpin <jamesphillipturpin@gmail.com> <mailto:jamesphillipturpin@gmail.com>
Sent: Tuesday, February 10, 2015 10:00 AM
Subject: [Fwd] Will you send a note to the city council expressing your thoughts about forcing a minority of citizens in Olympia to fund the public college tuition of others?
----- Forwarded message -----
From: Jami Lund <JLund@myFreedomFoundation.com>
Sent: Tuesday, February 10, 2015 9:58 AM
Subject: Will you send a note to the city council expressing your thoughts about forcing a minority of citizens in Olympia to fund the public college tuition of others?

Kari Pitharoulis

From: William Grous <wrgrous@comcast.net>
Sent: Tuesday, July 12, 2016 3:41 PM
To: CityCouncil
Cc: Jami Lund
Subject: Initiative to tax high wage earners

Dear City Council.

The initiative to tax Olympia's highest wage earners to provide free college to others is both illegal and immoral.

Some 40 years ago, my parents put me through college, contributing what they could, while the rest of the tuition/board

was paid by student loans I contracted.. It took me 10 years to pay off the loans.

Government provides schooling K-12 to all Americans. But college is not a right. Those who seek it must be willing to pay for the cost

themselves, as they are the only ones who benefit from it.

If you think this initiative through, there are a host of unintended consequences I don't believe you (or the petitioners) have thoroughly thought out.

Please dismiss this initiative.

Sincerely,

William Grous

5027 Foxhall Drive

Kari Pitharoulis

From: Jami Lund <JLund@myfreedomfoundation.com>
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

“the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful.”

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I’m not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

Kari Pitharoulis

From: Mark Barber
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund
Subject: RE: Confusing news account
Attachments: 2016-07-22 Complaint for Declaratory Judgment and Injunctive Relief.pdf

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

“the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful.”

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I’m not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com

360.956.3482 | PO Box 552 Olympia, WA 98507

myFreedomFoundation.com

Kari Pitharoulis

From: Jami Lund <JLund@myfreedomfoundation.com>
Sent: Tuesday, July 26, 2016 7:43 AM
To: Mark Barber
Subject: RE: Confusing news account

Thank you.

Jami Lund
(360) 956-3482
Senior Policy Analyst
Freedom Foundation

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

"the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful."

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I'm not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com

360.956.3482 | PO Box 552 Olympia, WA 98507

myFreedomFoundation.com

Kari Pitharoulis

From: Jami Lund <JLund@myfreedomfoundation.com>
Sent: Tuesday, August 09, 2016 9:46 AM
To: Mark Barber
Subject: RE: Confusing news account

Mr. Barber,

Thank you for the copy of the complaint to bar the placement of the Opportunity for Olympia initiative on the ballot.

May I see the briefing schedule for this case or the date of any court hearings?

Jami Lund
(360) 956-3482
Senior Policy Analyst
Freedom Foundation

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

Kari Pitharoulis

From: Mark Barber
Sent: Tuesday, August 09, 2016 3:11 PM
To: Jami Lund
Cc: Kari Pitharoulis
Subject: RE: Confusing news account
Attachments: 2016-07-29 City of Olympia's Motion for Declaratory Judgment and Injunctive Relief.pdf; 2016-08-01 OFO Opening Brief on Petition and Counterclaim.pdf

Mr. Lund,

See copies of attached documents. The trial court's hearing is scheduled for Wednesday, August 17, at 3:30 pm before Judge Anne Hirsch.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Tuesday, August 09, 2016 9:46 AM
To: Mark Barber
Subject: RE: Confusing news account

Mr. Barber,

Thank you for the copy of the complaint to bar the placement of the Opportunity for Olympia initiative on the ballot.

May I see the briefing schedule for this case or the date of any court hearings?

Jami Lund
(360) 956-3482
Senior Policy Analyst
Freedom Foundation

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM

To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

Kari Pitharoulis

From: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Sent: Wednesday, August 10, 2016 12:06 PM
To: Mark Barber
Subject: FW: Confusing news account

Mark:

I just filed a very short amicus curiae brief in support of the City's position in the income tax initiative case. I will not be attending the August 17 hearing or asking for any oral argument time.

I started on the brief yesterday afternoon so I didn't have time to call you first, which is my usual practice.

In any event, could you get me the names of the lawyers in the case other than Lowney. I only had Lowney's brief so use for the declarations of service.

Thanks.

Greg

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

"the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful."

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I'm not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com

360.956.3482 | PO Box 552 Olympia, WA 98507

myFreedomFoundation.com

Kari Pitharoulis

From: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Sent: Wednesday, August 10, 2016 2:15 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark.

From: Mark Barber [mailto:mbarber@ci.olympia.wa.us]
Sent: Wednesday, August 10, 2016 2:10 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

The lawyers and parties are as follows:

For the City of Olympia

P. Stephen (Steve) DiJulio, WSBA #7139
Jason R. Donovan, WSBA #40994
Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
steve.dijulio@foster.com
j.donovan@foster.com
Tel: 206-447-8971
Fax: 206-749-1927

Mark Barber, City Attorney, WSBA #8379
Annaliese Harksen, Deputy City Attorney, WSBA #31132
City of Olympia
601 4th Avenue East
P.O. Box 1967
Olympia, WA 98507
mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us
Tel : 360-753-8223

For Opportunity for Olympia, Ray Guerra and Danielle Westbrook

Knoll Lowney, WSBA #23457
Claire Tonry, WSBA #44497
Smith & Lowney PLLC
2317 East John Street
Seattle, WA 98112
knoll@igc.org
clairret@igc.org

Telephone: 206-860-2883

For Thurston County and Mary Hall, Auditor

Elizabeth Petrich, WSBA #18713
Chief Civil Deputy Prosecuting Attorney
Thurston County Prosecuting Attorney
Civil Division - Building No. 5
2000 Lakeridge Drive SW
Olympia, V/A 98502
petrice@co.thurston.wa.us
Telephone: 360-786-5540

For the State of Washington and Attorney General

Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
Telephone: (360) 664-9083

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 12:06 PM
To: Mark Barber
Subject: FW: Confusing news account

Mark:

I just filed a very short amicus curiae brief in support of the City's position in the income tax initiative case. I will not be attending the August 17 hearing or asking for any oral argument time.

I started on the brief yesterday afternoon so I didn't have time to call you first, which is my usual practice.

In any event, could you get me the names of the lawyers in the case other than Lowney. I only had Lowney's brief so use for the declarations of service.

Thanks.

Greg

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

“the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful.”

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I’m not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com

360.956.3482 | PO Box 552 Olympia, WA 98507

myFreedomFoundation.com

Kari Pitharoulis

From: Mark Barber
Sent: Wednesday, August 10, 2016 2:10 PM
To: Greg Overstreet
Subject: RE: Confusing news account

Greg,

The lawyers and parties are as follows:

For the City of Olympia

P. Stephen (Steve) DiJulio, WSBA #7139
Jason R. Donovan, WSBA #40994
Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
steve.dijulio@foster.com
j.donovan@foster.com
Tel: 206-447-8971
Fax: 206-749-1927

Mark Barber, City Attorney, WSBA #8379
Annaliese Harksen, Deputy City Attorney, WSBA #31132
City of Olympia
601 4th Avenue East
P.O. Box 1967
Olympia, WA 98507
mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us
Tel : 360-753-8223

For Opportunity for Olympia, Ray Guerra and Danielle Westbrook

Knoll Lowney, WSBA #23457
Claire Tonry, WSBA #44497
Smith & Lowney PLLC
2317 East John Street
Seattle, WA 98112
knoll@igc.org
clairet@igc.org
Telephone: 206-860-2883

For Thurston County and Mary Hall, Auditor

Elizabeth Petrich, WSBA #18713
Chief Civil Deputy Prosecuting Attorney

Thurston County Prosecuting Attorney
Civil Division - Building No. 5
2000 Lakeridge Drive SW
Olympia, V/A 98502
petrice@co.thurston.wa.us
Telephone: 360-786-5540

For the State of Washington and Attorney General

Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
Telephone: (360) 664-9083

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 12:06 PM
To: Mark Barber
Subject: FW: Confusing news account

Mark:

I just filed a very short amicus curiae brief in support of the City's position in the income tax initiative case. I will not be attending the August 17 hearing or asking for any oral argument time.

I started on the brief yesterday afternoon so I didn't have time to call you first, which is my usual practice.

In any event, could you get me the names of the lawyers in the case other than Lowney. I only had Lowney's brief so use for the declarations of service.

Thanks.

Greg

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM

To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

“the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful.”

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I’m not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

Kari Pitharoulis

From: Mark Barber
Sent: Wednesday, August 10, 2016 2:34 PM
To: Greg Overstreet
Subject: RE: Confusing news account

Greg,

I neglected to inform you that the court advised the parties this morning that the court had a conflict with the scheduled hearing on August 17 at 3:30 pm. The parties responded and advised the judicial assistant that Thursday, August 25 at 3:30 pm was acceptable. We have not received confirmation of the new date/time from the judicial assistant.

As an explanation, I added the service information related to the Attorney General because Opportunity for Olympia is alleging that RCW 36.65.030 is unconstitutional and the defendants have so advised the AG's Office.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [mailto:GOverstreet@myfreedomfoundation.com]
Sent: Wednesday, August 10, 2016 2:15 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark.

From: Mark Barber [mailto:mbarber@ci.olympia.wa.us]
Sent: Wednesday, August 10, 2016 2:10 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

The lawyers and parties are as follows:

[For the City of Olympia](#)

P. Stephen (Steve) DiJulio, WSBA #7139
Jason R. Donovan, WSBA #40994
Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
steve.dijulio@foster.com
j.donovan@foster.com
Tel: 206-447-8971
Fax: 206-749-1927

Mark Barber, City Attorney, WSBA #8379
Annaliese Harksen, Deputy City Attorney, WSBA #31132
City of Olympia
601 4th Avenue East
P.O. Box 1967
Olympia, WA 98507
mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us
Tel : 360-753-8223

For Opportunity for Olympia, Ray Guerra and Danielle Westbrook

Knoll Lowney, WSBA #23457
Claire Tonry, WSBA #44497
Smith & Lowney PLLC
2317 East John Street
Seattle, WA 98112
knoll@igc.org
clairet@igc.org
Telephone: 206-860-2883

For Thurston County and Mary Hall, Auditor

Elizabeth Petrich, WSBA #18713
Chief Civil Deputy Prosecuting Attorney
Thurston County Prosecuting Attorney
Civil Division - Building No. 5
2000 Lakeridge Drive SW
Olympia, V/A 98502
petrice@co.thurston.wa.us
Telephone: 360-786-5540

For the State of Washington and Attorney General

Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
Telephone: (360) 664-9083

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 12:06 PM
To: Mark Barber
Subject: FW: Confusing news account

Mark:

I just filed a very short amicus curiae brief in support of the City's position in the income tax initiative case. I will not be attending the August 17 hearing or asking for any oral argument time.

I started on the brief yesterday afternoon so I didn't have time to call you first, which is my usual practice.

In any event, could you get me the names of the lawyers in the case other than Lowney. I only had Lowney's brief so use for the declarations of service.

Thanks.

Greg

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



Legal Department

WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

“the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful.”

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I’m not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

Kari Pitharoulis

From: Kirsten Nelsen <KNelsen@myfreedomfoundation.com>
Sent: Wednesday, August 10, 2016 3:12 PM
To: steve.dijulio@foster.com; j.donovan@foster.com; Mark Barber; Annaliese Harksen; knoll@igc.org; clairet@igc.org; petrice@co.thurston.wa.us
Cc: Greg Overstreet; Kirsten Nelsen
Subject: Case No. 16-2-02998-34: Freedom Foundation's Motion for Leave to File Amicus Curiae Brief, Motion to Shorten Time, Declaration of Greg Overstreet, Proposed Order for Leave to File Amicus Brief and Motion to Shorten Time, Notices of Issue, & Ltr. to Court
Attachments: FF MOT for Leave to File Amicus Curiae Brief and Prop. Amicus Brief.pdf; FF MOT to Shorten Time (Laptop-3's conflicted copy 2016-08-10).pdf; Declaration of Greg Overstreet.pdf; Prop. ORD Granting Leave file Amicus (Laptop-3's conflicted copy 2016-08-10).pdf; Prop. ORD MOT Shorten Time.pdf; FF NOI Leave File Amicus Brief.pdf; FF NOI MOT Shorten Time.pdf; Ltr to Court.pdf

Good afternoon,

Please find attached for filing today in Case No. 16-2-02998-34 Freedom Foundation's Motion for Leave to File Amicus Curiae Brief, Motion to Shorten Time, Declaration of Greg Overstreet, Proposed Order for Leave to File Amicus Brief and Motion to Shorten Time, Notices of Issue, and Letter to Court.

Notify me immediately if you are unable to open the attachments.

Best,

Kirsten Nelsen

Paralegal | Freedom Foundation

KNelsen@FreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
FreedomFoundation.com

NOTICE: This e-mail (including attachments) is confidential and may be legally privileged. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please reply to the sender that you have received the message in error, then permanently delete it.

Kari Pitharoulis

From: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Sent: Wednesday, August 10, 2016 3:40 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark. I appreciate it.

From: Mark Barber [mailto:mbarber@ci.olympia.wa.us]
Sent: Wednesday, August 10, 2016 2:34 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

I neglected to inform you that the court advised the parties this morning that the court had a conflict with the scheduled hearing on August 17 at 3:30 pm. The parties responded and advised the judicial assistant that Thursday, August 25 at 3:30 pm was acceptable. We have not received confirmation of the new date/time from the judicial assistant.

As an explanation, I added the service information related to the Attorney General because Opportunity for Olympia is alleging that RCW 36.65.030 is unconstitutional and the defendants have so advised the AG's Office.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [mailto:GOverstreet@myfreedomfoundation.com]
Sent: Wednesday, August 10, 2016 2:15 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark.

From: Mark Barber [mailto:mbarber@ci.olympia.wa.us]
Sent: Wednesday, August 10, 2016 2:10 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

The lawyers and parties are as follows:

For the City of Olympia

P. Stephen (Steve) DiJulio, WSBA #7139

Jason R. Donovan, WSBA #40994

Foster Pepper, PLLC

1111 Third Avenue, Suite 3000

Seattle, WA 98101

steve.dijulio@foster.com

j.donovan@foster.com

Tel: 206-447-8971

Fax: 206-749-1927

Mark Barber, City Attorney, WSBA #8379

Annaliese Harksen, Deputy City Attorney, WSBA #31132

City of Olympia

601 4th Avenue East

P.O. Box 1967

Olympia, WA 98507

mbarber@ci.olympia.wa.us

aharksen@ci.olympia.wa.us

Tel : 360-753-8223

For Opportunity for Olympia, Ray Guerra and Danielle Westbrook

Knoll Lowney, WSBA #23457

Claire Tonry, WSBA #44497

Smith & Lowney PLLC

2317 East John Street

Seattle, WA 98112

knoll@igc.org

clairet@igc.org

Telephone: 206-860-2883

For Thurston County and Mary Hall, Auditor

Elizabeth Petrich, WSBA #18713

Chief Civil Deputy Prosecuting Attorney

Thurston County Prosecuting Attorney

Civil Division - Building No. 5

2000 Lakeridge Drive SW

Olympia, V/A 98502

petrice@co.thurston.wa.us

Telephone: 360-786-5540

For the State of Washington and Attorney General

Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
Telephone: (360) 664-9083

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 12:06 PM
To: Mark Barber
Subject: FW: Confusing news account

Mark:

I just filed a very short amicus curiae brief in support of the City's position in the income tax initiative case. I will not be attending the August 17 hearing or asking for any oral argument time.

I started on the brief yesterday afternoon so I didn't have time to call you first, which is my usual practice.

In any event, could you get me the names of the lawyers in the case other than Lowney. I only had Lowney's brief so use for the declarations of service.

Thanks.

Greg

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney

City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

“the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful.”

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I’m not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

Kari Pitharoulis

From: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Sent: Wednesday, August 10, 2016 4:26 PM
To: Mark Barber
Subject: RE: Confusing news account

OK. Thanks. I still will not ask for oral argument on either our motion to file the brief or argument on the contents of the brief.

Good luck to the City on this. You guys are right on the law.

From: Mark Barber [mailto:mbarber@ci.olympia.wa.us]
Sent: Wednesday, August 10, 2016 4:20 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

The parties have received confirmation that this matter has been reassigned to Judge Mary Sue Wilson, who will conduct the hearing on August 25 at 3:30 pm.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [mailto:GOverstreet@myfreedomfoundation.com]
Sent: Wednesday, August 10, 2016 3:40 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark. I appreciate it.

From: Mark Barber [mailto:mbarber@ci.olympia.wa.us]
Sent: Wednesday, August 10, 2016 2:34 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

I neglected to inform you that the court advised the parties this morning that the court had a conflict with the scheduled hearing on August 17 at 3:30 pm. The parties responded and advised the judicial assistant that Thursday, August 25 at 3:30 pm was acceptable. We have not received confirmation of the new date/time from the judicial assistant.

As an explanation, I added the service information related to the Attorney General because Opportunity for Olympia is alleging that RCW 36.65.030 is unconstitutional and the defendants have so advised the AG's Office.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 2:15 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark.

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Wednesday, August 10, 2016 2:10 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

The lawyers and parties are as follows:

For the City of Olympia

P. Stephen (Steve) DiJulio, WSBA #7139
Jason R. Donovan, WSBA #40994
Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
steve.dijulio@foster.com
j.donovan@foster.com

Tel: 206-447-8971
Fax: 206-749-1927

Mark Barber, City Attorney, WSBA #8379
Annaliese Harksen, Deputy City Attorney, WSBA #31132
City of Olympia
601 4th Avenue East
P.O. Box 1967
Olympia, WA 98507
mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us
Tel : 360-753-8223

For Opportunity for Olympia, Ray Guerra and Danielle Westbrook

Knoll Lowney, WSBA #23457
Claire Tonry, WSBA #44497
Smith & Lowney PLLC
2317 East John Street
Seattle, WA 98112
knoll@igc.org
clairret@igc.org
Telephone: 206-860-2883

For Thurston County and Mary Hall, Auditor

Elizabeth Petrich, WSBA #18713
Chief Civil Deputy Prosecuting Attorney
Thurston County Prosecuting Attorney
Civil Division - Building No. 5
2000 Lakeridge Drive SW
Olympia, V/A 98502
petrice@co.thurston.wa.us
Telephone: 360-786-5540

For the State of Washington and Attorney General

Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
Telephone: (360) 664-9083

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



Legal Department

WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 12:06 PM
To: Mark Barber
Subject: FW: Confusing news account

Mark:

I just filed a very short amicus curiae brief in support of the City's position in the income tax initiative case. I will not be attending the August 17 hearing or asking for any oral argument time.

I started on the brief yesterday afternoon so I didn't have time to call you first, which is my usual practice.

In any event, could you get me the names of the lawyers in the case other than Lowney. I only had Lowney's brief so use for the declarations of service.

Thanks.

Greg

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



Legal Department

WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]

Sent: Thursday, July 14, 2016 9:53 AM

To: Mark Barber

Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

"the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful."

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I'm not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com

360.956.3482 | PO Box 552 Olympia, WA 98507

myFreedomFoundation.com

Kari Pitharoulis

From: Mark Barber
Sent: Wednesday, August 10, 2016 4:20 PM
To: Greg Overstreet
Subject: RE: Confusing news account

Greg,

The parties have received confirmation that this matter has been reassigned to Judge Mary Sue Wilson, who will conduct the hearing on August 25 at 3:30 pm.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 3:40 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark. I appreciate it.

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Wednesday, August 10, 2016 2:34 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

I neglected to inform you that the court advised the parties this morning that the court had a conflict with the scheduled hearing on August 17 at 3:30 pm. The parties responded and advised the judicial assistant that Thursday, August 25 at 3:30 pm was acceptable. We have not received confirmation of the new date/time from the judicial assistant.

As an explanation, I added the service information related to the Attorney General because Opportunity for Olympia is alleging that RCW 36.65.030 is unconstitutional and the defendants have so advised the AG's Office.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 2:15 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark.

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Wednesday, August 10, 2016 2:10 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

The lawyers and parties are as follows:

For the City of Olympia

P. Stephen (Steve) DiJulio, WSBA #7139
Jason R. Donovan, WSBA #40994
Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
steve.dijulio@foster.com
j.donovan@foster.com
Tel: 206-447-8971
Fax: 206-749-1927

Mark Barber, City Attorney, WSBA #8379
Annaliese Harksen, Deputy City Attorney, WSBA #31132
City of Olympia
601 4th Avenue East
P.O. Box 1967
Olympia, WA 98507
mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us

Tel : 360-753-8223

For Opportunity for Olympia, Ray Guerra and Danielle Westbrook

Knoll Lowney, WSBA #23457
Claire Tonry, WSBA #44497
Smith & Lowney PLLC
2317 East John Street
Seattle, WA 98112
knoll@igc.org
clairet@igc.org
Telephone: 206-860-2883

For Thurston County and Mary Hall, Auditor

Elizabeth Petrich, WSBA #18713
Chief Civil Deputy Prosecuting Attorney
Thurston County Prosecuting Attorney
Civil Division - Building No. 5
2000 Lakeridge Drive SW
Olympia, V/A 98502
petrice@co.thurston.wa.us
Telephone: 360-786-5540

For the State of Washington and Attorney General

Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
Telephone: (360) 664-9083

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Greg Overstreet [<mailto:GOverstreet@myfreedomfoundation.com>]
Sent: Wednesday, August 10, 2016 12:06 PM

To: Mark Barber
Subject: FW: Confusing news account

Mark:

I just filed a very short amicus curiae brief in support of the City's position in the income tax initiative case. I will not be attending the August 17 hearing or asking for any oral argument time.

I started on the brief yesterday afternoon so I didn't have time to call you first, which is my usual practice.

In any event, could you get me the names of the lawyers in the case other than Lowney. I only had Lowney's brief so use for the declarations of service.

Thanks.

Greg

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



WARNING: Be advised the City of Olympia is required to comply with the Public Records Act as set forth in RCW Chapter 42.56. This Act establishes a strong state policy in favor of disclosure of public records. The information you submit to the City of Olympia by e-mail, including personal information, may ultimately be subject to disclosure as a public record.

From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

"the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful."

This sounds like the city will be going straight to court without a plaintiff, but I cannot tell. Is this an attempt to get some kind of advisory decision?

I'm not an attorney, but in my experience the city could decline to put something on the ballot and let the proponents bring an action. That would be the quickest, most focused effort since it would be over in a matter of months and appeals could be unlikely.

Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com

360.956.3482 | PO Box 552 Olympia, WA 98507

myFreedomFoundation.com

Kari Pitharoulis

From: Susan Banner <susan.banner@foster.com>
Sent: Thursday, August 11, 2016 2:08 PM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us; 'goverstreet@myfreedomfoundation.com'
Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Kari Pitharoulis
Subject: City of Olympia v. Opportunity For Olympia, et al., Thurston County Case No. 16-2-02998-34
Attachments: OLYMPIA Re-Notice of Issue.pdf; Thurston County eFile Status Confirmation of Re-Note.pdf

Counsel – Attached are the following documents in the above-referenced matter:

1. **Civil Re-Notice of Issue for August 25, 2016 at 3:30 p.m. before Judge Mary-Sue Wilson (special setting); and**
2. **Thurston County Clerk's eFile Confirmation.**

No hard copy to follow.

Susan Banner
LEGAL ASSISTANT TO P. STEPHEN DiJULIO,
RICHARD L. SETTLE, LEE R. MARCHISIO, and
THOMAS FARROW

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000
Seattle, WA 98101

susan.banner@foster.com

Tel: 206-447-7891

Fax: 206-447-9700

foster.com

Kari Pitharoulis

From: Kirsten Nelsen <KNelsen@myfreedomfoundation.com>
Sent: Thursday, August 11, 2016 3:50 PM
To: steve.dijulio@foster.com; j.donovan@foster.com; knoll@igc.org; claret@igc.org; Mark Barber; Annaliese Harksen; petrice@co.thurston.wa.us
Cc: Greg Overstreet; Kirsten Nelsen
Subject: Case No. 16-2-02998-34: Freedom Foundation's Notice of Hearing Stricken
Attachments: NOT Hearing Stricken MOT Shorten Time.pdf

Good afternoon,

Please find attached for filing today in Case No. 16-2-02998-34, Freedom Foundation's Notice of Hearing Stricken.

Notify me immediately if you are unable to open the attachment.

Best,

Kirsten Nelsen

Paralegal | Freedom Foundation

KNelsen@FreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
FreedomFoundation.com

NOTICE: This e-mail (including attachments) is confidential and may be legally privileged. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please reply to the sender that you have received the message in error, then permanently delete it.

Kari Pitharoulis

From: Kirsten Nelsen <KNelsen@myfreedomfoundation.com>
Sent: Friday, August 12, 2016 10:20 AM
To: steve.dijulio@foster.com; j.donovan@foster.com; knoll@igc.org; claret@igc.org; Mark Barber; Annaliese Harksen; petrice@co.thurston.wa.us
Cc: Greg Overstreet; Kirsten Nelsen
Subject: Case No. 16-2-02998-34: Freedom Foundation's Re-Notice of Issue for Motion Granting Leave to File Amicus Curiae Brief
Attachments: FF Re-NOI Leave File Amicus Brief.pdf

Good morning,

Please find attached for filing today in Case No. 16-2-02998-34 Freedom Foundation's Re-Notice of Issue for Motion Granting Leave to File Amicus Curiae Brief.

Notify me immediately if you are unable to open the attachment.

Best,

Kirsten Nelsen

Paralegal | Freedom Foundation

KNelsen@FreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
FreedomFoundation.com

NOTICE: This e-mail (including attachments) is confidential and may be legally privileged. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please reply to the sender that you have received the message in error, then permanently delete it.

Kari Pitharoulis

From: Susan Banner <susan.banner@foster.com>
Sent: Friday, August 12, 2016 10:48 AM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us; 'goverstreet@myfreedomfoundation.com'
Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Kari Pitharoulis
Subject: City of Olympia v. Opportunity for Olympia, et al., Thurston County Case No. 16-2-02998-34
Attachments: Olympia Briefing Schedule Status Report.pdf; Olympia Certificate of Service.pdf; Thurston County eFiling Confirmation.pdf

Counsel – Attached are the following documents in the above-referenced matter:

1. **Briefing Schedule Status Report;**
2. **Certificate of Service; and**
3. **Thurston County Clerk's eFile Confirmation.**

No hard copy to follow.

Susan Banner
LEGAL ASSISTANT TO P. STEPHEN DIJULIO,
RICHARD L. SETTLE, LEE R. MARCHISIO, and
THOMAS FARROW

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000
Seattle, WA 98101

susan.banner@foster.com

Tel: 206-447-7891

Fax: 206-447-9700

foster.com

Kari Pitharoulis

From: Susan Banner <susan.banner@foster.com>
Sent: Tuesday, August 16, 2016 11:24 AM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us; 'goverstreet@myfreedomfoundation.com'
Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Kari Pitharoulis
Subject: City of Olympia v. Opportunity for Olympia, et al., Thurston County Case No. 16-2-02998-34
Attachments: Olympia v OFO - Notice of Stipulation.pdf; Olympia v OFO - Certificate of Service 8-16-16.PDF; TCSC Clerks eFile Confirmation 8-16-16.pdf

Counsel – Attached are the following in the above-referenced matter:

1. **Notice of Stipulation;**
2. **Certificate of Service; and**
3. **Thurston County Clerk's eFile Confirmation.**

No hard copy to follow.

Susan Banner
LEGAL ASSISTANT TO P. STEPHEN DiJULIO,
RICHARD L. SETTLE, and LEE R. MARCHISIO
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
susan.banner@foster.com
Tel: 206-447-7891
Fax: 206-447-9700
foster.com

Kari Pitharoulis

From: Susan Banner <susan.banner@foster.com>
Sent: Monday, August 22, 2016 3:54 PM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us; 'goverstreet@myfreedomfoundation.com'
Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Kari Pitharoulis
Subject: City of Olympia v. Opportunity for Olympia, et al., Thurston County Cause No. 16-2-02998-34
Attachments: Olympia Reply Brief.pdf; Olympia v OFO Certificate of Service.pdf; TCSC eFile Confirmation .pdf

Counsel – Attached are the following in the above-referenced matter:

- 1. Reply in Support of Plaintiff's Motion for Declaratory Judgment and Injunctive Relief;**
- 2. Certificate of Service; and**
- 3. Thurston County Clerk's eFile Confirmation.**

No hard copy to follow.

Susan Banner
LEGAL ASSISTANT TO P. STEPHEN DIJULIO,
RICHARD L. SETTLE, and LEE R. MARCHISIO
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
susan.banner@foster.com
Tel: 206-447-7891
Fax: 206-447-9700
foster.com

Kari Pitharoulis

From: Kari Pitharoulis
Sent: Wednesday, August 24, 2016 11:44 AM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us; 'goverstreet@myfreedomfoundation.com'
Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Susan Banner (susan.banner@foster.com)
Subject: City of Olympia v. Opportunity for Olympia, et al., Thurston County Case No. 16-2-02998-34
Attachments: City v. OFO - Declaration of Annaliese Harksen 08-24-16.pdf; City v. OFO - Certificate of Service 08-24-16.pdf; City v OFO - TCSC Clerks eFile Confirmation 08-24-16.pdf

Counsel – Attached are the following in the above-referenced matter:

1. Document Declaration of Annaliese Harksen;
2. Certificate of Service; and
3. Thurston County Clerk's eFile Confirmations.

No hard copies to follow.

Kari Pitharoulis
Paralegal II
Direct Phone: 360.753.8037 | FAX: 360.570.3791

Please note: This email may be subject to public disclosure.



Kari Pitharoulis

From: Stephen DiJulio <steve.dijulio@foster.com>
Sent: Thursday, August 25, 2016 9:52 AM
To: 'coa2filings@courts.wa.gov'
Cc: clairet@igc.org; knoll lowney (knoll@igc.org); Petrice@co.thurston.wa.us; Greg Overstreet; Mark Barber; Annaliese Harksen; Jay Donovan
Subject: City of Olympia v. Opportunity for Olympia/Thurston County, Thurston County Cause No. 16-2-02998-34

Mr. Ponzoha,
Together with the Office of City Attorney, we represent the City of Olympia in the above-referenced matter. An appeal was filed yesterday from the judgment of Judge Nevin (sitting as visiting judge) that a proposed City initiative was unlawful and that it not appear on the November ballot. The initiative sponsors reportedly will seek emergency relief from the Court of Appeals. The City opposes any such request; and, respectfully requests an opportunity to respond to any such request. Thank you for the Court's attention to these proceedings.

P. Stephen DiJulio

P. Stephen (Steve) DiJulio
ATTORNEY

FOSTER PEPPER P.L.L.C.

1111 Third Avenue, Suite 3000
Seattle, WA 98101

steve.dijulio@foster.com

Tel: 206-447-8971
Fax: 206-749-1927

foster.com

Kari Pitharoulis

From: Jay Donovan <j.donovan@foster.com>
Sent: Thursday, September 08, 2016 3:02 PM
To: 'Tonya Moore'
Cc: claret@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Kari Pitharoulis; Jessie Sherwood; 'Elizabeth Petrich'; knoll lowney; Susan Banner
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.
Attachments: Letter to Thurston County Superior Court 9.8.16.pdf

Dear Ms. Moore:

Attached is the City of Olympia's response to the correspondence from counsel below. Please do not hesitate to contact me should you have any questions.

Sincerely,
Jay Donovan

Jason R. Donovan

Partner
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101-3299
Phone: 206.447.7269
Fax: 206.749.1944
j.donovan@foster.com
www.foster.com

From: Elizabeth Petrich [<mailto:Petrice@co.thurston.wa.us>]
Sent: Thursday, September 08, 2016 1:02 PM
To: knoll lowney; Susan Banner
Cc: claret@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Jay Donovan; Mark Barber (mbarber@ci.olympia.wa.us); aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us); Jessie Sherwood
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

I just heard from the court that a hearing can be scheduled for 9:00 a.m on Wednesday September 14th, and they will know later this afternoon which judicial officer will be hearing the matter.

From: seattleknoll@gmail.com [<mailto:seattleknoll@gmail.com>] **On Behalf Of** knoll lowney
Sent: Thursday, September 8, 2016 12:29 PM
To: Susan Banner <susan.banner@foster.com>
Cc: claret@igc.org; Elizabeth Petrich <Petrice@co.thurston.wa.us>; goverstreet@myfreedomfoundation.com; Stephen DiJulio <steve.dijulio@foster.com>; Jay Donovan <j.donovan@foster.com>; Mark Barber (mbarber@ci.olympia.wa.us) <mbarber@ci.olympia.wa.us>; aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us)

<kpitharo@ci.olympia.wa.us>; Jessie Sherwood <jessie.c.sherwood@gmail.com>

Subject: OFO Initiative Ballot Title Appeal

Good morning,

Attached is a petition for ballot title appeal, which is being filed today in Thurston County Superior Court.

I have spoken with Ms. Petrich and we agreed that a suitable briefing schedule, given the urgency of this matter, is as follows:

Opening brief for any party seeking amendment to the ballot title: Close of business Friday.

Response briefs: Close of business Monday.

Reply briefs: Close of business Tuesday.

Hearing: Wednesday.

If the hearing is scheduled for Wednesday morning, then the replies would be due by Tuesday noon.

Please let me and Claire know if you have any objection to this briefing schedule.

Knoll Lowney
Smith & Lowney PLLC
2317 E. John St.
Seattle WA 98112
(206) 860-2976
fax (206) 860-4187
knoll@igc.org

****Note: the content of this message may be confidential and/or subject to attorney client privilege.****

Kari Pitharoulis

From: Kari Pitharoulis
Sent: Friday, September 09, 2016 8:17 AM
To: Tonya Moore; Claire Tonry; Jay Donovan
Cc: Knoll Lowney; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Carolina Mejia Barahona; Jessie Sherwood; Elizabeth Petrich; Carolina Mejia Barahona; knoll lowney; Susan Bannier
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Good morning Tonya – The City would appreciate that information as well. Thank you.

Kari Pitharoulis
Paralegal II
Direct Phone: 360.753.8037 | FAX: 360.570.3791

Please note: This email may be subject to public disclosure.



From: Tonya Moore [mailto:mooret@co.thurston.wa.us]
Sent: Friday, September 09, 2016 8:12 AM
To: Claire Tonry; Jay Donovan
Cc: Knoll Lowney; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Kari Pitharoulis; Carolina Mejia Barahona; Jessie Sherwood; Elizabeth Petrich; Carolina Mejia Barahona; knoll lowney; Susan Bannier
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Can someone provide me with the case number for the ballot title appeal?

Tonya S. Moore
360.754.4405

From: Tonya Moore
Sent: Thursday, September 08, 2016 4:42 PM
To: 'Claire Tonry' <clairet@igc.org>; 'Jay Donovan' <j.donovan@foster.com>
Cc: Knoll Lowney <knoll@igc.org>; 'goverstreet@myfreedomfoundation.com' <goverstreet@myfreedomfoundation.com>; 'Stephen DiJulio' <steve.dijulio@foster.com>; 'Mark Barber (mbarber@ci.olympia.wa.us)' <mbarber@ci.olympia.wa.us>; 'aharksen@ci.olympia.wa.us' <aharksen@ci.olympia.wa.us>; 'Kari Pitharoulis (kpitharo@ci.olympia.wa.us)' <kpitharo@ci.olympia.wa.us>; Carolina Mejia Barahona <mejiabc@co.thurston.wa.us>; 'Jessie Sherwood' <jessie.c.sherwood@gmail.com>; Elizabeth Petrich <Petrice@co.thurston.wa.us>; Carolina Mejia Barahona <mejiabc@co.thurston.wa.us>; 'knoll lowney' <knoll@igc.org>; 'Susan Bannier' <susan.bannier@foster.com>
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Yes, Judge Hirsch will still be hearing this matter.

Tonya S. Moore

360.754.4405

From: clairetonry@gmail.com [<mailto:clairetonry@gmail.com>] **On Behalf Of** Claire Tonry
Sent: Thursday, September 08, 2016 4:39 PM
To: Tonya Moore <mooret@co.thurston.wa.us>
Cc: Knoll Lowney <knoll@igc.org>
Subject: Re: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Thank you, Ms. Moore.

We just received a notice of assignment to the Hon. Judge Murphy. Will the hearing still be before the Hon. Judge Hirsch?

Thank you for clarifying.

On Thu, Sep 8, 2016 at 3:26 PM, Tonya Moore <mooret@co.thurston.wa.us> wrote:

Counsel,

Thank you for your input. As these matters are heard on an expedited manner, the ballot title appeal hearing will be heard on Wednesday, September 14th at 9:00 a.m. before Judge Hirsch.

Should another ballot title challenge petition be filed, that matter will also be scheduled on an expedited manner.

Tonya S. Moore

360.754.4405

From: Jay Donovan [<mailto:j.donovan@foster.com>]
Sent: Thursday, September 08, 2016 3:02 PM
To: Tonya Moore <mooret@co.thurston.wa.us>
Cc: clairet@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio <steve.dijulio@foster.com>; Mark Barber (mbarber@ci.olympia.wa.us) <mbarber@ci.olympia.wa.us>; aharsen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us) <kpitharo@ci.olympia.wa.us>; Jessie Sherwood <jessie.c.sherwood@gmail.com>; Elizabeth Petrich <Petrice@co.thurston.wa.us>; knoll lowney <knoll@igc.org>; Susan Bannier <susan.bannier@foster.com>

Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Dear Ms. Moore:

Attached is the City of Olympia's response to the correspondence from counsel below. Please do not hesitate to contact me should you have any questions.

Sincerely,

Jay Donovan

Jason R. Donovan

Partner

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000

Seattle, WA 98101-3299

Phone: [206.447.7269](tel:206.447.7269)

Fax: [206.749.1944](tel:206.749.1944)

j.donovan@foster.com

www.foster.com

From: Elizabeth Petrich [<mailto:Petrice@co.thurston.wa.us>]

Sent: Thursday, September 08, 2016 1:02 PM

To: knoll lowney; Susan Banner

Cc: clairet@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Jay Donovan; Mark Barber (mbarber@ci.olympia.wa.us); aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us); Jessie Sherwood

Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

I just heard from the court that a hearing can be scheduled for 9:00 a.m on Wednesday September 14th, and they will know later this afternoon which judicial officer will be hearing the matter.

From: seattleknoll@gmail.com [<mailto:seattleknoll@gmail.com>] **On Behalf Of** knoll lowney

Sent: Thursday, September 8, 2016 12:29 PM

To: Susan Banner <susan.bannier@foster.com>

Cc: clairet@igc.org; Elizabeth Petrich <Petrice@co.thurston.wa.us>; goverstreet@myfreedomfoundation.com; Stephen

Dijulio <steve.dijulio@foster.com>; Jay Donovan <j.donovan@foster.com>; Mark Barber (mbarber@ci.olympia.wa.us)
<mbarber@ci.olympia.wa.us>; aharsen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us)
<kpitharo@ci.olympia.wa.us>; Jessie Sherwood <jessie.c.sherwood@gmail.com>
Subject: OFO Initiative Ballot Title Appeal

Good morning,

Attached is a petition for ballot title appeal, which is being filed today in Thurston County Superior Court.

I have spoken with Ms. Petrich and we agreed that a suitable briefing schedule, given the urgency of this matter, is as follows:

Opening brief for any party seeking amendment to the ballot title: Close of business Friday.

Response briefs: Close of business Monday.

Reply briefs: Close of business Tuesday.

Hearing: Wednesday.

If the hearing is scheduled for Wednesday morning, then the replies would be due by Tuesday noon.

Please let me and Claire know if you have any objection to this briefing schedule.

Knoll Lowney
Smith & Lowney PLLC
2317 E. John St.
Seattle WA 98112
(206) 860-2976
fax (206) 860-4187

knoll@igc.org

****Note: the content of this message may be confidential and/or subject to attorney client privilege.****

--
Claire E. Tonry, Esq.

Smith & Lowney PLLC
2317 E. John St.
Seattle, WA 98112
Email: clairet@igc.org
Main: (206) 860-2883
Direct: (206) 860-1394
Fax: (206) 860-4187

The information contained in this e-mail message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this e-mail message in error, please notify the sender by reply e-mail and delete this message and any attachments.

Kari Pitharoulis

From: Microsoft Outlook on behalf of Greg Overstreet
<GOverstreet@myfreedomfoundation.com>
Sent: Friday, September 09, 2016 8:17 AM
To: Kari Pitharoulis
Subject: Automatic reply: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.
Attachments: Automatic reply: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Sender: GOverstreet@myfreedomfoundation.com

Subject: Automatic reply: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Message-Id: <92ca98e18ea54f07b83115959f6de4bf@MWHPR12MB1824.namprd12.prod.outlook.com>

Recipient: kpitharo@ci.olympia.wa.us

Kari Pitharoulis

From: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Sent: Friday, September 09, 2016 8:17 AM
To: Kari Pitharoulis
Subject: Automatic reply: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

I will be out of the office September 8 and 9. If you have any immediate questions or concerns, please contact my paralegal, Kirsten Nelsen, at knelsen@myfreedomfoundation.com or call one of my associates at 360-956-3482. Thank you.

Kari Pitharoulis

From: Kari Pitharoulis
Sent: Friday, September 09, 2016 9:24 AM
To: Jessie Sherwood
Cc: Tonya Moore; Claire Tonry; Jay Donovan; Knoll Lowney; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Carolina Mejia Barahona; Elizabeth Petrich; Susan Bannier
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Thank you, Jessie.

Kari Pitharoulis
Paralegal II
Direct Phone: 360.753.8037 | FAX: 360.570.3791

Please note: This email may be subject to public disclosure.



From: Jessie Sherwood [mailto:jessie.c.sherwood@gmail.com]
Sent: Friday, September 09, 2016 9:23 AM
To: Kari Pitharoulis
Cc: Tonya Moore; Claire Tonry; Jay Donovan; Knoll Lowney; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Carolina Mejia Barahona; Elizabeth Petrich; Susan Bannier
Subject: Re: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Good morning. I telephoned the Clerk's office this morning; the case number is 16-2-03575-34.

Yours very truly,
Jessie Sherwood

On Fri, Sep 9, 2016 at 8:17 AM, Kari Pitharoulis <kpitharo@ci.olympia.wa.us> wrote:

Good morning Tonya – The City would appreciate that information as well. Thank you.

Kari Pitharoulis

Paralegal II

Direct Phone: [360.753.8037](tel:360.753.8037) | FAX: [360.570.3791](tel:360.570.3791)

Please note: This email may be subject to public disclosure.



Legal Department

From: Tonya Moore [mailto:mooret@co.thurston.wa.us]

Sent: Friday, September 09, 2016 8:12 AM

To: Claire Tonry; Jay Donovan

Cc: Knoll Lowney; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Kari Pitharoulis; Carolina Mejia Barahona; Jessie Sherwood; Elizabeth Petrich; Carolina Mejia Barahona; knoll lowney; Susan Bannier

Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Can someone provide me with the case number for the ballot title appeal?

Tonya S. Moore

360.754.4405

From: Tonya Moore

Sent: Thursday, September 08, 2016 4:42 PM

To: 'Claire Tonry' <clairet@igc.org>; 'Jay Donovan' <j.donovan@foster.com>

Cc: Knoll Lowney <knoll@igc.org>; 'goverstreet@myfreedomfoundation.com'

<goverstreet@myfreedomfoundation.com>; 'Stephen DiJulio' <steve.dijulio@foster.com>; 'Mark Barber

(mbarber@ci.olympia.wa.us)' <mbarber@ci.olympia.wa.us>; 'aharksen@ci.olympia.wa.us'

<aharksen@ci.olympia.wa.us>; 'Kari Pitharoulis (kpitharo@ci.olympia.wa.us)' <kpitharo@ci.olympia.wa.us>; Carolina

Mejia Barahona <mejiabc@co.thurston.wa.us>; 'Jessie Sherwood' <jessie.c.sherwood@gmail.com>; Elizabeth Petrich

<Petrice@co.thurston.wa.us>; Carolina Mejia Barahona <mejiabc@co.thurston.wa.us>; 'knoll lowney' <knoll@igc.org>;

'Susan Bannier' <susan.bannier@foster.com>

Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Yes, Judge Hirsch will still be hearing this matter.

Tonya S. Moore

360.754.4405

From: clairetonry@gmail.com [mailto:clairetonry@gmail.com] **On Behalf Of** Claire Tonry
Sent: Thursday, September 08, 2016 4:39 PM
To: Tonya Moore <mooret@co.thurston.wa.us>
Cc: Knoll Lowney <knoll@igc.org>
Subject: Re: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Thank you, Ms. Moore.

We just received a notice of assignment to the Hon. Judge Murphy. Will the hearing still be before the Hon. Judge Hirsch?

Thank you for clarifying.

On Thu, Sep 8, 2016 at 3:26 PM, Tonya Moore <mooret@co.thurston.wa.us> wrote:

Counsel,

Thank you for your input. As these matters are heard on an expedited manner, the ballot title appeal hearing will be heard on Wednesday, September 14th at 9:00 a.m. before Judge Hirsch.

Should another ballot title challenge petition be filed, that matter will also be scheduled on an expedited manner.

Tonya S. Moore

360.754.4405

From: Jay Donovan [mailto:j.donovan@foster.com]
Sent: Thursday, September 08, 2016 3:02 PM
To: Tonya Moore <mooret@co.thurston.wa.us>

Cc: clairret@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio <steve.dijulio@foster.com>; Mark Barber (mbarber@ci.olympia.wa.us) <mbarber@ci.olympia.wa.us>; aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us) <kpitharo@ci.olympia.wa.us>; Jessie Sherwood <jessie.c.sherwood@gmail.com>; Elizabeth Petrich <Petrice@co.thurston.wa.us>; knoll lowney <knoll@igc.org>; Susan Banner <susan.bannier@foster.com>

Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Dear Ms. Moore:

Attached is the City of Olympia's response to the correspondence from counsel below. Please do not hesitate to contact me should you have any questions.

Sincerely,

Jay Donovan

Jason R. Donovan

Partner

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000

Seattle, WA 98101-3299

Phone: [206.447.7269](tel:206.447.7269)

Fax: [206.749.1944](tel:206.749.1944)

j.donovan@foster.com

www.foster.com

From: Elizabeth Petrich [mailto:Petrice@co.thurston.wa.us]

Sent: Thursday, September 08, 2016 1:02 PM

To: knoll lowney; Susan Banner

Cc: clairret@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Jay Donovan; Mark Barber (mbarber@ci.olympia.wa.us); aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us); Jessie Sherwood

Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

I just heard from the court that a hearing can be scheduled for 9:00 a.m on Wednesday September 14th, and they will know later this afternoon which judicial officer will be hearing the matter.

From: seattleknoll@gmail.com [mailto:seattleknoll@gmail.com] **On Behalf Of** knoll lowney

Sent: Thursday, September 8, 2016 12:29 PM

To: Susan Banner <susan.banner@foster.com>

Cc: clairret@igc.org; Elizabeth Petrich <Petrice@co.thurston.wa.us>; goverstreet@myfreedomfoundation.com; Stephen DiJulio <steve.dijulio@foster.com>; Jay Donovan <j.donovan@foster.com>; Mark Barber (mbarber@ci.olympia.wa.us) <mbarber@ci.olympia.wa.us>; aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us) <kpitharo@ci.olympia.wa.us>; Jessie Sherwood <jessie.c.sherwood@gmail.com>

Subject: OFO Initiative Ballot Title Appeal

Good morning,

Attached is a petition for ballot title appeal, which is being filed today in Thurston County Superior Court.

I have spoken with Ms. Petrich and we agreed that a suitable briefing schedule, given the urgency of this matter, is as follows:

Opening brief for any party seeking amendment to the ballot title: Close of business Friday.

Response briefs: Close of business Monday.

Reply briefs: Close of business Tuesday.

Hearing: Wednesday.

If the hearing is scheduled for Wednesday morning, then the replies would be due by Tuesday noon.

Please let me and Claire know if you have any objection to this briefing schedule.

Knoll Lowney
Smith & Lowney PLLC
2317 E. John St.
Seattle WA 98112

(206) 860-2976
fax (206) 860-4187

knoll@igc.org

****Note: the content of this message may be confidential and/or subject to attorney client privilege.****

--
Claire E. Tonry, Esq.

Smith & Lowney PLLC
2317 E. John St.
Seattle, WA 98112
Email: clairret@igc.org
Main: (206) 860-2883
Direct: (206) 860-1394
Fax: (206) 860-4187

The information contained in this e-mail message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this e-mail message in error, please notify the sender by reply e-mail and delete this message and any attachments.

--
Jessie Sherwood
Legal Assistant/Office Manager
Smith & Lowney, PLLC
2317 E. John
Seattle, WA 98112
E-mail: jessie.c.sherwood@gmail.com
Tel.: (206) 860-1570

Kari Pitharoulis

From: Marci Brandt <marci.brandt@foster.com>
Sent: Monday, September 12, 2016 4:30 PM
To: 'knoll@igc.org'; 'clairret@igc.org'; 'TCAuditor@co.thurston.wa.us';
'Petrice@co.thurston.wa.us'; 'goverstreet@myfreedomfoundation.com'; Steve Hall; Mark Barber; Annaliese Harksen
Cc: Stephen DiJulio; Jay Donovan
Subject: In Re: Ballot Title Appeal of Opportunity for Olympia Initiative - Thurston County Superior Court No. 16-2-03575-34
Attachments: City of Olympia's Opposition to Petition to Appeal.pdf; [Proposed] Order.pdf

Attached are the following:

- City of Olympia's Opposition to Petition to Appeal Ballot Title Opportunity for Olympia Initiative; and
- [Proposed] Order Denying Opportunity of Olympia's Petition to Appeal Ballot Title Dated 9/9/16.

Hard copies will follow via U.S. Mail.

Marci Brandt
Legal Assistant
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
marci.brandt@foster.com
Tel: 206-447-8955
Fax: 206-447-9700
foster.com

Kari Pitharoulis

From: Marci Brandt <marci.brandt@foster.com>
Sent: Tuesday, September 13, 2016 2:29 PM
To: 'knoll@igc.org'; 'clairret@igc.org'; 'TCAuditor@co.thurston.wa.us';
'Petrice@co.thurston.wa.us'; 'goverstreet@myfreedomfoundation.com'; Steve Hall; Mark Barber; Annaliese Harksen
Cc: Stephen DiJulio; Jay Donovan
Subject: RE: In Re: Ballot Title Appeal of Opportunity for Olympia Initiative - Thurston County Superior Court No. 16-2-03575-34
Attachments: Declaration of Jason R. Donovan.pdf

Attached is the Declaration of Jason R. Donovan in this matter.

Hard copies will follow via U.S. Mail.

Marci Brandt
Legal Assistant
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
marci.brandt@foster.com
Tel: 206-447-8955
Fax: 206-447-9700
foster.com

EXHIBIT J

EXHIBIT J

1 THE COURT OF APPEALS
2 STATE OF WASHINGTON
3 DIVISION II

4 CITY OF OLYMPIA, a Washington)
5 municipal corporation,)
6 Respondent,)
7 vs.) NO. 49333-1-II
8 OPPORTUNITY FOR OLYMPIA, a)
9 Washington Political)
10 Committee, RAY GUERRA,)
11 DANIELLE WESTBROOK, THURSTON)
12 COUNTY, and MARY HALL,)
13 Thurston County Auditor,)
14 Appellants.)

15 VERBATIM RECORD OF RECORDED HEARING
16 Thursday, September 1, 2016

17 APPEARANCES:

18 FOR THE RESPONDENT CITY OF OLYMPIA:

19 MR. P. STEPHEN DiJULIO
20 FOSTER PEPPER, PLLC
21 1111 - 3rd Avenue, Suite 3000
22 Seattle, WA 98101-3299

23 MR. MARK BARBER
24 CITY ATTORNEY
25 MS. ANNALIESE HARKSEN
DEPUTY CITY ATTORNEY
CITY OF OLYMPIA LEGAL DEPT.
601 - 4th Avenue E.
Olympia, WA 98501

Dixie Cattell & Associates * (360) 352-2506
Court Reporters & Videoconferencing

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

CITY OF OLYMPIA, a Washington)
municipal corporation,)
Respondent,)
vs.)
OPPORTUNITY FOR OLYMPIA, a)
Washington Political)
Committee, RAY GUERRA,)
DANIELLE WESTBROOK, THURSTON)
COUNTY, and MARY HALL,)
Thurston County Auditor,)
Appellants.)

NO. 49333-1-II

VERBATIM RECORD OF RECORDED HEARING
Thursday, September 1, 2016

APPEARANCES:

FOR THE RESPONDENT CITY OF OLYMPIA:

MR. P. STEPHEN DiJULIO
FOSTER PEPPER, PLLC
1111 - 3rd Avenue, Suite 3000
Seattle, WA 98101-3299

MR. MARK BARBER
CITY ATTORNEY
MS. ANNALIESE HARKSEN
DEPUTY CITY ATTORNEY
CITY OF OLYMPIA LEGAL DEPT.
601 - 4th Avenue E.
Olympia, WA 98501

1 APPEARANCES (Continued):

2 FOR THE APPELLANTS OFO, RAY GUERRA & DANEILLE WESTBROOK:

3 MS. CLAIRE TONRY
4 MR. KNOLL LOWNEY
5 SMITH & LOWNEY, PLLC
6 2317 E. John Street
7 Seattle, WA 98112

8 FOR THE APPELLANT MARY HALL:

9 MS. ELIZABETH PETRICH
10 CHIEF CIVIL DEPUTY PROSECUTING
11 ATTORNEY
12 2000 Lakeridge Drive SW
13 Olympia, WA 98502
14
15
16
17
18
19
20
21
22
23
24
25

1 COMMISSIONER BEARSE: Opportunity for Olympia
2 versus City of Olympia, 49333-1. And I understand -- I'm
3 going to hear appearances of counsel in a minute, and I do
4 understand we have some people on the phone here as well.
5 So why don't I hear who is here and confirm that our
6 telephonic participants can hear us as well.

7 So telephonic participants, if you could just
8 announce who you are.

9 MS. PETRICH: Good morning, Commissioner. My
10 name is Elizabeth Petrich. I'm the attorney representing
11 the Thurston County Auditor.

12 MS. HALL: Mary Hall, Thurston County Auditor.

13 MS. PETRICH: I am Elizabeth Petrich, and I am
14 representing the Thurston County Auditor.

15 COMMISSIONER BEARSE: Understood.

16 And then counsel who are here in person, we'll
17 start --

18 MS. TONRY: Good morning, Your Honor. Claire
19 Tonry with Smith & Lowney on behalf of Appellants
20 Opportunity for Olympia, Ray Guerra and Danielle Westbrook.

21 COMMISSIONER BEARSE: Thank you.

22 MR. DIJULIO: Good morning, Commissioner. Steve
23 DiJulio with Foster Pepper appearing on behalf of the City
24 of Olympia, together with Mark Barber, City Attorney, and
25 Annaliese Harksen, Assistant City Attorney.

1 COMMISSIONER BEARSE: Thank you.

2 I hear a little bit of background noise coming from
3 our telephone. Unless you need to speak for some reason,
4 could you make sure that you are on mute or there's no
5 other sounds?

6 As I said when I came in, we are here on a motion for
7 a stay pending appeal.

8 For the moving parties, are we going to have a single
9 person arguing for the full ten minutes, or are you
10 reserving rebuttal time?

11 MS. TONRY: We will be taking seven minutes and
12 (inaudible) it together, presuming there's (inaudible).

13 COMMISSIONER BEARSE: Thank you. And the
14 responding parties?

15 MR. DiJULIO: I'll be appearing on behalf of the
16 City. Thank you.

17 COMMISSIONER BEARSE: Are you going to be
18 splitting any time with Thurston County?

19 MR. DIJULIO: We have not decided what Thurston
20 County will do. Thurston County typically does not speak
21 at these hearings, but I'll leave it to Ms. Petrich to
22 advise and advise as much time as she may need.

23 COMMISSIONER BEARSE: Ms. Petrich, are you
24 planning on having any argument time here?

25 MS. PETRICH: No, I'm not planning on arguing.

1 I'm only here to answer any questions that the Court may
2 have.

3 COMMISSIONER BEARSE: Thank you very much.

4 So we will hear from the moving party.

5 MS. TONRY: Thank you. And may it please the
6 Court -- again, I'm Claire Tonry here on behalf of
7 appellants Opportunity for Olympia, Ray Guerra, and
8 Danielle Westbrook.

9 And we're here today to request emergency injunctive
10 relief pending appeal so that there may be a vote on the
11 Opportunity for Olympia citywide initiative measure this
12 November.

13 Now, the criteria for an junction pending appeal asks
14 whether the movant will lose the fruits of a successive
15 appeal without the relief and, if so, whether the appeal
16 presents debatable questions such that it is not totally
17 devoid of merit.

18 And I submit that if ever there were a case deserving
19 of injunctive -- injunction performing appeal, this is it.
20 There's no dispute that more than enough registered voters
21 signed Opportunity for Olympia's petition to advance the
22 measure to this November's ballot. Indeed more than 4,719
23 registered voters exercised their First Amendment right in
24 signing that petition and express their view that it ought
25 to be put to a vote at the very next election.

1 There's also no question that absent an order from
2 this Court staying that injunction from the trial court and
3 ordering an election on the Opportunity for Olympia measure
4 this November, petitioners will lose the fruits of a
5 successful appeal, thereby irreparably harming, not only
6 their First Amendment rights, but those of thousands of
7 other Olympia voters.

8 And as Thurston County stated in its brief, the
9 County needs to have the final ballot by September 12th to
10 meet ballot printing deadlines.

11 COMMISSIONER BEARSE: Is it the 12th or the
12 14th?

13 MS. TONRY: We were originally informed that it
14 was the 14th, and I believe that that's the deadline for
15 finalizing the ballot to print. And the County has more
16 recently requested it to be finalized by the 12th.

17 COMMISSIONER BEARSE: Okay.

18 MS. TONRY: So obviously, in either event,
19 there's no time to resolve the merits of this appeal before
20 the critical deadline for printing ballots.

21 And this, I have to note, is entirely a problem of
22 the City's own making, because they waited ten weeks to
23 bring their claims, and in the interim they failed to carry
24 out their ministerial duties that they are clearly required
25 to carry out to advance the measure to the ballot, and

1 holding the election this November is sinful --

2 COMMISSIONER BEARSE: In terms of your harms, I
3 mean, are you -- when you sign a petition, are you
4 guaranteed the right to have your initiative voted on, or
5 not guaranteed, you're expressing your view to have your
6 initiative voted on at an election or at a certain
7 election?

8 MS. TONRY: It's at the election that the
9 initiative is qualified for, your Honor. And I want to
10 point out that the Court in Filo Foods versus City of
11 SeaTac stated that the First Amendment protects statutorily
12 created initiative rights -- that's a quote -- in code
13 cities. And those initiative rights that are statutorily
14 created mandate that the city council forward it to the
15 next election, which is this November's general election.

16 COMMISSIONER BEARSE: In you're not given the
17 right to have it in this election, would it potentially be
18 able to be held at a later election, heard in a later
19 election?

20 MS. TONRY: That relief, your Honor, would
21 not --

22 COMMISSIONER BEARSE: Would you have to go back
23 to square one to collect signatures again?

24 MS. TONRY: I think that that's -- it's
25 debatable, but the point that I really want to emphasize

1 here is that that November election is essential to
2 preserving the fruits of a successful appeal, because a
3 later election as you're suggesting with a different
4 electorate is simply no substitute. This November's
5 general election is a presidential election. A general
6 election with voter turnout is the highest, and the subject
7 of the Opportunity for Olympia initiative education funding
8 is a headline political issue right now.

9 As the Ninth Circuit recognized in Southwest Voter
10 Registration versus Shelley, quote, investments of time,
11 money, and the exercise of citizenship rights, end quote,
12 in reliance on an election date, end quote, the political
13 and social environment of the time cannot be returned if an
14 appellate court finds that an election is improperly
15 enjoined.

16 And so in this situation where appellants and
17 thousands of voters will suffer irreparable harm without
18 the request for relief and the fruits of a successful
19 appeal will certainly be lost, the Supreme Court instructs
20 that, quote, relief should be granted unless the appeal is
21 totally devoid of merit.

22 And even when the threatened harm is not so great as
23 it is here, the merits of the controversy are considered
24 only so far as to ascertain that the questions presented
25 are debatable, and that's Shamley versus City of Olympia.

1 Opportunity for Olympia usually meets this standard
2 because this appeal has merits, and I want to address three
3 of those merits.

4 COMMISSIONER BEARSE: Go ahead.

5 MS. TONRY: So, first, the trial court erred by
6 invalidating the entire measure when the City only
7 challenged the tax element, and the Court never conducted
8 any severability analysis.

9 COMMISSIONER BEARSE: And you brought up the
10 severability issue in the Superior Court? I don't have the
11 benefit of a full record here, so --

12 MS. TONRY: We did, your Honor. We pointed out
13 that no severability analysis argument was made, yet -- no
14 argument was made and the Court never took up the issue or
15 analyzed the severability, which the Court of Appeals in
16 Priorities, excuse me, in the Supreme Court in League of
17 Education Voters versus State tells us that that's an
18 analysis that must be conducted before --

19 COMMISSIONER BEARSE: And if that analysis is
20 conducted, do you think it's debatable as the severability?

21 MS. TONRY: I think it's at least debatable, but
22 I think that there's -- the City really has no meritorious
23 argument at all, that the issue --

24 COMMISSIONER BEARSE: Do you think the City
25 waived the severability issue?

1 MS. TONRY: We do think that the City waived the
2 severability issue --

3 COMMISSIONER BEARSE: Go ahead.

4 MS. TONRY: -- by failing to reach it. But in
5 any event, the measure contains a severability clause, and
6 the Court again in League of Education Voters tells us
7 severability is presumed in that event. And, in addition,
8 the initiative has a funding mechanism aside from the tax
9 element that was challenged, and it has a provision for
10 distributing grants for education, even if there are not
11 funds to distribute grants to every --

12 COMMISSIONER BEARSE: In the severability cases
13 I looked at, it appeared that the funding position was the,
14 I'm sorry, the funding provision was the only provision for
15 funding an initiative, which then supported the reasoning
16 of those courts that it was the heart and soul of the
17 initiative and thus unseverable. So you're saying because
18 there are other funding mechanisms, it's not the case here?

19 MS. TONRY: That's right. There are explicit
20 funding mechanisms.

21 COMMISSIONER BEARSE: I am going to stop you for
22 one minute, because I do want to hear this full argument,
23 and I think ten minutes is going to be insufficient. I'm
24 going to add five minutes here --

25 MS. TONRY: Thank you, your Honor.

1 COMMISSIONER BEARSE: -- and five minutes to the
2 responding party if they desire to use it.

3 Go ahead.

4 MS. TONRY: Okay, thank you.

5 And it's section 4, subsection 3, that provides
6 specific mechanisms for receiving private gifts, grants,
7 and bequests. So there is sufficient independent funding
8 mechanism, in addition to heart and soul of the measure
9 being grants for education, which are fully preserved and
10 have never be challenged. Neither of these provisions
11 have.

12 COMMISSIONER BEARSE: Okay. Move on.

13 MS. TONRY: And so I do want to make the
14 additional point that regardless of the fate of the
15 initiative's tax element, the City is obligated to put the
16 remainder of the measure on the November ballot, and so the
17 City will incur the same costs to run the entire measure.
18 And that's just yet another reason why the request for
19 relief pending appeal is justified.

20 So the second merit issue I want to address is that
21 the trial court erred in holding that the city council has
22 exclusive power over local taxation to the exclusion of
23 citizens through initiative petitions. The City's entire
24 argument on this point is based on two specific statutes
25 that contain the phrase "legislative bodies." But in 1000

1 Friends versus McFarland, the Supreme Court squarely
2 rejected that argument and said that the phrase
3 "legislative bodies" is not dispositive. It directed us
4 then to the analysis we were supposed to conduct, is to
5 examine the entire statutory scheme and determine whether
6 there's a clear legislative intent to preclude the
7 different initiatives.

8 So if we look to the statutory scheme, we find that
9 the Legislature's explicit intent stated in RCW 35A.01.010,
10 which states that any specific enumeration of municipal
11 powers in this chapter, quote, shall not be construed in
12 any way to limit these broad powers. So that's to read to
13 specific statutory grants with power to the legislative
14 body, as the City does -- reading that to implicitly
15 preclude local tax initiatives is directly contrary to the
16 Legislature's explicit directions as to how to interpret
17 these statutes.

18 COMMISSIONER BEARSE: Did 1000 Friends
19 specifically address these statutes, 020 and 030, or was it
20 concerned with another statutory provision?

21 MS. TONRY: I believe it was concerned with
22 another statutory provision, your Honor.

23 COMMISSIONER BEARSE: Okay.

24 MS. TONRY: But specifically stated that the
25 Legislature normally is not paying attention to the citizen

1 initiative power versus -- versus not, using the term
2 legislative body.

3 COMMISSIONER BEARSE: I did find one case
4 involving 020 and 080 -- I didn't see it cited in the
5 briefs -- that predated 1000 Friends, however, which is
6 Citizens for Responsible Wildlife Management, which talked
7 about a zoning code alteration, and it said because 020
8 vested the city council with this power, it precluded a
9 referendum.

10 MS. TONRY: And that's an important point, your
11 Honor. Precluding a referendum is something that the City
12 has argued supports this argument but, in fact, it's just
13 the opposite.

14 COMMISSIONER BEARSE: Okay.

15 MS. TONRY: Where the Legislature has, as in the
16 case of tax ordinances, has precluded citizens only from
17 exercising the power of referendum, it's silent in terms of
18 the initiative power.

19 COMMISSIONER BEARSE: Okay.

20 MS. TONRY: And that shows that the Legislature
21 knows how to explicitly preclude its citizens from direct
22 legislation and have not done that here.

23 In addition, because the grants of power to the
24 legislative body in RCW 35A.11.020, those grants are
25 extremely broad. They literally include enacting, quote,

1 ordinances of all kind, so reading that to preclude citizen
2 initiatives would effectively nullify the entire initiative
3 power.

4 COMMISSIONER BEARSE: It would wipe out the 080
5 subsection?

6 MS. TONRY: There would be nothing left, and
7 that cannot be the Legislature's intent when it granted
8 powers to code cities the right of initiative.

9 So the third point I want to address is that the
10 court erred by applying RCW 36.65.030, which is the statute
11 that purports to prohibit local taxes on, quote, net
12 income. The statute's application of validity are issues
13 of first impression, which in and of itself, indicate that
14 there are debatable issues here, and, as such, relief
15 should be granted pending appeal.

16 COMMISSIONER BEARSE: You strongly believe this
17 is an excise tax?

18 MS. TONRY: We do, your Honor. And that's
19 supported by the City's own draft ordinances just a few
20 months ago, the scholarship of the City's legal advisor,
21 United States Supreme Court.

22 COMMISSIONER BEARSE: And I'm just -- I'm really
23 trying to educate myself on the taxation issue in
24 particular, and it seems to me that excise taxes are
25 premised on the doing of what's quoted as a voluntary act;

1 for example, somebody who wants to run a retail business in
2 a city or somebody who wants to get a particular license
3 for something. And I'm wondering what the acts are here.

4 MS. TONRY: Well, to quote the Supreme Court,
5 the taxes and excise -- if the government is taxing a
6 particular use or enjoyment of property for the shifting
7 from one to another of any power or privilege incidental to
8 the ownership or enjoyment of property. And here this tax
9 is based on the benefits that are disproportionately
10 received by residents with household incomes above
11 \$200,000, including, for example, city services providing
12 for parks for which they receive a disproportionate
13 benefit, police and other emergency-like services.

14 COMMISSIONER BEARSE: But these police and other
15 emergency-like services, they are offered to everybody in
16 Olympia, correct?

17 MS. TONRY: They are, and they provide a
18 disproportionate value, as do the parks in close proximity
19 to these households.

20 COMMISSIONER BEARSE: And we're out of time. We
21 can talk about the excise tax if we need a little more on
22 rebuttal. Thank you.

23 MR. DIJULIO: May it please the Court and
24 Counsel.

25 The King Dome, the I-90 floating bridge, water system

1 fluoridation, traffic safety cameras, zoning, municipal
2 bonds, growth management and taxation, what do all those
3 important public issues have in common? They're not
4 subject to local direct legislation. But appellants seek
5 to elevate this case in this motion to a level that is
6 unsupported by fact or law. Saying it is so does not make
7 it so, but that is the whole foundation for this motion.

8 The appellant political committee says there are
9 debatable issues, but the city council, Thurston County's
10 special election commissioner and Court found no debatable
11 issues, and there are none, because the Legislature
12 answered these questions directly. The Court doesn't need
13 to look to 020. 030 itself precludes the application of
14 the direct legislation when it specifically delegates such
15 political powers to the legislative bodies such as eminent
16 domain and taxation.

17 COMMISSIONER BEARSE: And you think that 030's
18 language is sufficient to sort of overcome the 1000
19 Friends' statements about how particular you need to be
20 when you're trying to circumvent initiative power?

21 MR. DIJULIO: It's not only 1000 Friends, but
22 all the cases that come after 1000 Friends, your Honor.
23 And, of course, under 36.65.030, the Legislature has simply
24 and unequivocally prohibited a city from levying a tax on
25 net income.

1 Before addressing the counsel's argument, it should
2 not go unnoticed that the United States Supreme Court
3 yesterday denied North Carolina's request to stay pending
4 appeal the Fourth Circuit's ruling that invalidated that
5 state's voter registration laws.

6 First, let's address the issue of who is really
7 damaged in this case by this motion. Counsel
8 misrepresented the petition that was circulated. There's
9 no reference in the petition to a November 2016 election.
10 The petition is attached to the City's complaint and it's
11 attached to the opposition and petition of the political
12 committee.

13 The election can be held just as easily in February
14 2017 as it can in November 2016.

15 COMMISSIONER BEARSE: Can you answer my question
16 about whether re-acquisition of signatures would be
17 required?

18 MS. TONRY: MR. DIJULIO: There's no requirement
19 for that. If the Court issues wishes a stipulation, the
20 City is prepared to so stipulate, and we will right now.

21 There's no foundation, evidentiary or in law, that
22 the assertions for the November general election either is
23 a right or a necessity. This case has been pending for six
24 weeks. There is no declaration, expert or otherwise, that
25 an election in early 2017 is any different than late 2016.

1 They say all these political things are going on, but where
2 is there an evidentiary record in support of that? The
3 City can just as easily point out, and the Commissioner may
4 take notice, that a lower voter turnout at a special
5 election in February would be better for a proposition, as
6 there is a greater likelihood that committed voters will
7 vote and there will be a greater opportunity to secure the
8 necessary percentage. That is why school district bonds in
9 this state are typically held at the February or April
10 special election, because you have the committed voters
11 turning out. And, of course, all ballots are by mail in
12 this state, and so there is no issue of voter turnout or
13 accessibility to polls.

14 So, again, there is not a single fact in this effort
15 that supports a claim that a November 2016 election is any
16 different than an election in February 2017, and this
17 matter can be resolved by then.

18 Second, the fruits of this case are preserved for
19 appeal, notwithstanding the trial court's invalidation of
20 the initiative. In Philadelphia II versus Gregoire, a very
21 similar situation: The Thurston County Superior Court
22 invalidated an initiative, kept it off the ballot. The
23 Supreme Court nevertheless reviewed the matter on the
24 merits. There, the so-called Philadelphia II initiative
25 sought to establish the United States direct "direct

1 democracy" by means of federal nationwide initiative
2 process to complement the Congressional system and to call
3 what was known as a world meeting to discuss global issues.

4 Again, the Supreme Court, although arguably moot with
5 respect to a specific election, nevertheless went forward
6 and considered the merits and ruled it invalid, just as has
7 happened here.

8 And, third, and, of course, while they cannot show a
9 likelihood of prevailing, or as the City asserts, even
10 debatable issue, even a debatable issue is not enough to
11 gain extraordinary relief.

12 As -- by the way, the Court has the record before it.
13 The City filed an appendix of these proceedings in this
14 matter.

15 COMMISSIONER BEARSE: Are you -- I just want to
16 make sure I have all the documents.

17 MR. DIJULIO: Yeah, I recognize --

18 COMMISSIONER BEARSE: You filed an appendix with
19 your response?

20 MR. DIJULIO: We did.

21 COMMISSIONER BEARSE: Is that what you're
22 referring to, or is there another appendix?

23 MR. DIJULIO: No, that's the appendix we're
24 referring to.

25 COMMISSIONER BEARSE: Okay, just making sure.

1 MR. DIJULIO: And while there may be a document
2 or so that is not -- that is in the trial court record that
3 is not before the Court, you have the transcript from the
4 judge's ruling and you have all of the pleadings we believe
5 that are relevant to this consideration. Again, we filed
6 both the City's and the Defendant's pleadings.

7 COMMISSIONER BEARSE: You started out talking
8 about the lack of the harm to OFO. I'm supposed to look at
9 -- I'm supposed to balance equities here. Is there any
10 harm to the City?

11 MR. DIJULIO: Thank you, your Honor.

12 In the court's exercise of its discretion in applying
13 the sliding scale of RAP 8.1, what party really loses by
14 granting the defendant's motion? It's not appellants.
15 They preserve the right to appeal, they preserve the right
16 to a ruling on the merits, and reserve the right to an
17 election if it prevails. It is the City that loses; the
18 City loses the fruits of this matter, because the judgment
19 in the City's favor entered by the trial court becomes
20 void, and the City is compelled to hold a useless election
21 and incur the attendant costs and administrative burdens.
22 The City has no recovery for that. You have to --

23 COMMISSIONER BEARSE: I understand you will
24 incur the cost, for example, of printing a supplemental
25 voter's pamphlet, but what are the additional real-world

1 costs?

2 MR. DIJULIO: The City has to pay for the
3 election. The City has to pay --

4 COMMISSIONER BEARSE: Well, we're talking about
5 an election that's going ahead, correct?

6 MR. DIJULIO: Yeah.

7 COMMISSIONER BEARSE: I mean, this is not a
8 special election.

9 MR. DIJULIO: No. The city has an obligation
10 under law, your Honor, to pay a percentage of the cost of
11 the election based upon the number of measures on the
12 ballot, and it is admitted by the City that the cost for
13 its participation in a general election is less than the
14 cost of the participation in a special election, but,
15 nevertheless, there's a direct cost for the City, and those
16 -- the Spokane case, the Longview case, all recognize that
17 it is such a cost that is a damage to the City and
18 certainly gives rise to the standing that allows them to
19 challenge a matter preelection to avoid that very cost.
20 And that's what we're talking about. And there's no
21 recovery. The electorate, loses again in such a
22 circumstance by having a ballot measure that is invalid
23 placed before it.

24 The efforts of the initiative sponsors here are
25 similar to those of Tim Eyman who puts these initiatives

1 before the people without consideration of their validity.
2 And they get on the ballot and the people vote on them,
3 thinking that they have a right that they're not entitled
4 to, and it puts the courts in a position of again
5 invalidating a measure --

6 COMMISSIONER BEARSE: But, you know, they do a
7 post-election validation. Isn't that what just happened
8 with this most recent one?

9 MR. DIJULIO: That's correct, your Honor, but in
10 the situation here, you have a judgment. We understand
11 politically that decisions are made and some will not --
12 well, some will send matters to the ballot, in any event.
13 The city council of the City of Olympia made a conscious
14 decision, after studied efforts -- again, those studied
15 efforts are part of the record; the resolutions of the
16 council are before you -- to consider this matter and to
17 say this doesn't work, we're not putting it before the
18 electorate, and a judgment of the trial court affirmed
19 that. That is what is here before the Court.

20 And to suggest that we're going to have an election
21 on a matter that is going to be invalid is a disservice to
22 the public and a waste of public resources. The City
23 concludes then where it began. There is no constitutional
24 right to a city initiative or referendum. The right
25 exists, if at all, by statute.

1 Appellant asked the commissioner to put a measure on
2 the November ballot, simply because they say it should be
3 on that ballot. There's no right constitutionally and no
4 debatable issues, and there is no statutory right to have
5 an election in November 2016. This Court should not
6 exercise its discretion in the face of thorough and studied
7 consideration by the Olympia city council and the legal
8 determinations by the trial court below.

9 The City asks this court to not order an election,
10 that it will be a useless act and an election that condones
11 bad policy by allowing invalid matters onto the ballot and
12 wastes public resources. The motion should be denied.

13 One further --

14 COMMISSIONER BEARSE: Going to --

15 MR. DIJULIO: I'm sorry, your Honor. One
16 further comment. The issue of severability --

17 COMMISSIONER BEARSE: You can read my mind.

18 MR. DIJULIO: Thank you.

19 -- was before the trial court. I refer the Court to
20 the briefing, and I'll specifically refer to page 5 of the
21 City's reply brief to the defendant's motion, which is
22 index No. 13 in the City's submission and subsection 4
23 specifically addresses the issue of severability. The City
24 says: Defendants ask the Court to parse the initiative and
25 sever provisions unrelated to the illegal income tax, but

1 the entire proposed income tax initiative is about the
2 levying and appropriation of the proposed income tax. And
3 the Court can review that briefing, if it wishes further,
4 but clearly that issue was before the trial court.

5 COMMISSIONER BEARSE: And what did the trial
6 court do with it? I didn't -- I mean, I read the ruling.

7 MR. DIJULIO: The trial court did not address it
8 and -- the Court didn't need to address a number of issues
9 in that regard, as it said. I don't need to address it,
10 the Court said, and we believe the court act was correct in
11 doing so.

12 The trial court, having reviewed the record, is not
13 obligated to review and rule on every element of the matter
14 before it. Here it ruled the initiative was invalid and --

15 COMMISSIONER BEARSE: And you don't think the
16 severability issue is debatable?

17 MR. DIJULIO: The issue, your Honor, is: Can
18 direct election, here in initiative, direct the
19 appropriation of college -- or of city funds to support
20 college education? The statute, 030, specifically
21 prohibits, and 090, specifically addresses appropriation.
22 And here they're saying we're going to appropriate city
23 funds, however they come in to the City, for use for
24 college education. That is not within the power of direct
25 legislation. And so we're going to have a vote on a single

1 measure? That is, that the City receives grants or gifts
2 and uses that money first to support college education? Is
3 that what we're going to have a vote on, to essentially
4 tell the City how it's going to appropriate its fund? We
5 don't believe that's a debatable issue, your Honor.

6 COMMISSIONER BEARSE: And your views on the
7 excise tax? As I explained, I am coming up to speed on
8 arcane taxation issues very quickly.

9 MR. DIJULIO: The Court's question is addressed
10 in our briefing and, we believe, answered, and we agree
11 with the Court that an excise tax is on the privilege of
12 doing business, and if you look at the excise tax cases in
13 this state's history -- the City of Olympia is not
14 antagonistic to the defendant's general proposition for tax
15 relief and tax remediation in our state. We understand --
16 the city council understands that. The city council
17 supports the issue of better funding for education in this
18 state. It says it in its resolutions.

19 The difficulty is, and we don't want to address this,
20 but in our brief we note it, the Legislature specifically
21 called an income tax an excise tax, and the Supreme Court
22 invalidated it and said this isn't an excise tax, it's an
23 income --

24 COMMISSIONER BEARSE: That's the old -- I can't
25 remember the case -- from 1930's, correct?

1 MR. DIJULIO: Correct.

2 COMMISSIONER BEARSE: Okay.

3 MR. DIJULIO: So here we have a situation where
4 we have a claim of an excise tax on adjusted gross income.
5 That's not an income tax filed for -- ?

6 COMMISSIONER BEARSE: So you believe this is
7 best characterized as an income tax, and even though it's
8 an AGI tax, you believe it resembles enough a net income
9 tax to fall within the prohibition of 36 -- I'm not going
10 to recite the whole quote, but you understand what I'm
11 talking about?

12 MR. DIJULIO: And that was specifically found by
13 the city council in its resolution, your Honor.

14 COMMISSIONER BEARSE: Thank you.

15 MR. DIJULIO: Thank you.

16 COMMISSIONER BEARSE: And is it three minutes of
17 rebuttal time?

18 UNIDENTIFIED SPEAKER: She went over briefly by
19 about a minute.

20 COMMISSIONER BEARSE: Okay, two minutes of
21 rebuttal time, but I'll be a little casual with the red
22 light.

23 MS. PETRICH: Thank you, your Honor.

24 I want to first address the equities here, because I
25 think they're plain and they're completely misstated by the

1 City. The City stands to lose nothing if the injunctive
2 relief is granted pending appeal, but Opportunity for
3 Olympia stands to lose their First Amendment rights.

4 COMMISSIONER BEARSE: Do you think any of the
5 State's actual outlay, let's say, the cost of printing a
6 supplemental voter's pamphlet can be adequately protected
7 by filing a supersedeas bond?

8 MS. PETRICH: If those costs were impact --
9 something that the City only needed to incur because of the
10 appeal --

11 COMMISSIONER BEARSE: Well, the Hall declaration
12 seems to say that they need to print another pamphlet,
13 correct?

14 MS. TONRY: That's right, and that is the case
15 regardless because, again, the lack of a severability
16 argument, and the City has just claimed that all it says
17 below is that the entire measure is invalid, but that's not
18 a severability analysis, and it was not conducted as it
19 needs to be, but --

20 COMMISSIONER BEARSE: Well, and then they argue
21 that it infringes the appropriation power given by statute
22 to a legislative body, if I'm not misstating what the City
23 just argued.

24 MS. TONRY: The City has made that argument, but
25 it's completely unsupported, because this is not an

1 appropriation. An appropriation is a compulsory payment.
2 Accepting gifts and bequests is, by definition, not an
3 appropriation, so that argument has no merit.

4 But I want to go back to the fact that we stand to
5 lose everything that we have -- that my clients have
6 designed this initiative for, designed it to for this
7 election, designed it for the high-voter turnout election,
8 and we've put evidence into the record on page 13 of our
9 motion that, in fact, as I'm sure, that the Court can take
10 judicial notice of, that general elections in a
11 presidential year have much higher voter turnout. And the
12 campaign is underway. The staff are here; the voters are
13 here today.

14 As the Ninth Circuit clearly held, those investments
15 of time and money, and primarily the exercise of their
16 citizenship rights, based on the political and social
17 environment of the time, cannot be returned. That is, by
18 definition, irreparable harm.

19 And going back, your Honor, to the severability
20 issue, I want to again point up to the initiative, which
21 provides section 5, subsection 4, that if funds are
22 insufficient, the Department, in consultation with the
23 committee, may determine the priority by which grants are
24 awarded, so there's a provision for grants appeal.

25 COMMISSIONER BEARSE: And I understand the

1 function and the way the initiative functions, and we are
2 out of time, so if you want to have just ten seconds to
3 wrap up.

4 MS. TONRY: In conclusion, your Honor, voters
5 have everything to lose here, and the City stands to lose
6 nothing by running an initiative -- running an initiative
7 that was undisputably qualified.

8 COMMISSIONER BEARSE: Thank you. I am going to
9 take this matter under consideration. I do understand that
10 we're coming up against some very strict deadlines here. I
11 will issue a written decision as quickly as I can, and,
12 obviously, all parties will be notified.

13 Thurston County, are you still with us?

14 MS. PETRICH: Yes, I am. Yes, we are, your
15 Honor.

16 COMMISSIONER BEARSE: Do you have any questions
17 before we conclude this hearing?

18 MS. PETRICH: No, I don't.

19 COMMISSIONER BEARSE: Thank you. I do want to,
20 before you hang up, Thurston County, switch to a more
21 administrative portion of this hearing, in that I do
22 understand we have a September 12th or September 14th
23 deadline we are coming up against, and in that I likely --
24 think that likely, regardless of my commissioner's ruling,
25 that any party will want to bring this up on a motion to

1 modify to a panel of judges, and I do appreciate both
2 parties working hard to meet the deadline, the emergency
3 filing deadlines, to get this stay before me so quickly,
4 and I just want to notify the parties that in the event --
5 well, regardless of my ruling -- I am going to likely set
6 out a motion-to-modify scheduling in my ruling. If anybody
7 objects to that or has concerns about that, now would be a
8 good time to air them.

9 MR. DIJULIO: No objection from the City.

10 COMMISSIONER BEARSE: Certainly I'm not
11 encouraging people to file a motion to modify, but, again,
12 I'm conscious of deadlines that were set out in the Hall
13 declaration, and I think everybody deserves their day in
14 court, and we're going to do our best to give it to the
15 both of you.

16 With that, we will be adjourned.

17 (Hearing adjourned)

18

19

20

21

22

23

24

25

C E R T I F I C A T E

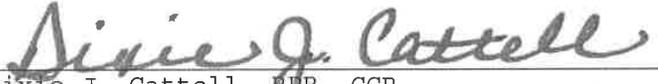
I, DIXIE J. CATTELL, the undersigned Registered Professional Reporter and Washington Certified Court Reporter, do hereby certify:

That the foregoing VERBATIM RECORD OF RECORDED HEARING was taken by me via a recording and completed on the 3rd day of October, 2016, and thereafter transcribed by me by means of computer-aided transcription; that the transcript is a full, true and complete transcript of the proceedings, to the best of my ability;

That I am not a relative, employee, attorney or counsel of any party to this action or relative or employee of such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That I am herewith securely sealing the VERBATIM RECORD OF RECORDED HEARING and promptly serving the same upon MR. MARK BARBER.

IN WITNESS HEREOF, I have hereunto set my hand this 3rd day of OCTOBER, 2016.


Dixie J. Cattell, RPR, CCR
NCRA Registered Professional Reporter
Washington Certified Court Reporter CSR#2346

\$	5	ahead 9:4 10:3 11:3 21:5	12:2 13:12 17:1 27:16, 24 28:3
\$200,000 15:11	5 23:20 28:21	air 30:8	ascertain 8:24
0	8	allowing 23:11	asks 5:13 23:9
020 12:19 13:4,7 16:13	8.1 20:13	alteration 13:7	assertions 17:22
030 12:19 16:13 24:20	A	Amendment 5:23 6:6 7:11 27:3	asserts 19:9
030's 16:17		analysis 9:8,13,18,19 12:4 27:18	Assistant 3:25
080 13:4 14:4	absent 6:1	analyzed 9:15	attached 17:10,11
090 24:21	Accepting 28:2	Annaliese 3:25	attendant 20:21
1	accessibility 18:13	announce 3:8	attention 12:25
1000 11:25 12:18 13:5 16:18,21,22	act 14:25 23:10 24:10	antagonistic 25:14	attorney 3:10,24,25
12th 6:9,11,16 29:22	acts 15:3	appeal 4:7 5:10,13,15, 19 6:5,19 8:2,19,20 9:2 11:19 14:15 17:4 18:19 20:15 27:2,10 28:24	Auditor 3:11,12,14
13 23:22 28:8	actual 27:5	Appeals 9:15	avoid 21:19
14th 6:12,14 29:22	add 10:24	appearances 3:3	awarded 28:24
1930's 25:25	addition 10:7 11:8 13:23	appeared 10:13	B
2	additional 11:14 20:25	appearing 3:23 4:15	back 7:22 28:4,19
2016 17:9,14,25 18:15 23:5	address 9:2 11:20 12:19 14:9 17:6 24:7, 8,9 25:19 26:24	appellant 16:8 23:1	background 4:2
2017 17:14,25 18:16	addressed 25:9	appellants 3:19 5:7 8:16 16:4 20:14	bad 23:11
3	addresses 23:23 24:21	appellate 8:14	balance 20:9
3 11:5	addressing 17:1	appendix 19:13,18, 22,23	ballot 5:22 6:9,10,15, 25 11:16 18:22 21:12, 22 22:2,12 23:2,3,11
35A.01.010 12:9	adequately 27:6	application 14:12 16:13	ballots 6:20 18:11
35A.11.020 13:24	adjourned 30:16,17	applying 14:10 20:12	Barber 3:24
36 26:9	adjusted 26:4	appropriation 24:2, 19,21 27:21 28:1,3	based 11:24 15:9 21:11 28:16
36.65.030 14:10 16:23	administrative 20:21 29:21	April 18:9	BEARSE 3:1,15,21 4:1,13,17,23 5:3 6:11, 17 7:2,16,22 9:4,9,19, 24 10:3,12,21 11:1,12 12:18,23 13:3,14,19 14:4,16,22 15:14,20 16:17 17:15 19:15,18, 21,25 20:7,23 21:4,7 22:6 23:14,17 24:5,15 25:6,24 26:2,6,14,16, 20 27:4,11,20 28:25 29:8,16,19 30:10
4	admitted 21:12	arcane 25:8	began 22:23
4 11:5 23:22 28:21	advance 5:21 6:25	arguably 19:4	behalf 3:19,23 4:15 5:6
4,719 5:22	advise 4:22	argue 27:20	
49333-1 3:2	advisor 14:20	argued 13:12 27:23	
	affirmed 22:18	arguing 4:9,25	
	AGI 26:8	argument 4:24 9:13, 14,23 10:22 11:24	
	agree 25:10		

benefit 9:11 15:13	Circuit 8:9 28:14	9:4,9,19,24 10:3,12,21	consultation 28:22
benefits 15:9	Circuit's 17:4	11:1,12 12:18,23 13:3,	contrary 12:15
bequests 11:7 28:2	circulated 17:8	14, 19 14:4, 16, 22	controversy 8:23
bit 4:2	circumstance 21:22	15:14,20 16:10,17	correct 15:16 21:5
bodies 11:25 12:3	circumvent 16:20	17:15 18:3 19:15,18,	22:9 24:10 25:25 26:1
16:15	cited 13:4	21,25 20:7,23 21:4,7	27:13
body 12:14 13:2,24	cities 7:13 14:8	22:6 23:1,14,17 24:5,	cost 20:24 21:10,12,
27:22	citizen 12:25 14:1	15 25:6,24 26:2,6,14,	14,15,17,19 27:5
bond 27:7	citizens 11:23 13:6,	16,20 27:4,11,20	costs 11:17 20:21
bonds 16:2 18:8	16,21	28:25 29:8,16,19	21:1 27:8
bridge 15:25	citizenship 8:11	30:10	council 7:14 11:21
briefing 23:20 24:3	28:16	commissioner's	13:8 16:9 22:13,16
25:10	city 3:2,23,24,25 4:16	29:24	23:7 25:16 26:13
briefly 26:18	7:10,14 8:25 9:6,22,24	committed 18:6,10	counsel 3:3,16 15:24
briefs 13:5	10:1 11:15,17,21	committee 16:8 17:12	17:7
bring 6:23 29:25	12:14 13:8,11 15:2,11	28:23	counsel's 17:1
broad 12:12 13:25	16:9,24 17:20 18:3	common 16:3	County 3:11,12,14
brought 9:9	19:9,13 20:10,17,18,	compelled 20:20	4:18,20 6:8,9,15 18:21
burdens 20:21	20,22 21:2,3,9,12,15,	complaint 17:10	29:13,20
business 15:1 25:12	17 22:13,22,24 23:7,9,	complement 19:2	County's 16:9
	23 24:19,22,23 25:1,4,	completely 26:25	court 5:1,6 6:2 7:10
	13,16 26:13 27:1,9,16,	27:25	8:14,19 9:5,7,10,14,
	22,24 29:5 30:9	compulsory 28:1	15,16 10:6 11:21 12:1
	City's 6:22 11:23	concerned 12:20,21	14:10,21 15:4,23
	14:19,20 17:10 20:6,	concerns 30:7	16:10,12 17:2,19
	19 23:21,22	conclude 29:17	18:21,23 19:4,12 20:2,
	citywide 5:11	concludes 22:23	3,19 22:18,19 23:5,8,
	claim 18:15 26:4	conclusion 29:4	9,19,24 24:3,4,6,7,8,
	claimed 27:16	condones 23:10	10,12 25:11,21 28:9
	claims 6:23	conduct 12:4	30:14
	Claire 3:18 5:6	conducted 9:7,18,20	court's 18:19 20:12
	clause 10:5	27:18	25:9
	clear 12:6	confirm 3:5	courts 10:16 22:4
	clients 28:5	Congressional 19:2	created 7:12,14
	close 15:18	conscious 22:13	criteria 5:13
	code 7:12 13:7 14:8	30:12	critical 6:20
	collect 7:23	consideration 20:5	
	college 24:19,20,24	22:1 23:7 29:9	D
	25:2	considered 8:23 19:6	damage 21:17
	comment 23:16	constitutional 22:23	damaged 17:7
	commissioner 3:1,9,	constitutionally 23:3	Danielle 3:20 5:8
	15,21,22 4:1,13,17,23	construed 12:11	date 8:12
	5:3 6:11,17 7:2,16,22		day 30:13
call 19:2			
called 25:21			
cameras 16:1			
campaign 28:12			
Carolina's 17:3			
carry 6:23,25			
case 5:18 10:18 13:3,			
16 16:5 17:7,23 18:18			
21:16 25:25 27:14			
cases 10:12 16:22			
25:12			
casual 26:21			
challenge 21:19			
challenged 9:7 10:9			
11:10			
chapter 12:11			
characterized 26:7			

deadline 6:14,20 29:23 30:2	discuss 19:3	elevate 16:5	exercising 13:17
deadlines 6:10 29:10 30:3,12	dispositive 12:3	Elizabeth 3:10,13	exists 22:25
debatable 5:16 7:25 8:25 9:20,21 14:14 16:9,10 19:10 23:4 24:16 25:5	disproportionate 15:12,18	emergency 5:9 30:2	expert 17:24
decided 4:19	disproportionately 15:9	emergency-like 15:13,15	explained 25:7
decision 22:14 29:11	dispute 5:20	eminent 16:15	explicit 10:19 12:9,16
decisions 22:11	disservice 22:21	emphasize 7:25	explicitly 13:21
declaration 17:24 27:11 30:13	distribute 10:11	enacting 13:25	express 5:24
defendant's 20:6,14 23:21 25:14	distributing 10:10	encouraging 30:11	expressing 7:5
Defendants 23:24	district 18:8	end 8:11,12	extraordinary 19:11
definition 28:2,18	document 20:1	enjoyed 8:15	extremely 13:25
delegates 16:14	documents 19:16	enjoyment 15:6,8	Eyman 21:25
democracy 19:1	domain 16:16	entered 20:19	F
denied 17:3 23:12	Dome 15:25	entire 9:6 11:17,23 12:5 14:2 24:1 27:17	face 23:6
Department 28:22	draft 14:19	entitled 22:3	fact 13:12 16:6 18:14 28:4,9
deserves 30:13	duties 6:24	enumeration 12:10	failed 6:23
deserving 5:18	E	environment 8:13 28:17	failing 10:4
designed 28:6,7	early 17:25	equities 20:9 26:24	fall 26:9
desire 11:2	easily 17:13 18:3	erred 9:5 11:21 14:10	fate 11:14
determinations 23:8	educate 14:23	essential 8:1	favor 20:19
determine 12:5 28:23	education 8:7 9:17 10:6,10 11:9 24:20,24 25:2,17	essentially 25:3	February 17:13 18:5, 9,16
devoid 5:17 8:21	effectively 14:2	establish 18:25	federal 19:1
difficulty 25:19	effort 18:14	event 6:18 10:5,7 22:12 30:4	file 30:11
Dijulio 3:22,23 4:15, 19 15:23 16:21 17:18 19:17,20,23 20:1,11 21:2,6,9 22:9 23:15,18 24:7,17 25:9 26:1,3, 12,15 30:9	efforts 21:24 22:14,15	evidence 28:8	filed 19:13,18 20:5 26:5
direct 13:21 16:4,14 18:25 21:15 24:18,24	election 5:25 6:3 7:1, 6,7,8,15,17,18,19 8:1, 3,5,6,12,14 16:10 17:9,13,22,25 18:5,10, 15,16 19:5 20:17,20 21:3,5,8,11,13,14 22:20 23:5,9,10 24:18 28:7	evidentiary 17:21 18:2	filing 27:7 30:3
directed 12:3	elections 28:10	examine 12:5	Filo 7:10
directions 12:16	electorate 8:4 21:21 22:18	excise 14:17,24 15:5, 21 25:7,11,12,21,22 26:4	final 6:9
directly 12:15 16:12	element 9:7 10:9 11:15 24:13	exclusion 11:22	finalized 6:16
discretion 20:12 23:6		exclusive 11:22	finalizing 6:15
		excuse 9:16	find 12:8 13:3
		exercise 8:11 20:12 23:6 28:15	finds 8:14
		exercised 5:23	floating 15:25
			fluoridation 16:1
			Foods 7:10
			forward 7:14 19:5

late 17:25	make 4:4 11:13 16:6 19:16	28:15	objects 30:7
law 16:6 17:21 21:10	making 6:22 19:25	months 14:20	obligated 11:15 24:13
laws 17:5	management 13:6 16:2	moot 19:4	obligation 21:9
League 9:16 10:6	mandate 7:14	morning 3:9,18,22	offered 15:15
leave 4:21	Mark 3:24	motion 4:6 16:5,7 17:7 20:14 23:12,21 28:9 29:25 30:11	OFO 20:8
left 14:6	Mary 3:12	motion-to-modify 30:6	Olympia 3:1,2,20,24 5:7,11 6:3,7 8:7,25 9:1 15:16 22:13 23:7 25:13 27:3
legal 14:20 23:7	matter 18:17,23 19:14 20:18 21:19 22:16,21 24:13 29:9	movant 5:14	Olympia's 5:21
legislation 13:22 16:4,14 24:25	matters 22:12 23:11	Move 11:12	opportunity 3:1,20 5:7,11,21 6:3 8:7 9:1 18:7 27:2
legislative 11:25 12:3,6,13 13:2,24 16:15 27:22	Mcfarland 12:1	moving 4:8 5:4	opposite 13:13
Legislature 12:25 13:15,20 16:11,23 25:20	means 19:1	municipal 12:10 16:1	opposition 17:11
Legislature's 12:9,16 14:7	measure 5:11,22 6:3, 25 9:6 10:5 11:8,16,17 21:22 22:5 23:1 25:1 27:17	mute 4:4	order 6:1 23:9
level 16:5	measures 21:11	N	ordering 6:3
levying 16:24 24:2	mechanism 10:8 11:8	nationwide 19:1	ordinances 13:16 14:1,19
license 15:2	mechanisms 10:18, 20 11:6	necessity 17:23	originally 6:13
light 26:22	meet 6:10 30:2	needed 27:9	outlay 27:5
likelihood 18:6 19:9	meeting 19:3	net 14:11 16:25 26:8	overcome 16:18
limit 12:12	meets 9:1	Ninth 8:9 28:14	ownership 15:8
literally 13:25	merit 5:17 8:21 11:20 28:3	noise 4:2	P
local 11:22 12:15 14:11 16:4	meritorious 9:22	North 17:3	pamphlet 20:25 27:6, 12
Longview 21:16	merits 6:19 8:23 9:2,3 18:24 19:6 20:16	note 6:21 25:20	panel 30:1
looked 10:13	mind 23:17	notice 18:4 28:10	parks 15:12,18
lose 5:14 6:4 27:1,3 28:5 29:5	ministerial 6:24	notified 29:12	parse 23:24
loses 20:13,17,18 21:21	minute 3:3 10:22 26:19	notify 30:4	part 22:15
lost 8:19	minutes 4:9,11 10:23, 24 11:1 26:16,20	notwithstanding 18:19	participants 3:6,7
lower 18:4	misrepresented 17:8	November 5:12 6:4 7:1 8:1 11:16 17:9,14, 22 18:15 23:2,5	participation 21:13, 14
Lowney 3:19	misstated 26:25	November's 5:22 7:15 8:4	parties 4:8,14 29:12 30:2,4
M	misstating 27:22	nullify 14:2	party 5:4 11:2 20:13 29:25
made 9:13,14 22:11, 13 27:24	modify 30:1,11	number 21:11 24:8	pay 21:2,3,10
mail 18:11	money 8:11 25:2	O	paying 12:25
		objection 30:9	

payment 28:1	27:21	property 15:6,8	read 12:12 23:17 24:6
pending 4:7 5:10,13 11:19 14:15 17:3,23 27:2	powers 12:11,12 14:8 16:15	proposed 24:1,2	reading 12:14 14:1
people 3:4 22:1,2 30:11	preclude 12:6,15 13:21 14:1	proposition 18:5 25:14	real-world 20:25
Pepper 3:23	precluded 13:8,16	protected 27:6	reason 4:3 11:18
percentage 18:8 21:10	precludes 16:13	protects 7:11	reasoning 10:15
performing 5:19	Precluding 13:11	provide 15:17	rebuttal 4:10 15:22 26:17,21
person 3:16 4:9	predated 13:5	providing 15:11	receive 15:12
petition 5:21,24 7:3 17:8,9,10,11	preelection 21:19	provision 10:9,14 12:20,22 28:24	received 15:10
petitioners 6:4	premised 14:25	provisions 11:10 23:25	receives 25:1
petitions 11:23	prepared 17:20	proximity 15:18	receiving 11:6
Petrich 3:9,10,13 4:21,23,25 26:23 27:8 29:14,18	presented 8:24	public 16:3 22:22 23:12	recent 22:8
Philadelphia 18:24	presents 5:16	purports 14:11	recently 6:16
Philadephia 18:20	preserve 20:15	put 5:25 11:15 23:1 28:8	recite 26:10
phone 3:4	preserved 11:9 18:18	puts 21:25 22:4	recognize 19:17 21:16
phrase 11:25 12:2	preserving 8:2	putting 22:17	recognized 8:9
plain 26:25	presidential 8:5 28:11		record 9:11 18:2 19:12 20:2 22:15 24:12 28:8
planning 4:24,25	presumed 10:7	Q	recovery 20:22 21:21
pleadings 20:4,6	presuming 4:12	qualified 7:9 29:7	red 26:21
point 7:10,25 11:14,24 13:10 14:9 18:3 28:20	prevailing 19:9	question 6:1 17:15 25:9	refer 23:19,20
pointed 9:12	prevails 20:17	questions 5:1,16 8:24 16:12 29:16	reference 17:9
police 15:13,14	primarily 28:15	quickly 25:8 29:11 30:3	referendum 13:9,11, 17 22:24
policy 23:11	print 6:15 27:12	quote 7:12 8:10,11,12, 20 12:11 13:25 14:11 15:4 26:10	referring 19:22,24
political 8:8,12 16:8, 15 17:11 18:1 28:16	printing 6:10,20 20:24 27:5	quoted 14:25	regard 24:9
politically 22:11	Priorities 9:16		registered 5:20,23
polls 18:13	priority 28:23	R	registration 8:10 17:5
portion 29:21	private 11:6	RAP 20:13	rejected 12:2
position 10:13 22:4	privilege 15:7 25:11	Ray 3:20 5:7	relevant 20:5
post-election 22:7	problem 6:21	RCW 12:9 13:24 14:10	reliance 8:12
potentially 7:17	proceedings 19:13	re-acquisition 17:16	relief 5:10,15 7:20 8:18,20 11:19 14:14 19:11 25:15 27:2
power 11:22 12:13 13:1,8,17,18,23 14:3 15:7 16:20 24:24	process 19:2	reach 10:4	remainder 11:16
	prohibit 14:11		remediation 25:15
	prohibited 16:24		remember 25:25
	prohibition 26:9		
	prohibits 24:21		

reply 23:21	scale 20:13	so-called 18:24	statute's 14:12
representing 3:10,14	scheduling 30:6	social 8:13 28:16	statutes 11:24 12:17, 19
request 5:9 8:18 11:18 17:3	scheme 12:5,8	sort 16:18	statutorily 7:11,13
requested 6:16	scholarship 14:20	sought 18:25	statutory 12:5,8,13, 20,22 23:4
required 6:24 17:17	school 18:8	soul 10:16 11:8	stay 4:7 17:3 30:3
requirement 17:18	Seatac 7:11	sounds 4:5	staying 6:2
resembles 26:8	seconds 29:2	Southwest 8:9	Steve 3:22
reserve 20:16	section 11:5 28:21	speak 4:3,20	stipulate 17:20
reserving 4:10	secure 18:7	SPEAKER 26:18	stipulation 17:19
residents 15:10	seek 16:4	special 16:10 18:4,10 21:8,14	stop 10:21
resolution 26:13	send 22:12	specific 11:6,24 12:10,13 19:5	strict 29:10
resolutions 22:15 25:18	September 6:9 29:22	specifically 12:19,24 16:14 23:20,23 24:20, 21 25:20 26:12	strongly 14:16
resolve 6:19	services 15:11,13,15	speed 25:7	studied 22:14 23:6
resolved 18:17	set 30:5,12	splitting 4:18	subject 8:6 16:4
resources 22:22 23:12	sever 23:25	Spokane 21:16	submission 23:22
respect 19:5	severability 9:8,10, 13,15,20,25 10:2,5,7, 12 23:16,23 24:16 27:15,18 28:19	sponsors 21:24	submit 5:18
responding 4:14 11:2	Shamley 8:25	square 7:23	subsection 11:5 14:5 23:22 28:21
response 19:19	Shelley 8:10	squarely 12:1	substitute 8:4
Responsible 13:6	shifting 15:6	staff 28:12	successful 6:5 8:2,18
retail 15:1	show 19:8	stand 28:4	successive 5:14
returned 8:13 28:17	shows 13:20	standard 9:1	suffer 8:17
review 24:3,13	sign 7:3	standing 21:18	sufficient 11:7 16:18
reviewed 18:23 24:12	signatures 7:23 17:16	stands 27:1,3 29:5	suggest 22:20
rights 6:6 7:12,13 8:11 27:3 28:16	signed 5:21	start 3:17	suggesting 8:3
rise 21:18	signing 5:24	started 20:7	Superior 9:10 18:21
rule 24:13	silent 13:17	state 9:17 18:9,12 25:15,18	supersedeas 27:7
ruled 19:6 24:14	similar 18:21 21:25	state's 17:5 25:13 27:5	supplemental 20:24 27:6
ruling 17:4 20:4,16 24:6 29:24 30:5,6	simply 8:4 16:23 23:2	stated 6:8 7:11 12:9, 24	support 18:2 24:19 25:2
run 11:17 15:1	sinful 7:1	statements 16:19	supported 10:15 14:19
running 29:6	single 4:8 18:14 24:25	states 12:10 14:21 17:2 18:25	supports 13:12 18:15 25:17
	situation 8:16 18:21 22:10 26:3	statute 14:10 22:25 24:20 27:21	supposed 12:4 20:8,9
	sliding 20:13		Supreme 8:19 9:16 12:1 14:21 15:4 17:2
S	Smith 3:19		
safety 16:1			

18:23 19:4 25:21 switch 29:20 system 15:25 19:2	24 13:10,15,20 14:6, 18 15:4,17 17:18 27:14,24 29:4 totally 5:16 8:21 traffic 16:1 transcript 20:3 trial 6:2 9:5 11:21 18:19 20:2,19 22:18 23:8,19 24:4,5,7,12 turning 18:11 turnout 8:6 18:4,12 28:7,11 typically 4:20 18:9	view 5:24 7:5 views 25:6 void 20:20 voluntary 14:25 vote 5:10,25 18:7 22:2 24:25 25:3 voted 7:4,6 voter 8:6,9 17:5 18:4, 12 28:11 voter's 20:25 27:6 voters 5:20,23 6:7 8:17 9:17 10:6 18:6,10 28:12 29:4
T	U	W
taking 4:11 talk 15:21 talked 13:6 talking 20:7 21:4,20 26:11 tax 9:7 10:8 11:15 12:15 13:16 14:17 15:8,21 16:24 23:25 24:1,2 25:7,11,12,14, 15,21,22 26:4,5,7,8,9 taxation 11:22 14:23 16:2,16 25:8 taxes 14:11,24 15:5 taxing 15:5 telephone 4:3 telephonic 3:6,7 tells 9:17 10:6 ten 4:9 6:22 10:23 29:2 term 13:1 terms 7:2 13:17 things 18:1 thinking 22:3 thousands 6:6 8:17 threatened 8:22 Thurston 3:11,12,14 4:18,19,20 6:8 16:9 18:21 29:13,20 Tim 21:25 time 4:10,18,22,24 6:19 8:10,13 15:20 26:17,21 28:15,17 29:2 30:8 today 5:9 28:13 Tonry 3:18,19 4:11 5:5,6 6:13,18 7:8,20, 24 9:5,12,21 10:1,4, 19,25 11:4,13 12:21,	understand 3:2,4 20:23 22:10 25:15 26:10 28:25 29:9,22 understands 25:16 Understood 3:15 underway 28:12 undisputably 29:7 unequivocally 16:24 UNIDENTIFIED 26:18 United 14:21 17:2 18:25 unnoticed 17:2 unrelated 23:25 unseverable 10:17 unsupported 16:6 27:25 useless 20:20 23:10	waited 6:22 waived 9:25 10:1 waste 22:22 wastes 23:12 water 15:25 weeks 6:22 17:24 Westbrook 3:20 5:8 Wildlife 13:6 wipe 14:4 wishes 17:19 24:3 wondering 15:3 work 22:17 working 30:2 world 19:3 wrap 29:3 written 29:11
	V	Y
	validation 22:7 validity 14:12 22:1 versus 3:2 7:10 8:10, 25 9:17 12:1 13:1 18:20 vested 13:8	year 28:11 yesterday 17:3
		Z
		zoning 13:7 16:1

EXHIBIT K

EXHIBIT K

**BEFORE THE PUBLIC DISCLOSURE COMMISSION
STATE OF WASHINGTON**

In RE: 45-Day Citizen Action Complaint Filed by
Knoll Lowney on Behalf of the Opportunity for
Olympia Initiative Campaign,

Complainant.

PDC Case No. 8341

DECLARATION OF JANE KIRKEMO

I, JANE KIRKEMO, declare as follows:

1. I am over the age of 18 years. I have personal knowledge of the facts contained in this Declaration and if called upon to testify, I could and would testify competently as to the truth of the facts stated herein.

2. I am the Administrative Services Director for the City of Olympia, Washington. As part of my responsibilities as Administrative Services Director, I am the City Clerk. As City Clerk, I also serve as the City of Olympia's election officer.

3. The Opportunity for Olympia (OFO) initiative campaign did not file their proposed initiative petition with me before it commenced circulating its initiative petition for signatures as defined in RCW 42.17A.005(4).

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Signed at Olympia, Washington, this 6th day of October 2016.



Jane Kirkemo
Administrative Services Director/City Clerk

LOCAL APRIL 14, 2016 5:06 PM

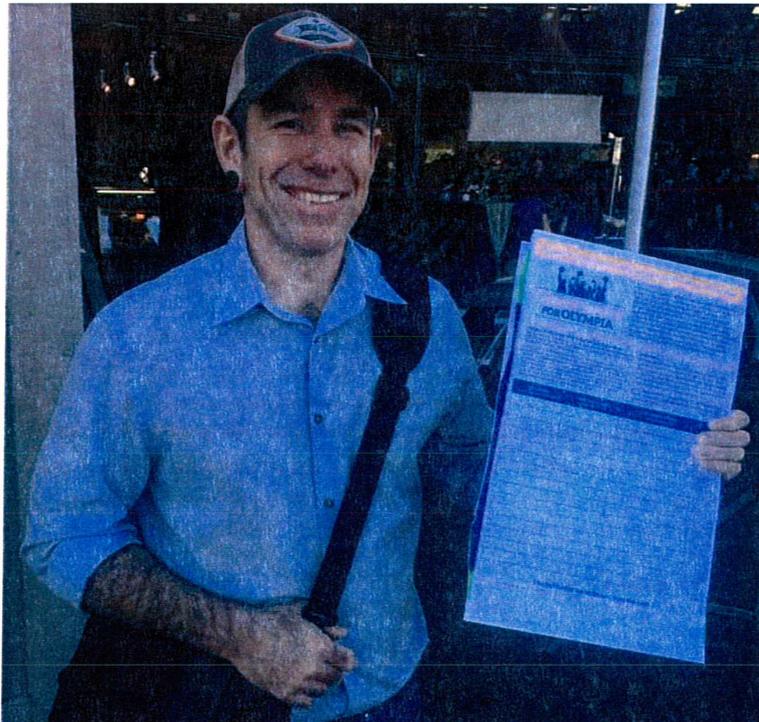
Petition calls for taxing Olympia's wealthiest households to create college fund

HIGHLIGHTS

Volunteers need to gather 4,702 valid signatures by June 16 to make the November ballot

Proposed ordinance seeks 1.5 percent tax on all income over \$200,000 in Olympia city limits

Olympia mayor expects to see a legal challenge if the measure passes



BY ANDY HOBBS

ahobbs@theolympian.com

A petition is circulating for a new ordinance that would tax Olympia's wealthiest households to generate college tuition money for all local high school graduates.

Backed by a volunteer group called Opportunity for Olympia, the proposal calls for creating a 1.5 percent tax on household income in excess of \$200,000. Organizers estimate about 750 households in Olympia city limits would be subject to the tax, which would raise about \$2.5 million a year.

The petition needs 4,702 valid signatures by June 16 to qualify for the November general election ballot. If the law passes, every public high school graduate and GED recipient living inside Olympia's boundaries would be eligible for money to pay for the first year of tuition at any community college, or an equivalent amount can be applied to tuition at any public university in Washington.

The Seattle-based Economic Opportunity Institute has provided the blueprint for Opportunity for Olympia.

"Obviously the state has not done a lot in terms of reducing tuition," said John Burbank, executive director of the institute. "This is a way for at least Olympia to sort of lead the way as to how this can be done."

Burbank said Olympia's measure would be the first of its kind in the state. Olympia voters are passionate about education, he said, pointing to the decisive votes for a school district construction bond (72 percent) and operations levy (76 percent) in the February special election.

The proposed tax could help increase the number of Olympia students who continue their education past high school, Burbank said. In 2012, about 77 percent of Olympia public high school graduates continued on to college, according to the institute.

"We think a lot of students don't go to college because of the cost of tuition," Burbank said. "It's not just a financial barrier. It's a psychological barrier."

Volunteer coordinator Ray Guerra has been gathering signatures from local voters. Guerra, who ran unsuccessfully for Olympia City Council in 2015, said that three rounds of informal polling have shown about "70 percent favorability" for the tax.

The goal is to collect at least 8,000 signatures to ensure the measure will qualify for the November election. Guerra said volunteers gathered about 1,500 signatures on March 26, Democratic caucus day in Thurston County.

In the bigger picture, organizers hope the proposal will present a formidable chink in opposition to a state income tax, and help reform a regressive tax system.

"If we can get this on the ballot," Guerra said, "it's going to go through."

Olympia Mayor Cheryl Selby said city officials were not consulted about the petition or the proposed ordinance. At this time, she wants the public and city officials to have access to as much information about the proposal as possible.

Selby said she believes the proposal will attract a court challenge regarding the tax's legality.

"This is uncharted territory," Selby told The Olympian. "This is going to be a conversation across the state that's going to put Olympia in the spotlight."

To that end, the Olympia City Council will hold a public study session on the proposal at 5:30 p.m. Tuesday at City Hall, 601 Fourth Ave. E. University of Washington law professor Hugh Spitzer will provide insight to the council, Selby said.

City attorney Mark Barber confirmed that if enough valid signatures are gathered, the proposal would go before the city council as an ordinance. The council could then enact the ordinance as is or put it on the ballot for voters.

Barber agreed with Selby it is possible that the ordinance, if it passes, could face a legal challenge.

Andy Hobbs: 360-704-6869, @andyhobbs



MORE LOCAL



Meeting Minutes

City Council

City Hall
601 4th Avenue E
Olympia, WA 98501

Information: 360.753.8244

Tuesday, April 19, 2016

5:30 PM

Council Chambers

Study Session

1. ROLL CALL

Present: 6 - Mayor Cheryl Selby, Mayor Pro Tem Nathaniel Jones, Councilmember Jessica Bateman, Councilmember Clark Gilman, Councilmember Julie Hankins and Councilmember Jeannine Roe

Excused: 1 - Councilmember Jim Cooper

2. BUSINESS ITEM

2.A 16-0508 City Revenue Option and Authority

Mayor Selby introduced Hugh Spitzer. Mr. Spitzer is a public finance and municipal law attorney with Foster Pepper PLLC as well as Professor of Law at University of Washington School of Law. City Manager Steve Hall noted Mr. Spitzer was invited to discuss income tax initiatives and the statutory authority of cities to impose such a tax.

Mr. Spitzer discussed his background working on policy and legislation around State income tax issues. He gave background on Revised Code of Washington (RCW) 35A.01.010 which addresses the statutory authority of cities regarding individual income tax. He noted code cities do not have the tools and powers of taxation.

Mr. Spitzer discussed the current petition circulating that would create an ordinance to impose an income tax on households in Olympia that earn more than \$200,000 per year. He shared background on the city of Bellingham, which attempted to implement a similar income tax, and the outcomes of the subsequent State Supreme Court cases.

Councilmembers asked clarifying questions.

The study session was completed.

3. ADJOURNMENT

The meeting adjourned at 6:50 p.m.



Meeting Minutes

City Council

City Hall
601 4th Avenue E
Olympia, WA 98501

Information: 360.753.8244

Tuesday, May 17, 2016

7:00 PM

Council Chambers

1. ROLL CALL

Present: 7 - Mayor Cheryl Selby, Mayor Pro Tem Nathaniel Jones, Councilmember Jessica Bateman, Councilmember Jim Cooper, Councilmember Clark Gilman, Councilmember Julie Hankins and Councilmember Jeannine Roe

1.A ANNOUNCEMENTS

Mayor Selby announced the Council met in a Study Session earlier this evening.

1.B APPROVAL OF AGENDA

Mayor Selby noted the addition of two Special Recognition items; one honoring Steve Romines and the other acknowledging the 35th Anniversary of the Capital City Marathon.

The agenda was approved as amended.

2. SPECIAL RECOGNITION

- 2.A** 16-0506 Special Recognition - Walker John and Ron Thomas, recipients of Futurewise's Annual Livable Communities Award on March 16, 2016

Community Planning and Development Director Keith Stahley discussed the work of Walker John of Urban Olympia LLC and Ron Thomas of Thomas Architecture Studio. He acknowledged the recent Futurewise Annual Livable Communities Award they were given for their redevelopment work in downtown Olympia.

The recognition was received.

- 2.B** 16-0469 Special Recognition - Bicycle Commuter Month Proclamation

Senior Program Specialist Michelle Swanson discussed Bicycle Commuter Month in Olympia. Councilmember Gilman read a proclamation to acknowledge Bicycle Commuter Month in Olympia. Intercity Transit representative Duncan Green received the proclamation, discussed the Bicycle Commuter contest, and encouraged the community to participate.

The recognition was received.

- 2.C** 16-0666 ADDED - Proclamation in Honor of the 35th Anniversary of the Capital City Marathon

Mayor Selby read the proclamation in honor of the 35th anniversary of the Capital City Marathon. Capital City Marathon Association representative Judy Hartman received the proclamation.

The recognition was received.

- 2.D** 16-0667 ADDED - Recognition to Honor Steve Romines' Service and Retirement From Thurston County Medic One

Councilmember Hankins read a proclamation to honor Thurston County Medic One Director Steve Romines for 24 years of service to the community as he retires. Mr. Romines received the proclamation.

The recognition was received.

3. PUBLIC COMMUNICATION

The following people spoke: Jim Reeves, Liz Atkins Pattenson, Mika Guevara, Holly West, Isabella Neal, Nani Nguyen, Glynn Rosenberg, Eileah Schlenker, Grecia Ramirez, Nicholas Hefling, and Julie Rodwell.

4. CONSENT CALENDAR

- 4.A** 16-0636 Approval of May 10, 2016 City Council Meeting Minutes

The minutes were adopted.

- 4.B** 16-0630 Approval of Community Development Block Grant (CDBG) Program Year 2015 Action Plan Amendments

The decision was adopted.

- 4.C** 16-0615 Approval of Multi-family Housing Limited Property Tax Exemption Agreement for 321 Legion Way

The contract was adopted.

- 4.D** 16-0616 Approval of Multi-family Housing Limited Property Tax Exemption Agreement for 512 12th Avenue SE

The contract was adopted.

4. SECOND READINGS - None

4. FIRST READINGS

- 4.E** 16-0606 Approval of Ordinance Amending Rezone Hearing Body

The ordinance was approved on first reading and moved to second reading.

- 4.F** 16-0643 Approval of Ordinance Amending Olympia Municipal Code (OMC) Chapter 9.44 by Adopting the Crime of Minor in Possession or Consumption of Alcohol, Supplying Liquor to Minor, and Minor Exhibiting the Effects of Having Consumed Liquor Pursuant to RCW 66.44.270

The ordinance was approved on first reading and moved to second reading.

- 4.G** 16-0607 Approval of Ordinance Amending High-Density Corridor-1 Zoning District Text

The ordinance was approved on first reading and moved to second reading.

- 4.H** 16-0642 Approval of Ordinance amending Olympia Municipal Code (OMC) Chapter 9.40 Relating to Offenses Against Property by Adopting by Reference Vehicle Prowling in the Second Degree Pursuant to RCW 9A.52.100, Theft Third Degree Pursuant to RCW 9A.56.050 and Possessing Stolen Property Third Degree Pursuant to RCW 9A.56.170

The ordinance was approved on first reading and moved to second reading.

- 4.I** 16-0644 Approval of Ordinance Amending Olympia Municipal Code (OMC) Chapter 9.08 Relating to Obstructing a Public Servant or Officer and Making a False or Misleading Statement to a Public Servant

The ordinance was approved on first reading and moved to second reading.

- 4.J** 16-0645 Approval of Ordinance Amending Olympia Municipal Code (OMC) Chapter 9.24 Relating to Crimes Against Public Decency by Adopting the Crime of Indecent Exposure Pursuant to RCW 9.88.010

The ordinance was approved on first reading and moved to second reading.

Approval of the Consent Agenda

Mayor Pro Tem Jones moved, seconded by Councilmember Bateman, to adopt the Consent Calendar. The motion carried by the following vote:

Aye: 7 - Mayor Selby, Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper, Councilmember Gilman, Councilmember Hankins and Councilmember Roe

5. PUBLIC HEARING - None

6. OTHER BUSINESS

- 6.A** 16-0614 Approval of 2016 Neighborhood Matching Grant Allocation

Community Planning and Development Program Manager Anna Schlecht discussed the Neighborhood Matching Grant program. Councilmember Hankins discussed the allocations requested by the Neighborhood Associations and which are recommended

for approval.

Councilmembers asked clarifying questions.

Councilmember Cooper moved, seconded by Mayor Selby, to approve neighborhood matching grant amounts, contingent on negotiation of agreements with respective neighborhood associations to complete each project in 2016. The motion carried by the following vote:

Aye: 7 - Mayor Selby, Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper, Councilmember Gilman, Councilmember Hankins and Councilmember Roe

6.B 16-0627 Discussion of Administrative Costs and Issues Related to the Opportunity for Olympia Income Tax Initiative

City Manager Steve Hall and Administrative Services Director Jane Kirkemo briefed the Council and discussed costs and administrative issues associated with the proposed City of Olympia income tax.

Mayor Pro Tem Jones proposed the Olympia City Council consider creating its own ordinance which would be on the November ballot that would accomplish the intent of the initiative. He also proposed the ordinance would tax all citizens using a graduated level of taxation. He asked that the drafted ordinance be brought back to the Council on June 21.

Councilmembers asked clarifying questions of Mayor Pro Tem Jones and discussed the issue.

Mayor Pro Tem Jones moved, seconded by Councilmember Bateman, to move forward with the drafting of an ordinance which would tax all citizens using a graduated level of taxation for review at the June 21 City Council meeting. The motion carried by the following vote:

Aye: 4 - Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper and Councilmember Gilman

Nay: 3 - Mayor Selby, Councilmember Hankins and Councilmember Roe

7. CONTINUED PUBLIC COMMUNICATION - None

8. REPORTS AND REFERRALS

8.A COUNCIL INTERGOVERNMENTAL/COMMITTEE REPORTS AND REFERRALS

Councilmembers reported on meetings and events attended.

8.B CITY MANAGER'S REPORT AND REFERRALS

City Manager Steve Hall requested a referral to the Finance Committee regarding public safety funding needs. The Council agreed to the referral.

9. EXECUTIVE SESSION

The meeting recessed to Executive Session at 10:03 p.m. to discuss a Real Estate Matter. Mayor Selby announced no decisions will be made, the meeting is expected to last no longer than one hour, and the Council will adjourn immediately following the Executive Session. The Assistant City Manager, Deputy City Attorney, Administrative Services Director, Parks, Arts & Recreation Director, and Public Works Director were present at the Executive Session.

- 9.A** 16-0628 Executive Session Pursuant to RCW 42.30.110(1)(b) and RCW 42.30.110 (1)(c) - Real Estate Matter

The executive session was held and no decisions were made.

9. ADJOURNMENT

The meeting adjourned at 11:00 p.m.



Meeting Minutes

City Council

City Hall
601 4th Avenue E
Olympia, WA 98501

Information: 360.753.8244

Tuesday, June 14, 2016

7:00 PM

Council Chambers

1. ROLL CALL

Present: 7 - Mayor Cheryl Selby, Mayor Pro Tem Nathaniel Jones, Councilmember Jessica Bateman, Councilmember Jim Cooper, Councilmember Clark Gilman, Councilmember Julie Hankins and Councilmember Jeannine Roe

1.A ANNOUNCEMENTS

Mayor Selby noted the Council met earlier in a Study Session.

Mayor Selby acknowledged the tragedy that occurred in Orlando over the weekend. She noted a rainbow flag is flying at half mast at City Hall. Capital City Pride representative Anna Schlecht spoke and thanked the Council for their support of the LGBTQ community.

1.B APPROVAL OF AGENDA

The agenda had an amendment to Item 4.I which had two changes; the dollar amount in number 9 under Budget Items not Previously Presented to Council changed from \$600,000 to \$200,000 and the dollar amount under Financial Impact changed from \$1,272,353 to \$872,353.

The agenda was approved as amended.

2. SPECIAL RECOGNITION

2.A 16-0694 Special Recognition - Fireworks Ban Reminder

Fire Marshall Robert Bradley gave the yearly reminder of the fireworks ban in Olympia.

The recognition was received.

3. PUBLIC COMMUNICATION

The following people spoke: Jim Reeves, Dean Jones, Jim Haley, Kris Tucker, David Shaffert, Brandon Goodman, Bill Wilson, Steve Langer, Michael Dean and Debra Jaqua.

4. CONSENT CALENDAR

- 4.A 16-0736 Approval of June 7, 2016 City Council Meeting Minutes

The minutes were adopted.

- 4.C 16-0661 Approval of the Drinking Water State Revolving Fund (DWSRF) Loan for the Fones Road Booster Pump Station

The contract was adopted.

- 4.D 16-0662 Approval of the Drinking Water State Revolving Fund (DWSRF) Loan for the McAllister Wellfield Corrosion Control Facility

The contract was adopted.

- 4.F 16-0702 Growth Management Act (GMA) Periodic Review Resolution

The resolution was adopted.

4. SECOND READINGS

- 4.G 16-0660 Approval of Appropriation of Transportation Impact Fees for Right-of-Way Acquisition

The ordinance was approved on second reading.

- 4.H 16-0688 Approval of Ordinance Regarding Transportation Network Companies

The ordinance was approved on second reading.

4. FIRST READINGS

- 4.B 16-0696 Approval of Amendment to OMC 9.48.160 Relating to Fireworks to Modify the Violation from Misdemeanor to a Civil Infraction

The ordinance was approved on first reading and moved to second reading.

- 4.E 16-0690 Adoption of the 2015 State-Mandated Building Code Revisions

The ordinance was approved on first reading and moved to second reading.

- 4.I 16-0706 Approval of Amendment to Ordinance #7006 related to the Operating Budget

The ordinance was approved on first reading and moved to second reading.

- 4.J 16-0707 Approval of Amendment to Ordinance #7007 related to the Capital Budget

The ordinance was approved on first reading and moved to second reading.

- 4.K** 16-0708 Approval of Amendment to Ordinance #6996 Related to Special Funds

The ordinance was approved on first reading and moved to second reading.

Approval of the Consent Agenda

Councilmember Hankins moved, seconded by Mayor Pro Tem Jones, to adopt the Consent Calendar. The motion carried by the following vote:

Aye: 7 - Mayor Selby, Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper, Councilmember Gilman, Councilmember Hankins and Councilmember Roe

5. PUBLIC HEARING - None

6. OTHER BUSINESS

- 6.A** 16-0327 Approval of Ordinance Amending Wastewater Regulations for Septic Systems

Water Resources Engineer Diane Utter presented amendments to Olympia Municipal Code Chapter 13.08 and Chapter 18.75.020 regarding septic systems.

Councilmembers asked clarifying questions.

The ordinance was approved on first reading and moved to second reading.

- 6.B** 16-0747 Discussion of a Draft Ordinance Creating a Graduated Income Tax on Wage Earners in the City of Olympia

City Manager Steve Hall reviewed the draft ordinance the Council instructed staff to draft as a potential referendum to be placed on the November 2016 ballot. Mr. Hall noted the variations from the motion and shared the drafting process. He also reviewed the key administrative changes in the draft ordinance which differ from the Opportunity for Olympia petition language along with major policy considerations. He shared the graduated tax table that was developed by staff.

Councilmembers asked clarifying questions and made statements regarding the subject.

Mayor Pro Tem Jones offered suggestions to the draft ordinance language. The suggestions primarily changed the income tax to excise tax and limits taxation to unearned income rather than all income.

Mayor Pro Tem Jones moved, seconded by Councilmember Gilman, to accept the work of City staff on the draft income tax ordinance and to amend it with changes as proposed by Mayor Pro Tem Jones. The motion carried by the following vote:

Aye: 4 - Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper and Councilmember Gilman

Nay: 3 - Mayor Selby, Councilmember Hankins and Councilmember Roe

7. CONTINUED PUBLIC COMMUNICATION - None

8. REPORTS AND REFERRALS

8.A COUNCIL INTERGOVERNMENTAL/COMMITTEE REPORTS AND REFERRALS

Councilmembers reported on meetings and events attended.

8.B CITY MANAGER'S REPORT AND REFERRALS

City Manager Steve Hall highlighted the upcoming Olympia Fire Department (OFD) Fire Safety Movie Spectacular on July 2. OFD will present Disney's Planes Fire & Rescue, hosted by the Capitol Theater. In addition to the movie, there will be a street party with popcorn, ice cream and prizes. Community members will be able to meet local firefighters, tour a fire truck and get autographs from Sparky the Fire Dog and Smokey the Bear.

9. ADJOURNMENT

The meeting adjourned at 10:00 p.m.



Meeting Minutes

City Council

City Hall
601 4th Avenue E
Olympia, WA 98501

Information: 360.753.8244

Tuesday, July 12, 2016

7:00 PM

Council Chambers

1. ROLL CALL

Present: 7 - Mayor Cheryl Selby, Mayor Pro Tem Nathaniel Jones, Councilmember Jessica Bateman, Councilmember Jim Cooper, Councilmember Clark Gilman, Councilmember Julie Hankins and Councilmember Jeannine Roe

1.A ANNOUNCEMENTS - None

1.B APPROVAL OF AGENDA

The agenda was approved.

2. SPECIAL RECOGNITION

2.A 16-0825 Special Recognition for Lon Wyrick Executive Director for the Thurston Regional Planning Council (TRPC)

Community Planning & Development Director Keith Stahley introduced Lon Wyrick, retiring Executive Director for the Thurston Regional Planning Council. Mayor Pro Tem Jones read a proclamation honoring Mr. Wyrick. Mr. Wyrick said a few words of thanks.

The recognition was received.

2.B 16-0792 Special Recognition - 2016 Fire Ops

Deputy Chief Greg Wright introduced Olympia Fire Fighters IAFF Local 468 representative Mike Simmons. Mr. Simmons explained Fire Ops allows administrators and elected officials to experience the work of firefighters for a day in order to understand their training and support needs.

Councilmember Gilman discussed his recent experience at Fire Ops and expressed his understanding of how highly technical, time sensitive and demanding the work of those who keep our homes and communities safe from fire is.

The recognition was received.

3. PUBLIC COMMUNICATION

The following people spoke: Phil Cornell, Ali Marie Baker, Michael Savoca, Tamborine Borelli, Tim Kelly, Judith Sue Langhans, James Turpin, Steve Lezan, Jami Lund,

Peter Bohmer, Ray Guerra, James Booth, Michael Foster, Pat Holme and Shauna Stewart.

4. CONSENT CALENDAR

- 4.A 16-0817 Approval of June 11, 2016 City Council Mid-Year Retreat Meeting Minutes

The minutes were adopted.

- 4.B 16-0789 Approval of June 21, 2016 Study Session Meeting Minutes

The minutes were adopted.

- 4.C 16-0790 Approval of June 21, 2016 City Council Meeting Minutes

The minutes were adopted.

- 4.D 16-0821 Bills and Payroll Certification

Payroll check numbers 88947 through 89063 and Direct Deposit transmissions:
Total: \$6,737,620.20; Claim check numbers 3674499 through 3675875: Total:
\$4,075,993.82.

The decision was adopted.

- 4.E 16-0785 Approval of Appointment of Nancy Clauson (Peterson) to the Capital Area Regional Public Facilities Board

The decision was adopted.

- 4.F 16-0754 Approval of Community Development Block Grant (CDBG) Program Year 2016 Action Plan

The decision was adopted.

4. SECOND READINGS

- 4.G 16-0521 Approval of Low Impact Development (LID) Code Revisions Ordinance

The ordinance was adopted on second reading.

4. FIRST READINGS

- 4.H 15-1140 Approval of Ordinance Adding Shoreline Master Program to Development Code and Comprehensive Plan

The ordinance was approved on first reading and moved to second reading.

Approval of the Consent Agenda

Councilmember Hankins moved, seconded by Mayor Pro Tem Jones, to adopt the Consent Calendar. The motion carried by the following vote:

Aye: 7 - Mayor Selby, Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper, Councilmember Gilman, Councilmember Hankins and Councilmember Roe

5. PUBLIC HEARING

5.A 16-0801 Public Hearing and Consideration of a Resolution for a Community Renewal Plan

Before the agenda item began the meeting adjourned for 20 minutes due to disruption.

Community Planning & Development Director Keith Stahley discussed the proposed resolution for the Community Renewal Plan as recommended by the Community Economic Revitalization Committee.

Jay Reich, of the Pacifica Law Group, outlined the legal context in which the decision making of the Council will take place.

Lorelei Juntunen, of ECONorthwest, gave an overview of the Community Renewal Plan process and how it applies to the Griswold's project.

Economic Development Director Renee Sunde reviewed the Request for Proposals details and a draft timeline.

Councilmembers asked clarifying questions.

Mayor Selby opened the public hearing at 8:55 p.m. The following people spoke: Connie Phegley, Bonnie Jacobs, Vida Zvirzdys-Farler, Mary Corso, Erik Lee, Bob Jacobs, Elise Rhiner, Michael Cade, and Beverly Bassett.

Mayor Selby closed the public hearing at 9:22 p.m.

The public hearing was held and the resolution was adopted.

6. OTHER BUSINESS

6.A 16-0826 Approval of a Request for Proposal for the City-owned Property known as the Former Griswold Property

The resolution was adopted.

6.B 16-0697 Briefing on the Comprehensive Plan Action Plan

Community Planning & Development Deputy Director Leonard Bauer briefed the Council on the Action Plan for the Comprehensive Plan. He reviewed what is included in the scope, timeline, and feedback from participants. Mr. Bauer also walked through the website and indicators for the Comprehensive Plan. He reviewed next steps and asked the Council to approve the framework of the plan as described.

Councilmembers asked clarifying questions and agreed to allow staff to move forward with the plan.

The discussion was completed.

6.C 16-0833 Approval of a Resolution Concerning Inadequate Public Funding of Higher Education and a Regressive State Tax System

City Manager Steve Hall gave a timeline of the Opportunity of Olympia initiative and related tax ordinances. He discussed next steps for the initiative noting the Thurston County Auditors office is still validating signatures. Should there be enough signatures, the ordinance will come before the Council with two options, pass the proposed ordinance or have a resolution to direct the Auditor to hold a special election.

Mayor Pro Tem Jones discussed the resolution, two referrals to General Government, and a motion for legal review of the Opportunity for Olympia initiative should the Auditor issue certification of sufficient valid signatures.

The referrals to General Government are as follows:

1. Develop a project plan, provide progress reporting and deliver a report within one year which defines the impact of regressive taxation on local residents and on the local economy.
2. Develop a project plan, provide progress reporting and deliver a report within one year which defines the impact of poor access to education on local residents and on the local economy.

Councilmembers asked clarifying questions.

The resolution was adopted and the referrals to General Government were approved.

Aye: 7 - Mayor Selby, Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper, Councilmember Gilman, Councilmember Hankins and Councilmember Roe

Mayor Pro Tem Jones moved, seconded by Mayor Selby, that upon the Auditor's certification of sufficient valid signatures for Opportunity for Olympia's initiative petition, the City Manager be authorized to take all reasonable steps on behalf of the City of Olympia and this Council, to obtain a judicial determination whether the initiative is a lawful, valid exercise of the

initiative power granted to Olympia's citizens under state law, and if not, to obtain an injunction prohibiting such initiative measure from appearing on the November ballot. The motion includes authorization for the City Manager to pursue any appeals as may be necessary before the appellate courts of this state.

The motion was approved by the following vote:

Aye: 7 - Mayor Selby, Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper, Councilmember Gilman, Councilmember Hankins and Councilmember Roe

7. CONTINUED PUBLIC COMMUNICATION

The following people spoke: Stan Sorscher and Vida Zvirzdys-Farler.

8. REPORTS AND REFERRALS

8.A COUNCIL INTERGOVERNMENTAL/COMMITTEE REPORTS AND REFERRALS

Mayor Pro Tem Jones noted Lakefair begins on Wednesday, July 13.

8.B CITY MANAGER'S REPORT AND REFERRALS

City Manager Hall reported most residents heeded the fireworks ban on July 4.

9. ADJOURNMENT

The meeting adjourned 10:30 p.m.



Meeting Minutes

City Council

City Hall
601 4th Avenue E
Olympia, WA 98501

Information: 360.753.8244

Tuesday, July 26, 2016

7:00 PM

Council Chambers

1. ROLL CALL

Present: 7 - Mayor Cheryl Selby, Mayor Pro Tem Nathaniel Jones, Councilmember Jessica Bateman, Councilmember Jim Cooper, Councilmember Clark Gilman, Councilmember Julie Hankins and Councilmember Jeannine Roe

1.A ANNOUNCEMENTS - None

1.B APPROVAL OF AGENDA

Mayor Selby noted item 4.B will be removed from the agenda and rescheduled at a later date because the applicant isn't ready to move forward.

The agenda was approved as amended.

2. SPECIAL RECOGNITION

2.A 16-0875 Special Recognition - Dan Lowe, Olympic Athlete

Mayor Selby introduced the recognition for Olympian Daniel Lowe. Mr. Lowe is on his way to compete for the US Olympic Shooting Team at the 2016 Olympic Games in Rio.

City Manager Steve Hall reviewed Mr. Lowe's achievements and background. The Mayor invited Dan Lowe's mother, Laura Lowe, to say a few words.

The recognition was received.

2.B 16-0882 Special Recognition - 2016 Paddle to Nisqually Canoe Journey Landing Day in Olympia

Strategic Communications Director Kellie Purce Braseth discussed the 2016 Paddle to Nisqually Canoe Journey occurring on July 30. She shared details of the event regarding parking and logistics for those who are attending.

The recognition was received.

2.C 16-0885 Special Recognition - Introduction of Semper, Olympia Police Department Therapy Dog

Police Administrative Services Manager Laura Wohl discussed the Therapy Dog program being implemented by the Olympia Police Department. The dog will provide

comfort to victims, witnesses and others impacted by crimes. Program Assistant and Therapy Dog Handler Madison Sol Del Vigo introduced Semper, who will be certified as a therapy dog after age 2. In the meantime, while being trained, he will be present at the police station and visit with the community.

The recognition was received.

3. PUBLIC COMMUNICATION

The following people spoke: Mindy Chambers, Jim Reeves, John Baldrige, Karli Stander, Becky Liebman, Leslie Owen, Russ Lidman, Bobby Snyder, Sara Develle, Hagbard Berkman and Janet Jordan.

4. CONSENT CALENDAR

- 4.A 16-0880 Approval of July 19, 2016 City Council Meeting Minutes

The minutes were adopted.

- 4.B 16-0794 Approval of Resolution Setting a Public Hearing Date for Consideration of a Street Vacation Petition

The resolution was postponed.

- 4.C 16-0810 Approval of Professional Services Agreement Amendment No.1 with HDR Engineering Inc. for the Fones Road Booster Pump Station

The decision was adopted.

- 4.D 16-0848 Approval of Access and Maintenance Easement Agreement and Utility Easement for Waste ReSources Trash Compactor with KBJ Investments, LLC

Public Works Director Rich Hoey gave background on the trash compactor to be placed in the TJ Potter Alley. The placement of the compactor will allow for several dumpsters to be removed from the alley, making it a much more pleasant area. The shared compactor will be within an easement on private property. KBJ Investments, LLC (Steve Cooper and Mike Reid) has allowed the City the necessary access and utility easements over their property for the shared trash compactor. Mr. Hoey noted both KBJ Investments, LLC and the Olympia Film Society allowed for this partnership between downtown businesses and the City to occur.

The decision was adopted.

4. SECOND READINGS

- 4.E 16-0379 Approval of Ordinance on the Hulbert, Hong and Slater Annexation

The ordinance was approved on second reading.

4. FIRST READINGS - None

Approval of the Consent Agenda

Councilmember Hankins moved, seconded by Mayor Pro Tem Jones, to adopt the Consent Calendar. The motion carried by the following vote:

Aye: 7 - Mayor Selby, Mayor Pro Tem Jones, Councilmember Bateman, Councilmember Cooper, Councilmember Gilman, Councilmember Hankins and Councilmember Roe

5. PUBLIC HEARING - None

6. OTHER BUSINESS

6.A 16-0758 Briefing on Mayors Climate Compact

Mr. Hoey briefed the Council on the Compact of Mayors. He highlighted global climate data and the major risks for Olympia if global warming continues at its current rate. He discussed actions and activities by the Council and City taken to bring forward positive change and a reduction to City operation emissions.

Mr. Hoey reviewed the work of the Compact of Mayors and its global efforts. He discussed the four phases, requirements of the Mayors Compact, where Olympia is in the process, and next steps.

Councilmembers asked clarifying questions.

The information was provided.

6.B 16-0878 Approval of Ordinance Related to the Opportunity for Olympia (OFO) Initiative Petition, or Approval of Resolution Placing the OFO Petition on the November 8, 2016, General Election Ballot, or Approval of Resolution to Take No Action to Pass OFO's Proposed Ordinance or to Order an Election

Before the agenda item began, Councilmember Cooper recused himself from the impending discussion and vote.

Mr. Hall gave background on the Opportunity for Olympia initiative and actions taken by the City Council so far. He reviewed the options before the Council.

Councilmembers asked clarifying questions.

Mayor Pro Tem Jones moved, seconded by Councilmember Hankins, to approve a resolution to take no action to pass Opportunity for Olympia's proposed ordinance or to order an election. The motion carried by the following vote:

Aye: 4 - Mayor Selby, Mayor Pro Tem Jones, Councilmember Gilman and Councilmember Hankins

Nay: 2 - Councilmember Bateman and Councilmember Roe

Recused: 1 - Councilmember Cooper

7. CONTINUED PUBLIC COMMUNICATION

8. REPORTS AND REFERRALS

8.A COUNCIL INTERGOVERNMENTAL/COMMITTEE REPORTS AND REFERRALS

Councilmembers reported on meetings and events attended.

8.B CITY MANAGER'S REPORT AND REFERRALS

Mr. Hall requested a referral to Finance Committee to discuss expansion of the Park Ranger Program.

9. ADJOURNMENT

Mayor Selby adjourned the meeting at 9:08 p.m.

EXHIBIT B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

<input type="checkbox"/> EXPEDITE <input checked="" type="checkbox"/> No Hearing set <input type="checkbox"/> Hearing is set: Date: Time: Judge/Calendar: _____
--

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor,

Defendants.

No.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. INTRODUCTION

The local power of taxation, even when authorized for a city, is reserved to the city's governing/legislative body, and not subject to direct legislation except as specifically authorized by the Legislature. The Legislature has not authorized direct legislation (initiative or referendum) for a city's imposition of an income tax.¹ Indeed, the Legislature has expressly forbidden cities from imposing a tax on net income.

Plaintiff the City of Olympia ("City") brings this action for declaratory and injunctive relief under chapters 7.24 and 7.40 RCW. The City seeks a declaration that a proposed initiative to

¹ "It is well-settled that in the context of statutory interpretation, a grant of power to a city's governing body ("legislative authority" or "legislative body") means exclusively the mayor and city council and not the electorate." *City of Sequim v. Malkasian*, 157 Wash.2d 251, at 265 (2006).

1 establish an income tax in the City is beyond the scope of the local initiative power. The City
2 also seeks an order enjoining the proposed income tax initiative from appearing on the ballot at a
3 City special election to be held in conjunction with the State general election on November 8,
4 2016.

5
6 **2. PARTIES**

7 **2.1** The City of Olympia is a non-charter code city organized and operating under the
8 laws of the State of Washington, including chapter 35A RCW.

9 **2.2** Defendant Thurston County is a political subdivision of the State of Washington.

10 **2.3** Defendant Mary Hall, named here only in her official capacity, is the Thurston
11 County Auditor.

12 **2.4** Defendant Opportunity for Olympia ("OFO") is a Washington political
13 committee, and sponsor of a proposed City income tax initiative. Attached as Complaint
14 Appendix 1 is Public Disclosure Commission form C1, identifying OFO ("PDC Form").

15 **2.5** Defendant Ray Guerra is a City and Thurston County resident, and a member and
16 representative of OFO. The PDC Form lists Ray Guerra as OFO's Campaign Manager or Media
17 Contact.

18 **2.6** Defendant Danielle Westbrook is a City and Thurston County resident; the self-
19 described campaign manager for OFO; a member of OFO; and, the filer of the income tax
20 initiative petition with the City.

21
22 **3. JURISDICTION AND VENUE**

23 **3.1** This Court has subject matter jurisdiction over this action under chapter 7.24
24 RCW and chapter 7.40 RCW.

25 **3.2** Venue is proper in Thurston County, Washington, including under RCW
26 4.12.020.

COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - 2

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1
2 **4. FACTUAL BACKGROUND**

3
4 **4.1** On July 6, 2016, OFO through Danielle Westbrook filed an initiative petition with
5 the City. The initiative petition calls for the enactment of an ordinance, entitled:

6 AN ORDINANCE of the City of Olympia, Washington, imposing an excise tax
7 on household income above \$200,000 per year derived from financial transactions,
8 personal activities, business, commerce, occupations, trades, professions and other lawful
9 activities, the revenues therefrom to be dedicated to funding at least one year of free
10 community or technical college for each year's City of Olympia public high school
11 graduates and General Education Development Certificate ("GED") recipients, or an
12 equivalent amount of money for such public high school graduates and GED recipients
13 who choose to attend public universities and colleges in the State of Washington.

14 This initiative petition (the "Income Tax Initiative") would both levy an income tax in the city,
15 and appropriate funds collected by the City from income tax revenues. The Income Tax
16 Initiative is attached as Complaint Appendix 2.

17 **4.2** Consistent with law, the City forwarded the Income Tax Initiative to the County
18 Auditor. On July 13, 2016, the County Auditor advised the City that the Income Tax Initiative
19 "was signed by the requisite number of names of persons listed as registered voters within the
20 city and is hereby certified as sufficient pursuant to the Revised Code of Washington
21 35A.11.100." (The "County Auditor's Certification.") OFO seeks inclusion of the proposed
22 Income Tax Initiative on a ballot at a City special election to be held in conjunction with the
23 State general election on November 8, 2016 (the "November ballot").

24 **4.3** The Olympia City Council determined on July 12, 2016, in anticipation of the
25 County Auditor's Certification, to challenge the Income tax Initiative and directed the City
26 Manager to obtain a judicial determination regarding the validity of the Income Tax Initiative

1 and to prevent the Income Tax Initiative from appearing on the November ballot. The
2 unanimously-adopted motion states:

3 . . . that upon the Auditor's certification of sufficient valid signatures for Opportunity for
4 Olympia's initiative petition, the City Manager be authorized to take all reasonable steps
5 on behalf of the City of Olympia and this Council, to obtain a judicial determination
6 whether the initiative is a lawful, valid exercise of the initiative power granted to
7 Olympia's citizens under state law, and if not, to obtain an injunction prohibiting such
8 initiative measure from appearing on the November ballot. My motion includes
9 authorization for the City Manager to pursue any appeals as may be necessary before the
10 appellate courts of this state.

11 **4.4** The City seeks a declaration that proposed Income Tax Initiative is invalid
12 because it is beyond the scope of the initiative power.

13 **4.5** The City seeks injunctive relief to prevent inclusion of an invalid initiative, the
14 proposed Income Tax Initiative, on the November ballot.

15 **5. FIRST CAUSE OF ACTION - DECLARATORY RELIEF**

16 **5.1** The preceding paragraphs are incorporated by reference as if set forth fully
17 herein.

18 **5.2** Courts review before elections a local initiative or referendum to determine,
19 notably, whether "the proposed law is beyond the scope of the initiative power." *City of Port*
20 *Angeles v. Our Water - Our Choice*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010), citing *Seattle Bldg. &*
21 *Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980) (citing
22 *Leonard v. City of Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976)).

23 **5.3** A controversy exists between the City and Defendants OFO, Guerra and
24 Westbrook regarding whether the subject matter of proposed Income Tax Initiative is within the
25 scope of the initiative power granted to the City's citizens by State law.

26 **5.4** Pre-election review of a city initiative is permitted where, as here, there is a
dispute regarding whether the subject matter of the proposed initiative is beyond the scope of a
city's initiative power. And, the City faces the financial and administrative burden of placing an
unlawful initiative on a ballot.

COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - 4

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 **5.5** The City seeks a declaration the proposed Income Tax Initiative is invalid because
2 it is beyond the scope of the City's local initiative power. Washington law specifically vests the
3 City Council, as the City's local legislative body, with the power to enact ordinances governing
4 taxation as well as appropriations. The Income Tax Initiative would improperly interfere with
5 the exercise of a power delegated by state law exclusively to a local legislative body. *See, e.g.,*
6 RCW 35A.11.020, RCW 35A.11.030 and, 35A.11.090.

7 **5.6** The Income Tax Initiative proposes a local income tax. The City seeks a
8 declaration the proposed Income Tax Initiative is invalid because it violates RCW 36.65.030: "A
9 **county, city, or city-county shall not levy a tax on net income.**"

10 **5.7** Under RCW 29A.04.330(1), city general elections are "held throughout the state
11 of Washington on the first Tuesday following the first Monday in November in the **odd-**
12 **numbered years.**" The next City general election is November 2017. A special election may be
13 held in conjunction with a State general election. RCW 29A.04.175. But, under RCW
14 29A.04.330(2), only a city's "governing body" can call a special election. The City Council is
15 the City's governing body and has not yet called for an election on the Income Tax Initiative.

16 **6. SECOND CAUSE OF ACTION - INJUNCTIVE RELIEF**

17 **6.1** The preceding paragraphs are incorporated by reference as if set forth fully
18 herein.

19 **6.2** Because the proposed Income Tax Initiative is not a lawful exercise of the
20 initiative power, the Income Tax Initiative should be enjoined from appearing on the November
21 ballot.

22 **7. RELIEF REQUESTED**

23 WHEREFORE, the City seeks relief as follows:
24
25
26

COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF - 5

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

EXHIBIT E

16-2-02998-34
OR
Order
848112



FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2016 AUG 24 PM 4:25

Linda Myhre Enlow
Thurston County Clerk

EXPEDITE
 No Hearing set
 Hearing is set:
 Date: August 24, 2016
 Time: 3:00 p.m.
 Judge/Calendar: Honorable Jack Nevin/Civil

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor,

Defendants.

No. 16-2-02998-34

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF

THIS MATTER came on specially pursuant to: (a) Plaintiff's Motion For Declaratory Judgment And Injunctive Relief; and (b) Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim. The Court reviewed and considered the records and files herein, including:

1. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief;
2. Document Declaration Of Jane Kirkemo, City Clerk (with attached exhibits);
3. Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim (with attached exhibits);
4. Affidavit Of Ray Guerra;
5. Defendants-Petitioners' Brief In Support Of Petition For Prevention Of Election Error And Motion For Injunctive Relief;

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 1

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

- 1 6. Declaration Of Claire Tonry (with attached exhibits);
- 2 7. City Of Olympia's Answer To Petition And Affidavit For Prevention Of Election
- 3 Error And Counterclaim;
- 4 8. Plaintiff's Opposition To Defendants/Petitioners' Petition For Prevention Of
- 5 Election Error And Motion For Injunctive Relief;
- 6 9. Second Declaration Of Claire Tonry (with attached exhibits);
- 7 10. Defendant Thurston County And Thurston County Auditor's Motion For
- 8 Accelerated Review And Response To Opportunity For Olympia's Petition For Prevention Of
- 9 Election Errors;
- 10 11. Plaintiff's Reply In Support Of Plaintiff's Motion For Declaratory Judgment And
- 11 Injunctive Relief; and
- 12 12. Opportunity For Olympia's And Ray Guerra's Reply To Plaintiff's Opposition
- 13 Brief. 13. DOCUMENT DECLARATION OF ANNALIESE WARKSEV. *J.R.*

- 14 In addition, the Court reviewed:
- 15 1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief;
 - 16 2. [Proposed] Freedom Foundation's Amicus Curiae Brief; and
 - 17 3. Opportunity For Olympia's Opposition To Freedom Foundation's Motion For
 - 18 Leave To File Amicus Curiae Brief.

19 Having considered the pleadings and submissions in this case, it is hereby ORDERED,
 20 ADJUDGED and DECREED that:

- 21 1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief is
- 22 ~~(GRANTED) DENIED~~;
- 23 2. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief is
- 24 **GRANTED**; and
- 25 3. Defendants' Petition For Prevention Of Election Error And Motion For Injunctive
- 26 Relief is **DENIED**.

ORDER GRANTING PLAINTIFF'S MOTION FOR
 DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
 DENYING DEFENDANTS' PETITION FOR PREVENTION OF
 ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 2

CITY OF OLYMPIA
 City Attorney's Office
 P.O. Box 1967/601 - 4th Ave. E.
 Olympia, Washington 98507-1967
 Telephone: (360) 753-8338

opportunity for Olympia

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Accordingly, this Court:

qk

1. Declares that the proposed ~~Income~~-Tax Initiative, in its entirety, is invalid, null, and void because it extends beyond the scope of the local initiative power; and

2. Enjoins Thurston County and the Thurston County Auditor from placing the proposed ~~Income~~-Tax Initiative on the State general election ballot in November 2016.

DATED: August *24*, 2016.

Jack Nevin
The Honorable Jack Nevin
Superior Court Judge (Visiting)

Presented by:

OFFICE OF THE CITY ATTORNEY
Mark Barber, WSBA No. 8379
Olympia City Attorney,
Annaliese Harksen, WSBA No. 31132
Deputy City Attorney,
Email: mbarber@ci.olympia.wa.us
Email: aharksen@ci.olympia.wa.us
and

P. Stephen DiJulio
P. Stephen DiJulio, WSBA No. 7139
Jason R. Donovan, WSBA No. 40994
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Phone: (206) 447-4400 / Fax: (206) 447-9700
Email: steve.dijulio@foster.com
Email: j.donovan@foster.com
Attorneys for Plaintiff City of Olympia

///
///
///

ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 3

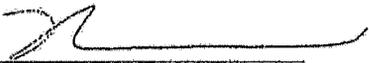
CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

1 Copy Received:

2 SMITH & LOWNEY PLLC

3

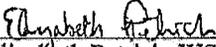
4

5 
Knoll Lowney, WSBA No. 23457
6 Claire Tonry, WSBA No. 44497
2317 E. John Street
7 Seattle, WA 98122
Tel: (206) 860-2883
8 Email: knoll@igc.org
Email: elairet@igc.org
9 Attorneys for Defendants Opportunity For Olympia;
Ray Guerra; and Danielle Westbrook

10

11 JON TUNHEIM
12 PROSECUTING ATTORNEY

13

14 
15 Elizabeth Petrich, WSBA No. 18713
Chief Civil Deputy Prosecuting Attorney
16 2000 Lakeridge Drive SW, Bldg No. 5
Olympia, WA 98502
17 Tel: (360) 786-5574
Email: petrice@co.thurston.wa.us
18 Attorneys for Defendants Thurston County; and
19 Mary Hall, Thurston County Auditor

20

21

22

23

24

25

26

ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 4

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

EXHIBIT G

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

<input type="checkbox"/> EXPEDITE <input type="checkbox"/> No hearing set <input type="checkbox"/> Hearing is set Date: _____ Time: _____ Judge: _____

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

CITY OF OLYMPIA, A Washington
municipal corporation,

Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a
Washington Political Committee; RAY
GUERRA; DANIELLE WESTBROOK;
THURSTON COUNTY; and MARY HALL,
Thurston County Auditor,

Defendants.

No. 16-2-02998-34

**NOTICE OF APPEAL TO THE
WASHINGTON STATE COURT
OF APPEALS, DIVISION II**

Defendants Opportunity for Olympia, Ray Guerra, and Danielle Westbrook seek review
by the Washington State Court of Appeals, Division II, of the attached Order, entered on August
24, 2016, in the above captioned matter.

Plaintiff, City of Olympia, is represented by:

Mark E. Barber, WSBA No. 8379
Annaliese Harksen, WSBA No. 31132
Office of the City Attorney
P.O. Box 1967/601 - 4th Ave. E.

No. 16-2-02998-34
NOTICE OF APPEAL - 1

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

Olympia, Washington 98507-1967
Telephone: (360) 753-8338
Email: mbarber@ci.olympia.wa.us
aharksen@ci.olympia.wa.us

P. Stephen DiJulio, WSBA No. 7139
Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Email: steve.dijulio@foster.com

Defendant, Mary Hall, Thurston County Auditor, is represented by:

Elizabeth Petrich, WSBA No. 18713
2000 Lakeridge Dr. SW, Bldg. 5
Olympia, WA 98502
Telephone: (360) 786-5540
Email: petrice@co.thurston.wa.us

RESPECTFULLY SUBMITTED this August 24, 2016

SMITH & LONEY, PLLC

By 
Knoll Lowney, WSBA # 23457
Claire Tonry, WSBA # 44497
Attorneys for Defendants Opportunity
for Olympia, Ray Guerra, and Danielle
Westbrook
2317 E. John St., Seattle WA 98122
Tel: (206) 860-2883
E-mail: knoll@igc.org,
clairet@igc.org

No. 16-2-02998-34
NOTICE OF APPEAL - 2

SMITH & LONEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

EXPEDITE
 No Hearing set
 Hearing is set:
Date: August 24, 2016
Time: 3:00 p.m.
Judge/Calendar: Honorable Jack Nevin/Civil

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor,

Defendants.

No. 16-2-02998-34

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF

THIS MATTER came on specially pursuant to: (a) Plaintiff's Motion For Declaratory Judgment And Injunctive Relief; and (b) Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim. The Court reviewed and considered the records and files herein, including:

1. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief;
2. Document Declaration Of Jane Kirkemo, City Clerk (with attached exhibits);
3. Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim (with attached exhibits);
4. Affidavit Of Ray Guerra;
5. Defendants-Petitioners' Brief In Support Of Petition For Prevention Of Election Error And Motion For Injunctive Relief;

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - I

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

6. Declaration Of Claire Tonry (with attached exhibits);
7. City Of Olympia's Answer To Petition And Affidavit For Prevention Of Election Error And Counterclaim;

8. Plaintiff's Opposition To Defendants/Petitioners' Petition For Prevention Of Election Error And Motion For Injunctive Relief;

9. Second Declaration Of Claire Tonry (with attached exhibits);

10. Defendant Thurston County And Thurston County Auditor's Motion For Accelerated Review And Response To Opportunity For Olympia's Petition For Prevention Of Election Errors;

11. Plaintiff's Reply In Support Of Plaintiff's Motion For Declaratory Judgment And Injunctive Relief; and

12. Opportunity For Olympia's And Ray Guerra's Reply To Plaintiff's Opposition

Brief. 13. DOCUMENT DECLARATION OF ANNALISE HARKSEN. ? k

In addition, the Court reviewed:

1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief;
2. [Proposed] Freedom Foundation's Amicus Curiae Brief; and
3. Opportunity For Olympia's Opposition To Freedom Foundation's Motion For Leave To File Amicus Curiae Brief.

Having considered the pleadings and submissions in this case, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief is ~~GRANTED~~ DENIED.
2. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief is GRANTED; and
3. Defendants' Petition For Prevention Of Election Error And Motion For Injunctive Relief is DENIED.

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 2

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

Oppose timely for Olympia

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Accordingly, this Court:

qk

1. Declares that the proposed ~~Income~~ Tax Initiative, in its entirety, is invalid, null, and void because it extends beyond the scope of the local initiative power; and
2. Enjoins Thurston County and the Thurston County Auditor from placing the proposed ~~Income~~ Tax Initiative on the State general election ballot in November 2016.

DATED: August *27*, 2016.

Jack Nevin

The Honorable Jack Nevin
Superior Court Judge (Visiting)

Presented by:

OFFICE OF THE CITY ATTORNEY
 Mark Barber, WSBA No. 8379
 Olympia City Attorney,
 Annaliese Harksen, WSBA No. 31132
 Deputy City Attorney,
 Email: mbarber@ci.olympia.wa.us
 Email: aharksen@ci.olympia.wa.us
 and

P. Stephen DiJulio

P. Stephen DiJulio, WSBA No. 7139
 Jason R. Donovan, WSBA No. 40994
 FOSTER PEPPER PLLC
 1111 Third Avenue, Suite 3000
 Seattle, Washington 98101-3292
 Phone: (206) 447-4400 / Fax: (206) 447-9700
 Email: steve.dijulio@foster.com
 Email: j.donovan@foster.com
 Attorneys for Plaintiff City of Olympia

///
///
///

ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 3

CITY OF OLYMPIA
 City Attorney's Office
 P.O. Box 1967/601 - 4th Ave. E.
 Olympia, Washington 98507-1967
 Telephone: (360) 753-8338

DECLARATION OF SERVICE

I, Jessie Sherwood, declare under penalty of perjury of the laws of the State of Washington, that I am a citizen of the United States and a resident of the State of Washington, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on August 24, 2016 I caused the foregoing Notice of Appeal to The Washington State Court Of Appeals, Division II to be filed with the Clerk of the Thurston County Superior Court, and a true and correct copy of the same to be sent to the following in the manner indicated:

Table with 3 rows and 2 columns. Row 1: Mark E. Barber, WSBA No. 8379, Annaliese Harksen, WSBA No. 31132, Office of the City Attorney, P.O. Box 1967/601 - 4th Ave. E., Olympia, Washington 98507-1967, Telephone: (360) 753-8338, Email: mbarber@ci.olympia.wa.us, aharksen@ci.olympia.wa.us. Row 2: P. Stephen DiJulio, WSBA No. 7139, Foster Pepper, PLLC, 1111 Third Avenue, Suite 3000, Seattle, Washington 98101-3292, Telephone: (206) 447-4400, Email: steve.dijulio@foster.com. Row 3: Elizabeth Petrich, WSBA No. 18713, 2000 Lakeridge Dr. SW, Bldg. 5, Olympia, WA 98502, Telephone: (360) 786-5540, Email: petrice@co.thurston.wa.us. Columns contain checkboxes for Messenger, U.S. Mail (postage prepaid), and E-mail.

DATED this 24th of August 2016 in Seattle, Washington.

Jessie Sherwood

No. 16-2-02998-34
NOTICE OF APPEAL - 3

SMITH & LONEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

EXHIBIT H

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF OLYMPIA, a Washington
municipal corporation,

Respondent,

v.

OPPORTUNITY FOR OLYMPIA, a
Washington Political Committee; RAY
GUERRA; DANIELLE WESTBROOK,

Petitioners,

THURSTON COUNTY; and MARY
HALL, Thurston County Auditor,

Respondents.

No. 49333-1-II

FILED
COURT OF APPEALS
DIVISION II
2016 AUG 33 PM 12: 22
STATE OF WASHINGTON
BY: [Signature] DEPUTY

RULING GRANTING STAY
PENDING APPEAL

Petitioners, Opportunity for Olympia, Ray Guerra, and Danielle Westbrook (collectively, OFO), move for a stay of the superior court's decision to enjoin the

placement of their initiative (the OFO initiative) on the November ballot.¹ RAP 8.3. Respondent, the City of Olympia (the City), opposes the motion.² The motion is granted.

BACKGROUND

The OFO initiative would establish a fund to pay for one year of community college (or the equivalent, for other in-state public colleges or universities) for public high school graduates and general equivalency diploma (GED) recipients in the City of Olympia. Mot. for Stay and Injunctive Relief, App. B, Ex. 1. According to OFO:

The measure would be funded by gifts, grants, and bequests, and by establishing an excise tax on household adjusted gross income ("AGI") exceeding \$200,000.00 in the City of Olympia.³ The initiative contains a severability clause and provides a mechanism for scaling back the grants if the income is insufficient.

Mot. for Stay and Injunctive Relief at 5 (citations omitted).

OFO worked to obtain enough signatures to place the OFO initiative on the November 8, 2016 ballot⁴ and, on July 13, 2016, the Thurston County Auditor issued a certificate of sufficiency for the OFO initiative. RCW 35A.11.100; Mot. for Stay and Injunctive Relief, App. D, Ex. 1. The City Council then met and failed to either pass the

¹ OFO's motion to file an overlength stay motion is granted.

² Thurston County and Thurston County Auditor Mary Hall filed an answer to the stay motion. They request accelerated review of this matter because the "Thurston County Auditor needs to receive the final decision in this appeal by **September 12, 2016.**" Thurston County Response to Stay Motion at 1.

³ Referred to herein as the "taxation provision."

⁴ The Motion for Stay and Injunctive Relief, App. D (Declaration of Mary Hall), sets out the relevant dates.

proposed measure or call a special election. Mot. for Stay and Injunctive Relief, App. B, Ex. 2.

On July 22, 2016, the City filed a complaint seeking a declaration that the OFO initiative is invalid and to enjoin placement of the OFO initiative on the November ballot. Mot. for Stay and Injunctive Relief at 6. The Thurston County Auditor is required to have a final ballot title for the OFO initiative by September 14, 2016, to meet ballot printing deadlines. RCW 29A.36.071; RCW 29A.36.090; Mot. for Stay and Injunctive Relief at 7.

On August 24, 2016, the superior court held a hearing. It concluded the taxation provision extended beyond the scope of local initiative power. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 4 (Report of Proceedings (RP) Aug. 24, 2016 at 4). Specifically, it ruled, "[the initiative] involves powers that are granted to the City's governing body and not to the City as a whole" and "it does conflict with the state law prohibiting income tax." City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 5 (RP Aug. 24, 2016 at 5). It enjoined the initiative from appearing on the November 2016 ballot. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 4-6 (RP Aug. 24, 2016 at 4-6). OFO moved for the trial court to "order the City to issue the ballot title that it has already prepared" due to the September 14 deadline. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 12 (RP Aug. 24, 2016 at 12). The trial court denied the motion.

ANALYSIS

RAP 8.3 provides:

Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review or in an original action under Title 16 of these rules, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security. A

party seeking the relief provided by this rule should use the motion procedure provided in Title 17.

RAP 8.3 permits this court to "stay an injunction if the movant can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986) (citing *Purser v. Rahm*, 104 Wn.2d 159, 702 P.2d 1196 (1985), *cert. dismissed sub nom. Department of Soc. and Health Servs. v. Purser*, 478 U.S. 1029 (1986)). As a practical matter,

courts apply a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the appeal. Indeed if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit.

Boeing, 43 Wn. App. at 291.

Debatable Issues on Appeal

Severability

Before addressing whether it is debatable that the OFO initiative's taxation provision is valid, OFO argues that the additional funding sources are clearly valid. Mot. for Stay and Injunctive Relief at 9. It notes that the City challenged only the taxation provision and never argued that this provision is not severable from the remainder of the initiative. Mot. for Stay and Injunctive Relief at 10. It adds that the superior court did not engage in a severability analysis despite that OFO raised it. Mot. for Stay and Injunctive Relief at 10.

The City responds that the taxation provision is not severable because it is central to the OFO initiative. City's Resp. to Mot. for Stay and Injunctive Relief at 7 (citing

Leonard v. City of Spokane, 127 Wn.2d 194, 202, 897 P.2d 358 (1995), for the proposition that a provision that is the "heart and soul" of a law is not severable). It adds that *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (2013), supports that the City would be harmed if forced to place invalid portions of a potentially severable initiative on a ballot.⁵

A law's provisions are not severable if

the constitutional and unconstitutional provisions are so connected . . . that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.

Leonard, 127 Wn.2d at 201 (quoting *Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982) (quoting *State ex rel. King Cy. v. State Tax Comm'n*, 174 Wash. 336, 339-40, 24 P.2d 1094 (1933))). Severability clauses in (passed) initiatives, however, are generally "conclusive as to the circumstances asserted." *League of Educ. Voters v. State*, 176 Wn.2d 808, 827, 295 P.3d 743 (2013) (quoting *McGowan v. State*, 148 Wn.2d 278, 296, 60 P.3d 67 (2002) (quoting *State v. Anderson*, 81 Wn.2d 234, 239, 501 P.2d 184 (1972))).

In *Leonard*, our Supreme Court concluded that the funding source for law intended to encourage cities to constrict public improvements unlawfully diverted tax dollars from common schools to public improvements. 127 Wn.2d at 199. It does not appear, however, that the act contained additional lawful funding sources. Thus, the *Leonard* court concluded, "As the Act's funding mechanism, it represents the heart and soul of the

⁵ In *Wallin*, the proposed initiative was eventually invalidated in its entirety. 174 Wn. App. 782-83.

Act. This being so, the Act would be virtually worthless without it." 127 Wn.2d at 201-02; see also *League of Women Voters v. State*, 184 Wn.2d 393, 411-12, 355 P.3d 1131 (2015) ("Without a valid funding source the charter schools envisioned in I-1240 are not viable.").

Here, although the City argues that serving the taxation provision "leaves nothing remaining," the OFO initiative includes additional funding sources and permits college grants to be scaled back if income is insufficient. City's Resp. to Mot. for Stay and Injunctive Relief at 17. Thus, the severability issue is debatable.

Legislative Body

With respect to the other potential issues presented on appeal, OFO next argues that the legislature has not precluded local tax initiatives despite that RCW 35A.11.020 and .030⁶ grant taxation powers to the "legislative body" of each code city.⁷ Mot. for Stay

⁶ RCW 35A.11.030 provides, in relevant part:

Powers of eminent domain, borrowing, taxation, and the granting of franchises may be exercised by the legislative bodies of code cities in the manner provided in this title or by the general law of the state where not inconsistent with this title; and the duties to be performed and the procedure to be followed by such cities in regard to the keeping of accounts and records, official bonds, health and safety and other matters not specifically provided for in this title, shall be governed by the general law.

⁷ At oral argument, the City added that even a severed initiative (removing the taxation provision) infringes on the City's appropriations power, which is also vested in a legislative body. RCW 35A.11.090. RCW 35A.11.090 provides, in relevant part:

Ordinances of noncharter code cities the qualified electors of which have elected to exercise the powers of initiative and referendum shall not go into effect before thirty days from the time of final passage and are subject to referendum during the interim except:

-
- (4) Ordinances appropriating money;
-

and Injunctive Relief at 19. It primarily argues that these laws do not demonstrate a clear legislative intent to preempt the initiative rights of the people. Mot. for Stay and Injunctive Relief at 20. See also RCW 35A.11.080 (granting code cities the right of initiative); *1000 Friends v. McFarland*, 159 Wn.2d 165, 177, 149 P.3d 616 (2006). The City responds by relying on the language of RCW 35A.11.020 and .030. City's Resp. to Mot. for Stay and Injunctive Relief at 4.

Decisions support that "initiative or referendum rights do not exist where the legislature has delegated power to a city or county legislative authority." *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 575, 103 P.3d 203 (2004) (citing cases). In *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976), for example, the court found that RCW 35A.11.020 vested the city council the power to adopt and modify a zoning code. It concluded, "[t]his grant of power precludes a referendum election" pursuant to RCW 35A.11.080. 87 Wn.2d at 853. See also City's Resp. to Mot. for Stay and Injunctive Relief at 4 n.5 (citing *Wallin*, 174 Wn. App. at 784; *Mulkiteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227 (2012); and *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006)).

As identified by OFO, these cases relied upon by the City address initiatives that sought to limit a city's exercise of authority granted to it by the legislature. Mot. for Stay and Injunctive Relief at 20 n.6. In *Mulkiteo Citizens*, for example, the initiative sought to

(7) Ordinances authorizing or repealing the levy of taxes; which excepted ordinances shall go into effect as provided by the general law or by applicable sections of Title 35A RCW as now or hereafter amended. Although the City cites RCW 35A.11.090 in its response to the stay motion, it presented no argument that a severed initiative violates this law. City's Resp. to Mot. for Stay and Injunctive Relief at 4. This argument will not be addressed further herein.

limit the legislative body's power to enact red light cameras by requiring a two-thirds vote of the electorate. 174 Wn.2d at 51-52. See also *Malkasian*, 157 Wn.2d at 255 ("The proposed initiative would impose additional requirements on revenue bonds" by "requir[ing] the city council of Sequim to obtain ratification by the voters before issuing citywide revenue bonds."); *Wallin*, 174 Wn. App. at 785-86 (prohibiting traffic safety cameras unless two-thirds of the council and voters approved and placing other limits on camera use). OFO attempts to distinguish these cases by arguing that "[t]he OFO [i]nitiative seeks to enact substantive legislation by *exercising* the power that the citizens and the City Council both hold in common." Mot. for Stay and Injunctive Relief at 20 n.6 (emphasis theirs).

Although the City is correct that "[a]n initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself," *Wallin*, 174 Wn.2d at 51, this court also recognizes that *1000 Friends* sets out that simply because a statute purports to give powers to a legislative authority or body, it does not automatically mean that the legislature intended to exclude "the people acting in a legislative capacity" from exercising the same powers. *1000 Friends*, 159 Wn.2d at 177-78. Accordingly, although the City prevailed on this issue in the superior court—and may be successful here on the merits of this issue—it qualifies as debatable. *Shamley v. City of Olympia*, 47 Wn.2d 124, 127, 286 P.2d 702 (1955).

Income/Excise Tax

The superior court also concluded that the OFO initiative conflicts with state law prohibiting the establishment of a net income tax by a city. City's Resp. to Mot. for Stay

and Injunctive Relief, App. 1 at 4 (RP Aug. 24, 2016 at 5). RCW 36.65.030 provides, "A county, city, or city-county shall not levy a tax on net income."

OFO contends, however, that the taxation provision is a permitted excise tax and not a prohibited net income tax. Mot. for Stay and Injunctive Relief at 23-25. According to OFO:

The OFO Initiative taxes the privileges of disproportionate use and benefit from city services enjoyed by wealthy residents, such as proximity to city parks which enhance private property enjoyment and values, and higher value police and fire protection services, by assessing a tax on the portion of AGI [adjusted gross income] in excess of \$200,000. Tony Decl., Ex. Ex. 1.8.

Mot. for Stay and Injunctive Relief at 24-25.

Chapter 35A.82 RCW addresses excise taxes. It, however, does not define them. According to *Estate of Hambleton*, 181 Wn.2d 802, 811, 335 P.3d 398 (2014), which involved a challenge to an amendment of the Estate and Transfer Act:

A tax is an "excise" or "transfer" tax if the government is taxing "a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property." *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945).

In addition, *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004), which addressed an assessment to fund ambulance services, states:

Our cases establish that an assessment is a valid excise tax if (1) the obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise tax, and (2) the element of absolute and unavoidable demand is lacking. *Covell*, 127 Wn.2d [874,] 889, 905 P.2d 324 [(1995)]; *High Tide Seafoods v. State*, 106 Wn.2d 695, 699, 725 P.2d 411 (1986); *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965).

These cases support that the taxation provision does not resemble a conventional excise tax. The payment of an excise tax "must be based on a voluntary act."⁸ *Covell*, 127 Wn.2d at 889 (discussing *Emerson College v. Boston*, 391 Mass. 415, 462 N.E.2d 1098 (1984)); see also *Arborwood*, 151 Wn.2d at 367. Here, the taxation provision is not premised upon any voluntary action of the person taxed. All citizens of Olympia use fire services, police services, other city services, and city parks.

However, because of the unique structure of the OFO initiative's taxation provision, which echoes the *Estate of Hambleton* language and imposes a "tax[on] the privileges of disproportionate use and benefit from city services enjoyed by wealthy residents," this court cannot say that OFO's argument is devoid of merit.⁹ Mot. for Stay and Injunctive Relief at 24-25; *Boeing*, 43 Wn. App. at 291.

Equities

Timing of Action

The parties argue as to whether our courts should decide this matter before the election, or after. Although in some circumstances, courts will decline to reach the merits of an initiative until after an election, issues relating to the scope of local initiatives will be

⁸ In addition, *Covell*, in its analysis of whether a residential street utility charge was an excise tax, relied on *Emerson College*. *Emerson College* addressed whether a fire protection service charge was an excise tax. *Covell* noted that *Emerson College* rejected an argument that "the charge qualified as an excise on the 'privilege' of receiving an extra level of fire protection." *Covell*, 127 Wn.2d at 890 (citing *Emerson College*, 391 Mass. 415, 427-28, 462 N.E. 2d 1098 (1984)). The taxation provision here appears also to tax the "privilege" of receiving more or better city services.

⁹ Because the issue whether the tax is an excise tax, as opposed to an income or a net income tax, is debatable, this court will not reach this issue whether the taxation provision qualifies as a net income tax that is prohibited by RCW 36.65.030 in this ruling.

heard before an election.¹⁰ *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005).

Nevertheless, as pointed out by OFO, the merits of this appeal will not be reached by this court until after the election has passed. This situation resembles the circumstances in *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 52-53, 65 P.3d 1203 (2003). In *Reed*, the petitioners sought a declaration that a referendum was unconstitutional and they sought to bar the secretary of state from certifying a ballot containing the referendum. 149 Wn.2d at 53. The *Reed* court declined to bar the secretary of state from adding the measure to the ballot because there was “insufficient time to engage in the deliberations that a case of this magnitude demands’ and because an immediate decision was not required by the dates of implementation of those sections of EHB 2901 included in Referendum 53.”¹¹ 149 Wn.2d at 53. The election was held. The matter returned to the courts and the secretary of state was prevented from certifying the election results until the *Reed* court ruled on the merits of the appeal. 149 Wn.2d at 53.

Thus, although it does not appear that the superior court’s decision was premature, that does not control the outcome of the present RAP 8.3 motion for a stay pending

¹⁰ *Yes For Seattle*, relied upon by the City, addressed whether pre-election review was the scope of an initiative was premature and decided it was not. In that case, however, although an appeal was filed from the superior court’s August decision to strike an initiative from a September ballot, it does not appear that any RAP 8.3 stay was requested or issued. The Court of Appeals decided the merits of the appeal the following June. 122 Wn. App. at 386-87.

¹¹ OFO also emphasizes that the taxation provision allows for “18 months for post-election review before any tax payments are due.” Mot. for Stay and Injunctive Relief at 18-19.

appeal, when, like *Reed*, this court will not have the opportunity to address the merits of the appeal before November 8, 2016.

Balancing Harms

Given that OFO presents at least one debatable issue, this court must analyze whether a "stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." *Boeing*, 43 Wn. App. at 291.

Here, the concrete cost to the City will be the printing of a supplemental voters' pamphlet.¹² The deadline for adding the initiative to the original pamphlet was August 2. Mot. for Stay and Injunctive Relief, App. D (Declaration of Mary Hall) (OFO, however, notes that the City knew of the ballot measure's language and possible legal challenges before this deadline and should have performed its ministerial duty to advance the ballot measure while any legal challenge was pending, which would have gotten the OFO initiative into the original pamphlet. Mot. for Stay and Injunctive Relief at 12). The asserted harms to OFO are (1) missing a high voter turnout presidential election and (2) impairment of the First Amendment rights of the signatories to the OFO petition, who expressed their views that the OFO initiative should be put to a vote this November. Mot. for Stay and Injunctive Relief at 13-15.

The City and OFO disagree as to the harm caused to OFO by not having the initiative included on the November 2016 ballot. The City stipulates OFO will not have to re-collect signatures if they succeed on appeal and, therefore, can present the initiative

¹² At oral argument, the City also referenced a charge it is billed a percentage of the costs of holding an election and that this charge is calculated based on the number of issues on the ballot.

in a future special election. OFO responds that it planned for this initiative to appear on the November ballot and obtained signatures for this purpose because of the high voter turnout in this specific election. This court agrees with OFO that it has an interest in having the initiative appear on the ballot that it sought and gained approval for and is now working to get passed, and that it would be harmed by deferring any election on its initiative. See Mot. for Stay and Injunctive Relief at 13 n.2. See generally *Small v. Avanti Health Sys. LLC*, 661 F.3d 1180, 1195 (9th Cir. 2011) (remedy of holding a new union election was insufficient to prevent harm).

Because this court has concluded that at least the severability issue is debatable and that a balancing of the equities favors OFO, this court determines to stay at least the portion of the superior court's decision that enjoined the *entire* initiative from appearing on the November 8, 2016 ballot.

The remaining issue is the harms to the parties if the taxation provision is included on the ballot. Although the court views the severability issue as more debatable than the remaining issues, it cannot conclude that the others are devoid of merit. Moreover, given that the City now will incur its additional costs regardless whether the taxation provision is included, this court concludes that a balancing of the equities favors having the full measure appear on the ballot regardless whether the additional issues meet the RAP 8.3 debatability requirement.

Supersedeas Bond or Other Security

RAP 8.3 provides, "The appellate court will ordinarily condition the order on furnishing a bond or other security." Neither OFO nor the City discussed the issuance of a bond. The primary financial harm to the City is the need to print a supplemental voters'

pamphlet. Mot. for Stay and Injunctive Relief, App. D, at 4 (Declaration of Mary Hall). This court sets the supersedeas amount at 50 percent of the reasonable cost to the City to print this pamphlet. The City has until 5:00 p.m. on September 6, 2016, to provide the printing cost information to OFO. Supersedeas must be posted with the Thurston County Superior Court Clerk no later than 5:00 p.m. on September 9, 2016. RAP 8.1(d).

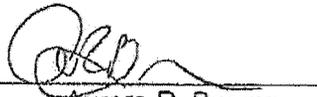
Accordingly, it is hereby

ORDERED that OFO's motion for a RAP 8.3 stay of the superior court's decision, which enjoined the OFO initiative from appearing on the November 8, 2016 ballot, is granted. It is further

ORDERED that OFO must comply with the supersedeas portion of this ruling by 5:00 p.m. on September 9, 2016. It is further

ORDERED that any motion to modify this ruling is due by 5:00 p.m. on Tuesday, September 6, any answer is due by 5:00 p.m. on Wednesday, September 7, and any reply is due by noon on Thursday, September 8, 2016.

DATED this 2nd day of September, 2016.



Aurora R. Bearse
Court Commissioner

cc: Eric Lowney
Claire E. Tonry
P. Stephen DiJulio
Mark E. Barber
Annaliese Harksen
Elizabeth Petrich
Hon. Jack Nevin



1 of 80 DOCUMENTS



Positive
As of: Oct 20, 2016

SHERRIL HUFF ET AL., Appellants, v. KIM WYMAN, as Secretary of State, ET AL., Respondents.

No. 92075-3

SUPREME COURT OF WASHINGTON

184 Wn.2d 643; 361 P.3d 727; 2015 Wash. LEXIS 1325

September 3, 2015, Considered

November 12, 2015, Filed

SUBSEQUENT HISTORY: Related proceeding at *Lee v. State, 2016 Wash. LEXIS 593 (Wash., May 26, 2016)*

PRIOR-HISTORY: Appeal from King County Superior Court. Docket No. 15-2-18335-4. Judgment or order under review. Date filed 08/14/2015. Judge signing Honorable Dean S. Lum.

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Several individuals sought to enjoin the placement of an initiative measure on a general election ballot. The proposed measure would reduce the state sales tax rate unless the legislature refers to voters a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes.

Superior Court: The Superior Court for King County, No. 15-2-18335-4, Dean Scott Lum, J., August 14, 2015 denied injunctive relief on.

Supreme Court: Holding that the plaintiffs had taxpayer standing to seek an injunction, and that the case was justiciable, but that the plaintiffs did not state sufficient grounds to merit injunctive relief, the court *affirms* the trial court's denial order.

COUNSEL: *Paul J. Lawrence, Kymberly K. Evanson, and Sarah S. Washburn (of Pacifica Law Group LLP), for appellants.*

Robert W. Ferguson, Attorney General, Callie A. Castillo, Managing Assistant, and Rebecca R. Glasgow and Peter B. Gonick, Assistants; and Richard M. Stephens (of Groen Stephens & Klinge LLP), for respondents.

Stephen W. Pidgeon on behalf of Pam Roach, amicus curiae.

JUDGES: AUTHOR: Chief Justice Barbara A. Madsen. WE CONCUR: Justice Charles W. Johnson, Justice Susan Owens, Justice Mary E. Fairhurst, Justice Debra L. Stephens, Justice Charles K. Wiggins, Justice Steven C. González, Justice Sheryl Gordon McCloud, Justice Mary I. Yu.

OPINION BY: Barbara A. Madsen

OPINION

En Banc

¶1 MADSEN, C. J. -- Appellants¹ seek reversal of a King County Superior Court order denying appellants' motion to enjoin the secretary of state from placing Initiative 1366 (I-1366) on the November 2015 general election ballot. On September 4, 2015, this court issued an

order, with this opinion to follow, affirming the trial court's denial of appellants' motion for injunctive relief.²

1 Sherril Huff, Mary Hall, David Frockt, Reuven Carlyle, Eden Mack, Tony Lee, Angela Bartels, Gerald Reilly, and Paul Bell.

2 On September 18, 2015, appellants filed a motion requesting oral argument. The same day, respondent sponsors filed an answer, also requesting this court grant appellants' request for oral argument. Appellants' motion requesting oral argument is denied.

FACTS

¶2 Respondents³ filed I-1366 in January 2015. As filed with the secretary of state, the proposed initiative measure contained the boldface and larger print heading "2/3 Constitutional Amendment." Clerk's Papers (CP) at 14 (capitalization omitted). The attorney general's official ballot title states:

Statement of Subject: Initiative Measure No. 1366 concerns state taxes and fees.

Concise Description: This measure would decrease the sales tax rate [from 6.5 percent to 5.5 percent] unless the legislature refers to voters a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes.

CP at 97. "Raises taxes" is defined in section 6 of the initiative as "any action or combination of actions by the state legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund." CP at 19. On July 29, 2015, Secretary of State Kim Wyman certified that I-1366 had received a sufficient number of signatures for the initiative to be placed on the ballot for the November 2015 election.

3 Kim Wyman, Tim Eyman, Leo J. Fagan, and M.J. Fagan.

¶3 Appellants Huff et al. sought to enjoin the initiative from being placed on the ballot by filing an action in King County Superior Court, claiming that the initiative went beyond the scope of the people's initiative power under *article II, section 1 of the state constitution* and was therefore not proper for direct legislation. On August 14, 2015, the trial court ruled that (1) appellants had standing to challenge the initiative as taxpayers, county election officials, and legislators, (2) this was a challenge

to the scope of the initiative and therefore appropriate for preelection review, (3) the "fundamental, stated and overriding purpose" of I-1366 was to amend the constitution in violation of *article II of the state constitution*, (4) I-1366 violated *article XXIII of the state constitution*, and (5) appellants were unable to show a "clear legal or equitable right" to an injunction under *Rabon v. City of Seattle*, 135 Wn.2d 278, 957 P.2d 621 (1998), because this court has yet to decide whether preelection restrictions on initiatives infringe on free speech rights under the *First Amendment to the United States Constitution* or *article I, section 5 of our state constitution*. CP at 132-38.

¶4 The same day, appellants sought direct, accelerated review in this court. We granted review and on September 4, 2015, issued an order affirming the trial court, with an opinion to follow, stating that "[a]ppellants have not made the clear showing necessary for injunctive relief as required by *Rabon v. City of Seattle*." Order, *Huff v. Wyman*, No. 92075-3, at 2 (Wash. Sept. 4, 2015).

¶5 This case presents three issues: (1) whether appellants have standing to seek an injunction, (2) whether this case is justiciable, and (3) whether appellants meet the elements necessary for injunctive relief. Without expressing any opinion on the general constitutionality of I-1366, or the free speech issues mentioned by the trial court, we hold that appellants have taxpayer standing and that this case is justiciable. However, we hold that appellants did not make a clear showing that the subject matter of the initiative is not within the broad scope of the people's power of direct legislation and, as such, failed to demonstrate a clear legal right for injunctive relief. We therefore affirm the trial court's denial of such relief on a different basis. See *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) (reviewing court may affirm the trial court's denial of an injunction on any basis supported by the briefing and record below).

STANDARD OF REVIEW

¶6 We review a trial court's decision on a preliminary injunction for an abuse of discretion. *Wash. Fed'n of State Emps., Council 28 v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). Discretion is abused if the decision is based on untenable grounds, or the decision is manifestly unreasonable or arbitrary. *Id.* An injunction is "frequently termed 'the strong arm of equity,' or a 'transcendent or extraordinary remedy,' and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (footnotes omitted) (quoting 42 AM. JUR. 2D Injunctions § 2, at 728 (1969)). Additionally, we may affirm the trial

court on any basis supported by the briefing and record below. *LaMon*, 112 Wn.2d at 200-01.

¶7 The establishment of a clear right is of particular importance where appellants are seeking the extraordinary remedy of preventing an initiative from being placed on the ballot for a vote of the people. The initiative is "[t]he first power reserved by the people." *CONST. art. II, § 1(a)*. This power is self-executing. *CONST. art. II, § 1(d)*. It has been a long-standing rule of our jurisprudence that we refrain from inquiring into the constitutionality or validity of an initiative before it has been enacted. *Futurewise v. Reed*, 161 Wn.2d 407, 410, 166 P.3d 708 (2007) (citing *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005)). Appellants can obtain injunctive relief only if they show a clear right based on a demonstration that the procedural requirements for placing the measure on the ballot have not been met (i.e., not enough signatures) or that the subject matter is not proper for direct legislation. *Id.* at 411 (citing *Coppernoll*, 155 Wn.2d at 298-99).

ANALYSIS

Standing

¶8 Appellants argue that they have standing as taxpayers, county election officials, and legislators. Respondent secretary of state agrees that the appellants have standing as taxpayers but not as county election officials or legislators. Respondent sponsors contend that appellants do not have standing in any capacity. We hold that the appellants have taxpayer standing and do not address the issues of county election official or legislator standing.

¶9 This court has granted taxpayer standing to challenge governmental acts in limited circumstances. *See, e.g., State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614-15, 694 P.2d 27 (1985); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Calvary Bible Presbyterian Church of Seattle v. Bd. of Regents of Univ. of Wash.*, 72 Wn.2d 912, 917-18, 436 P.2d 189 (1967); *Fransen v. State Bd. of Nat. Res.*, 66 Wn.2d 672, 404 P.2d 432 (1965). The challenger must be a taxpayer, request that the attorney general take action, and have the request denied before commencing her own action. *Boyles*, 103 Wn.2d at 614. However, taxpayer disagreement with a discretionary governmental act is not enough to convey standing. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997). Furthermore, if the grant of standing would encourage "unwarranted harassment" of public officials, it will be denied. *Boyles*, 103 Wn.2d at 614 (quoting *Calvary Bible*, 72 Wn.2d at 918).

¶10 Here, appellants allege taxpayer status, challenge the constitutionality of a government act, and had their request that the attorney general take action denied. CP at 21-24. The appellants do not challenge a discretionary decision. Rather, they challenge the exercise of constitutional authority that they contend is beyond what the constitution allows—namely, placing an initiative on the ballot that exceeds the scope of the people's *article II* power and violates *article XXIII of the state constitution*. Granting standing on this narrow issue will not lead to harassment of public officials; it is consistent with the recognized role that taxpayer suits play in determining whether a government official acts lawfully. We conclude, therefore, that appellants have taxpayer standing to maintain their claim.

¶11 Respondents dispute both county election official and legislator standing. However, because the county election officials and legislators have demonstrated taxpayer standing, we need not address whether they have standing in a different capacity.

Justiciability

¶12 Justiciability is a threshold requirement and must be met before proceeding to the litigant's claims. *Coppernoll*, 155 Wn.2d at 300. This requirement focuses on whether the question sought to be adjudicated is appropriate for the court to address. Respondent secretary of state acknowledges that "whether I-1366 falls within the people's power of initiative is an issue of significant and continuing public importance" and is therefore justiciable. Br. of Resp't Wyman at 7. Respondent sponsors argue that because the initiative has not yet been passed, there is nothing on which to rule. In reviewing an initiative, whether or not a case is justiciable depends on the type of review sought. *Coppernoll*, 155 Wn.2d at 300. While this court may not rule on the constitutional validity of a proposed initiative, whether an initiative is beyond the scope of the power the people reserved to themselves in *article II, section 1 of the state constitution* is appropriate for preelection review. *Id.* at 299 ("Subject matter challenges do not raise concerns regarding justiciability because postelection events will not further sharpen the issue (i.e., the subject of the proposed measure is either proper for direct legislation or it is not)."). Here the question to be addressed is not the constitutionality of the initiative. Rather, the question is whether the initiative is within the broad scope of the people's reserved power. To be within the scope of this reserved power, an initiative must propose the enactment of a law and not the amendment of the constitution. *See Ford v. Logan*, 79 Wn.2d 147, 156, 483 P.2d 1247 (1971) ("the initiative power set forth in *Const. art. 2* does not include the power to directly amend or repeal the constitution itself"); accord *Coppernoll*, 155 Wn.2d at 304; *Amalga-*

mated Transit Union Local 587 v. State, 142 Wn.2d 183, 204, 11 P.3d 762 (2000).

¶13 Appellants here maintain that I-1366 is inappropriate for direct legislation because its "fundamental and overriding purpose" is to amend the constitution. *Phila. II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.3d 389 (1996). This is a subject matter challenge to whether or not the initiative is within the scope of the people's initiative power under *article II, section 1*, and, as such, is justiciable. See *Coppernoll*, 155 Wn.2d at 301 (holding petitioners' claim as to scope was pretext for a substantive challenge and thus not justiciable).

Injunctive relief

¶14 To be entitled to an order enjoining the secretary of state from placing I-1366 on the November 2015 general election ballot, the appellants must establish (a) a clear legal or equitable right, (b) a well-grounded fear of immediate invasion of that right, and (c) that the act complained of will result in actual and substantial injury. *Rabon*, 135 Wn.2d at 284. Failure to establish any one of these requirements results in a denial of the injunction. *Kucera*, 140 Wn.2d at 210 (citing *Wash. Fed'n*, 99 Wn.2d at 888). These criteria must also "be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate." *Rabon*, 135 Wn.2d at 284. We hold that appellants have not made a sufficient showing of a clear legal or equitable right entitling them to relief.

Clear legal or equitable right

¶15 In determining whether there is a clear legal or equitable right, "the court examines the likelihood that the moving party will prevail on the merits." *Id.* at 285 (citing *Wash. Fed'n*, 99 Wn.2d at 888; *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)). A doubtful case will not warrant an injunction. *Id.* The issue here is whether the appellants have shown they have a clear legal or equitable right to enjoin I-1366 from being placed on the ballot. It must be "clear" that an initiative is outside of the legislative power to warrant removing it from the ballot. *Coppernoll*, 155 Wn.2d at 305. We look to the initiative's "fundamental and overriding purpose" to decide whether it is within the legislature's power to enact. *Id.* at 302 (quoting *Phila. II*, 128 Wn.2d at 719). The superior court found that I-1366's "fundamental, stated and overriding purpose" was to amend the constitution. CP at 134. The parties agree that the Washington constitution may not be amended by initiative. *Id.* The superior court therefore concluded that I-1366 exceeded the scope of the people's initiative power under *article II, section 1* and violated the constitutional amendment process of *article XXIII*. CP at 135.

¶16 This court has only once considered a challenge to the scope of a statewide initiative as exceeding the legislative power granted to the people by *article II, section 1*. *Phila. II*, 128 Wn.2d at 716-17. In *Philadelphia II*, the "fundamental and overriding purpose" of the initiative was to enact federal legislation that was "simply not within Washington's power to enact." *Id.* at 719-20. It was clear in that case that the Washington State Legislature would not be able to enact federal law. *Id.* at 720. The appellants here have not shown the fundamental and overriding purpose of I-1366 with the same level of clarity.

¶17 The parties' arguments demonstrate that "the fundamental and overriding purpose" of I-1366 depends on the prism through which one views its provisions. Appellants, who view it as seeking to amend the constitution, focus on the heading "2/3 Constitutional Amendment" and the fact that the sponsors ask that checks in support of the initiative be made out to "2/3 Constitutional Amendment" and refer to their initiative as "2/3 for Taxes Constitutional Amendment." See www.voterswantmorechoices.com. Appellants also point to the superior court's finding of fact 21, which stated that the sponsors, not unnamed supporters, "advertised the initiative as an effort to amend the [c]onstitution." CP at 133. In this light, although the text of the initiative does not explicitly call for or mandate an amendment, the threat of a \$ 1.4 billion-a-year tax cut ⁴ is obviously intended to bring pressure on the legislature to exercise its power to propose a constitutional amendment in violation of *articles II* and *XXIII*.

4 This figure is taken from the Fiscal Impact Statement for I-1366, www.ofm.wa.gov/ballot/2015/I-1366_Fiscal_Impact_Statement.pdf.

¶18 On the other hand, respondents view I-1366 as containing a form of conditional legislation that would operate to reduce the sales tax unless the legislature takes specified action to amend the constitution. They argue that the initiative is nothing more than contingent legislation to reduce taxes, a form of direct legislation within the legislature's power. ⁵ Viewed in this light, the purpose of I-1366 is the enactment of law and not the amendment of the constitution.

5 This court has previously dealt with the issue of contingent legislation and held that, as a general proposition, contingent legislation does not violate the constitution. See *Brower v. State*, 137 Wn.2d 44, 55-56, 969 P.2d 42 (1998) ("The power to enact contingent legislation has clearly been recognized. ... The Legislature has authority both to refer a measure to the people and to condition

the effectiveness of an enactment upon the happening of a future event."); *State v. Storey*, 51 Wash. 630, 632, 99 P. 878 (1909) ("[t]he mere fact that the act does not take effect until the contingency arises, does not indicate a delegation of legislative power, even where the contingency depends upon the action of certain persons"). *But see also Amalgamated Transit*, 142 Wn.2d at 244 (holding that initiatives making future legislative enactments of a particular class tax increases contingent on voter approval violates *article II, section 1*).

¶19 In the present context of subject matter preelection review, the fundamental and overriding purpose is not sufficiently clear. Had each claimed purpose been the sole and explicit purpose of I-1366, the outcome would be obvious. If the initiative called only for a reduction in the sales tax, there would be no preelection issues. If it called only for a two-thirds constitutional amendment, it would clearly be outside the scope of the people's initiative power. This court has never decided a case in which an initiative offered contingent alternatives and, if so, whether one invalid purpose would prevent it from being on the ballot. ⁶ As drafted, it is not clear that there is only one purpose to this initiative and that the other is incidental, "merely an ephemeral stepping stone" to the stated purpose. *Phila. II*, 128 Wn.2d at 719.

6 See *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971) (purpose was to repeal King County Charter); *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 748, 620 P.2d 82 (1980) ("[T]he obvious intent and thrust of Initiative 21" was to forbid continuation of the I-90 project); *Phila. II*, 128 Wn.2d at 719 (finding valid state procedures affected by the initiative but that those changes were "incidental to the primary goal of the initiative"); *Maleng v. King County Corr. Guild*, 150 Wn.2d 325, 329, 76 P.3d 727 (2003) (Initiative's purpose was to reduce the number of council members from 13 to 9); *Coppernoll*, 155 Wn.2d at 293 (purpose was to "change laws governing claims for negligent healthcare").

¶20 In light of the injunction standard, appellants cannot meet their burden by showing only that *one* purpose of the initiative is to seek adoption of a constitutional amendment. They must clearly show this purpose is the fundamental and overriding purpose. Due to the conceivable alternative view that I-1366 proposes conditional legislation, appellants have not met their burden to clearly demonstrate--certainly not to the level of clarity in *Philadelphia II*--that the initiative is beyond the scope

of the reserved legislative power as is necessary to obtain injunctive relief. ⁷

7 Our decision today does not hold that I-1366 is necessarily within the scope of the people's initiative power. We hold only that appellants have not met their high threshold burden of showing that I-1366 is clearly beyond the scope of the initiative power in order to warrant a preliminary injunction. To definitively decide that question in this context would be inappropriate because in the context of a preliminary injunction, the reviewing court "is not to adjudicate the ultimate rights in the case." *Kucera*, 140 Wn.2d at 216-17. This "court may reach the merits of any purely legal question provided that the interim harm factor is undisputed"; however, the appellants and respondent sponsors dispute whether or not an actual and substantial injury will result if I-1366 is placed on the ballot. *Rabon*, 135 Wn.2d at 285. As such, were this court to definitively determine the fundamental purpose of the initiative and whether that purpose is outside the scope of the people's initiative power, it "would be the equivalent of a decision on the merits, a task for which this court is ill suited." *Kucera*, 140 Wn.2d at 217 (quoting *Fed. Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 267, 721 P.2d 946 (1986)).

CONCLUSION

¶21 Because we hold that the first prong of the *Rabon* factors was not met, we need not address whether appellants feared an immediate invasion of that right, or whether appellants would suffer actual and substantial injury. The superior court's decision hinged on free speech concerns; however, because our determination that appellants have not established a clear right is dispositive of this case, it is unnecessary to answer the question of whether subject matter, substantive, or procedural preelection review of an initiative implicates the *First Amendment to the United States Constitution* or *article I, section 5 of our constitution*, and we express no opinion on that matter.

¶22 Although we conclude that appellants have taxpayer standing and that this case is justiciable, appellants have not met their threshold burden of showing a clear legal or equitable right that would support the granting of injunctive relief. The trial court therefore did not abuse its discretion in denying appellants' motion for a preliminary injunction. We affirm.

JOHNSON, OWENS, FAIRHURST, STEPHENS, WIGGINS, GONZÁLEZ, GORDON MCCLOUD, and YU, JJ., concur.

Annotated Revised Code of Washington by LexisNexis



1 of 28 DOCUMENTS



Analysis
As of: Oct 20, 2016

**SPOKANE ENTREPRENEURIAL CENTER ET AL., *Petitioners*, v. SPOKANE MOVES TO
AMEND THE CONSTITUTION ET AL., *Respondents*.**

No. 91551-2

SUPREME COURT OF WASHINGTON

185 Wn.2d 97; 369 P.3d 140; 2016 Wash. LEXIS 125; 46 ELR 20030

**November 10, 2015, Argued
February 4, 2016, Filed**

SUBSEQUENT HISTORY: Reconsideration denied by *Spokane Entrepreneurial Ctr. v. Moves*, 2016 Wash. LEXIS 465 (Wash., Apr. 1, 2016)

PRIOR-HISTORY: *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn. App. 1039, 2015 Wash. App. LEXIS 234 (2015)

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: A group of individuals, governmental entities, companies, and business associations sought a preelection declaration that a proposed local initiative measure that would amend a city's charter to establish a "Community Bill of Rights" was invalid. The Community Bill of Rights would add provisions to the city's charter to govern zoning changes, to grant certain water rights, to grant workplace rights to employees, and to affect the legal rights of corporations.

Superior Court: The Superior Court for Spokane County, No. 13-2-02495-5, Maryann C. Moreno, J., on August 27, 2013, entered a judgment requiring that the initiative be struck from the ballot, ruling that the petitioners had standing to challenge the initiative and that the initiative exceeded the scope of the local initiative power.

Court of Appeals: In an unpublished opinion noted at 185 Wn. App. 1039 (2015), the court reversed the judgment, ruling that the petitioners lacked standing, and ordered that the initiative be put on the next available ballot.

Supreme Court: Holding that the petitioners had standing to challenge the initiative and that the initiative exceeded the scope of the local initiative power, the court reverses the decision of the Court of Appeals and reinstates the judgment.

COUNSEL: Robert J. Maguire and Rebecca J. Francis (of Davis Wright Tremaine LLP), for petitioners.

Lindsey Schromen-Wawrin (of Shearwater Law PLLC), for respondent Envision Spokane.

Nancy L. Isserlis, City Attorney, and Nathaniel J. Odle, Assistant; and Michael K. Ryan and Thaddeus O'Sullivan (of K&L Gates LLP), for respondent City of Spokane.

Lawrence H. Haskell, Prosecuting Attorney, and Dan L. Catt, Deputy, for respondent Spokane County Auditor.

Josh Weiss, Robert A. Battles, Adam R. Frank, Bill Clarke, and Robert H. Crick, Jr. on behalf of Washington State Association of Counties, Association of Washington Business, Building Industry Association of

Washington, Inland Association of General Contractors, and Washington Association of Realtors, amici curiae.

Andrea L. Bradford on behalf of Washington State Association of Municipal Attorneys, amicus curiae.

JUDGES: AUTHOR: Justice Susan Owens. WE CONCUR: Chief Justice Barbara A. Madsen, Justice Charles W. Johnson, Justice Mary E. Fairhurst, Justice Debra L. Stephens, Justice Charles K. Wiggins, Justice Steven C. Gonzalez, Justice Sheryl Gordon McCloud, Justice Mary I. Yu.

OPINION BY: Susan Owens

OPINION

En Banc

¶1 OWENS, J. -- Courts generally avoid reviewing ballot initiatives before they have been enacted into law, but a few limited types of challenges can be appropriately reviewed prior to election: procedural challenges (such as sufficiency of signatures and ballot titles) and challenges asserting that the initiative is not within the scope of the legislative authority granted to local residents. The first issue in this case is who has standing to bring those types of challenges. The Court of Appeals created new limits on who can bring such challenges, but we reverse and adhere to our existing standards because they adequately ensure that only those affected by an ordinance may challenge it. Applying those existing standards, we find that petitioners in this case had standing to bring this challenge. The second issue in this case is the substance of the petitioners' challenge: whether the initiative's subject matter falls within the scope of authority granted to local residents. This initiative attempts to regulate a variety of subjects outside this scope of authority, including administrative matters, water law, and constitutional rights. Therefore, we affirm the trial court's finding that this local initiative exceeds the scope of local initiative power and should not be put on the ballot.

FACTS

¶2 In 2013, Envision Spokane gathered enough signatures to place a local initiative on the ballot that would establish a "Community *Bill of Rights*" (referred to herein as the "Envision Initiative"). Clerk's Papers (CP) at 39. The Envision Initiative would amend the city of Spokane's charter to add a "Community *Bill of Rights*" that contained four primary provisions relating to zoning changes, water rights, workplace rights, and the rights of corporations. *Id.* at 39-40.

¶3 First, the initiative would require any proposed zoning changes involving large developments to be ap-

proved by voters in the neighborhood. Second, it would give the Spokane River the legal right to "exist and flourish," including the right to sustainable recharge, sufficient flows to support native fish, and clean water. *Id.* at 40. It would also give Spokane residents the right to access and use water in the city, as well as the right to enforce the Spokane River's new rights. Third, it attempts to give employees the protections of the *Bill of Rights* against their employer in the workplace. Fourth, it would strip the legal rights of any corporation that violated the rights secured in the charter. *Id.*

¶4 Petitioners filed this declaratory judgment action challenging the validity of the Envision Initiative. The petitioners include Spokane County, individual residents of Spokane (including two city council members acting in their individual capacities), for-profit corporations and companies in Spokane (including Pearson Packaging Systems and the utility company Avista Corporation), and nonprofit associations (including the Spokane Association of Realtors, the Spokane Building Owners and Managers Association, the Spokane Home Builders Association, and local chambers of commerce). *See id.* at 8-13.

¶5 The trial judge ruled that (1) petitioners had standing to challenge the initiative and (2) the initiative exceeded the scope of the local initiative power. She therefore instructed that it be struck from the ballot. Envision Spokane appealed, and the Court of Appeals held that petitioners lacked standing and ordered the initiative be put on the next available ballot. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, noted at 185 Wn. App. 1039, 2015 WL 410344, at *8-9, 2015 Wash. App. LEXIS 116, at *16. We granted review. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 183 Wn.2d 1017, 355 P.3d 1153 (2015).

ISSUES

¶6 1. Do petitioners have standing to bring this challenge?

¶7 2. Does the Envision Initiative exceed the scope of local initiative power?

ANALYSIS

1. Under Our Existing Standing Requirements, Petitioners Have Standing

¶8 This case involves the intersection of our rules regarding standing in declaratory judgment actions and our rules regarding preelection challenges to initiatives. The Court of Appeals found these rules to be in tension with each other, noting that our liberal standing requirements seemed to conflict with limits on preelection judi-

cial review of initiatives. *Spokane Entrepreneurial Ctr.*, 2015 WL 410344, at *4, 2015 Wash. App. LEXIS 116, at *11. Because of this conflict, the Court of Appeals applied heightened standing requirements for this type of action.

¶9 As explained below, we decline to adopt heightened standing requirements for this type of action. Our case law has consistently applied existing standing requirements for declaratory judgment actions, and we believe the concerns regarding preelection review of initiatives are properly addressed by our limits on the types of challenges that courts will review prior to elections.

A. Existing standing requirements limit who can bring declaratory judgment actions

¶10 To challenge the Envision Initiative, petitioners filed an action under the *Uniform Declaratory Judgments Act*, chapter 7.24 RCW. That statute allows a person whose rights are affected by a statute or municipal ordinance to "have determined any question of construction or validity" of that statute or ordinance, and to "obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. At issue in this case is whether petitioners had standing to file that declaratory judgment action.

¶11 "The standing doctrine prohibits a litigant from raising another's legal rights." *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). This court's test for standing in declaratory judgment actions has two requirements. First, the interest sought to be protected must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (internal quotation marks omitted) (quoting *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978)). Second, the challenged action must have caused "injury in fact," economic or otherwise, to the party seeking standing." *Id.* (quoting *Save a Valuable Env't*, 89 Wn.2d at 866).

B. Existing rules strictly limit preelection judicial review of initiatives

¶12 As a preliminary issue, it is important to distinguish statewide and local initiatives. The right of the people to file a statewide initiative is laid out in the Washington Constitution. CONST. art. II, § 1(a). Because it is a constitutional right, Washington courts interpret the rules regarding statewide initiatives to facilitate this right. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005); *In re Estate of Thompson*, 103 Wn.2d 292, 294-95, 692 P.2d 807 (1984).

¶13 However, the right to file a local initiative is not granted in the constitution. Instead, state statutes governing the establishment of cities allow the cities to establish a local initiative process. See RCW 35.22.200 ("The [city] charter may provide for direct legislation by the people through the initiative and referendum upon any matter within the scope of the powers, functions, or duties of the city.").

¶14 We have expressed great concern about reviewing initiatives prior to enactment. This concern has been attributed to both "the constitutional preeminence of the right of initiative," *Coppernoll*, 155 Wn.2d at 297, as well as general concerns that "the courts should not interfere in the electoral and legislative processes, and that the courts should not render advisory opinions." *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980). To address these concerns, we strictly limit the type of preelection challenges courts will review. Courts will not consider a challenge to the substantive validity of a statewide initiative prior to the election. *Coppernoll*, 155 Wn.2d at 297. Courts will generally review only two types of challenges--procedural challenges (such as sufficiency of signatures and ballot titles) and whether the subject matter is proper for direct legislation. *Id.* at 298-99. As we have explained, this second type of challenge is typically aimed at local initiatives because of the "more limited powers of initiatives under city or county charters." *Id.* at 299. Thus, while "[g]enerally, judicial preelection review of initiatives and referendums is disfavored ... courts will review local initiatives and referendums to determine, notably, whether 'the proposed law is beyond the scope of the initiative power.'" *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010) (quoting *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 746).

¶15 Based on our court's concerns about preelection review of an initiative, the Court of Appeals concluded that even in the context of an allowable challenge to an initiative, petitioners must meet heightened standing requirements. We now clarify that these rules address different concerns and should not be conflated. "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Grant County*, 150 Wn.2d at 802 (quoting *Walker*, 124 Wn.2d at 419). In contrast, our limits on preelection review ensure that we do not address the substantive validity of a statute before it is enacted. Requiring challengers to meet heightened standing requirements does nothing to help the court avoid addressing the substantive validity of a statute before it is enacted, it limits only the groups of people who can challenge initiatives. Therefore, if a case involves one of the few types of allowable

preelection initiative challenges, petitioners should have to meet only our traditional standing requirements.

C. Applying our existing standing requirements, petitioners had standing to challenge the Envision Initiative

¶16 Applying those existing standing requirements, we hold that petitioners in this case have standing to bring their challenge. First, petitioners must show that the interest they are seeking to protect is arguably within the zone of interests that the initiative will protect or regulate. As the Court of Appeals noted, one of the petitioners' strongest arguments regarding this prong relates to the initiative's provision giving the Spokane River water rights. Two of the petitioners actively use the Spokane River--Spokane County (which maintains a sewage treatment plant on the river) and Avista Corporation (a utility company that, among other things, stores water in Lake Coeur d'Alene that might otherwise flow into the Spokane River). The Court of Appeals found that these would arguably put the petitioners within the zone of interests regulated by the initiative but that this was not sufficient in the context of a preelection challenge. *Spokane Entrepreneurial Ctr.*, 2015 WL 410344, at *5, 2015 Wash. App. LEXIS 116, at *12. In light of our holding that petitioners are not subject to heightened standing requirements, we hold that petitioners are certainly within the zone of interests that the initiative protects or regulates. The initiative gives the Spokane River its own water rights, including the rights to sustainable recharge, sufficient flows to support native fish, and clean water. This protects or regulates the water of the Spokane River, which petitioners use pursuant to state and federal law. Similarly, housing builders and developers would be within the zone of interests regulated by the initiative's provision requiring an additional level of approval from neighborhood residents for all major developments. Petitioners meet the first standing requirement.

¶17 Second, petitioners must show injury in fact, economic or otherwise. If we were to require that a petitioner show that an injury had already occurred, no challenger could ever meet this requirement for an initiative that had not yet been enacted. However, we have not required challengers to local initiatives to show that an injury has already occurred. Instead, we have allowed petitioners to show that they would suffer an injury in fact if the law were to pass. For example, in *Grant County*, we held that property owners "clearly" met the "actual injury" standing requirement because they "face different tax rates following annexation." 150 Wn.2d at 802-03. Similarly, in *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012), we found that an association of city residents had standing to challenge a proposed initiative because

the individual members had standing as "Mukilteo residents who are eligible to vote."

¶18 In this case, petitioners will face injury if the initiative passes. The clearest examples arise from the provisions of the initiative that (1) assign water rights that conflict with water rights held pursuant to state law and (2) create a new zoning approval process. Petitioners include a utility company and a county entity that use the Spokane River pursuant to existing state law who would certainly suffer harm if others were given conflicting water rights related to the Spokane River. Similarly, the petitioner builders and developers would suffer harm by having to go through an additional zoning approval process. Regardless of whether these harms might be justified or offset by other societal benefits, these petitioners will suffer harm. Therefore, they meet the second requirement for standing and can bring a challenge to the initiative.

2. The Envision Initiative Exceeds the Scope of Local Initiative Power

¶19 Having found that petitioners have standing to challenge the Envision Initiative, the next question is whether the initiative exceeds the scope of the local initiative power. As described below, the local initiative power is limited to legislative matters that are within the authority of the city. In this case, we affirm the trial court's ruling that all four provisions of the Envision Initiative were outside the scope of the local initiative power, as they either dealt with nonlegislative matters or were outside the authority of the city.

¶20 There are multiple limits on the local initiative power, three of which apply in this case. First, "administrative matters, particularly local administrative matters, are not subject to initiative or referendum." *Our Water-Our Choice!*, 170 Wn.2d at 8. "Generally speaking, a local government action is administrative if it furthers (or hinders) a plan the local government or some power superior to it has previously adopted." *Id.* at 10. We have noted that "[d]iscerning whether a proposed initiative is administrative or legislative in nature can be difficult." *Id.* In one case, we described the question as "whether the proposition is one to make new law or declare a new policy, or merely to carry out and execute law or policy already in existence." *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973).

¶21 Similarly, a local initiative "is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself." *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). As this court has explained, a grant of authority to the city's legislative

body means the city council or mayor, not the electorate. *Id.* at 265.

¶22 Finally, the provisions of a local initiative must be within the scope of the authority of the city itself. As we have explained, "While the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law." *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747. In that case, we reviewed a Seattle initiative that would have halted certain Interstate 90 construction projects. *Id.* at 742. We struck down the initiative--prior to it being put on the ballot--holding that it dealt with matters that the city had no authority to regulate: "the location and construction of state limited access facilities." *Id.* at 749.

¶23 The trial court found that all four of the Envision Initiative provisions were outside the scope of the initiative power. We discuss each provision in turn.

¶24 The first provision would require any proposed zoning changes involving large developments to be approved by voters in the neighborhood. The trial court ruled that this provision dealt with administrative matters and was thus outside the scope of the initiative power. We affirm this ruling. The city of Spokane has already adopted processes for zoning and development. This provision would modify those processes for zoning and development decisions, which falls under our description of an administrative matter since it deals with carrying out and executing laws or policies already in existence. *See Ruano*, 81 Wn.2d at 823.

¶25 The second provision would give the Spokane River the legal right to "exist and flourish," including the rights to sustainable recharge, sufficient flows to support native fish, and clean water. CP at 40. It would also give Spokane residents the right to access and use water in the city, as well as the right to enforce the Spokane River's new rights. *Id.* The trial court ruled that this provision was outside of the scope of the local initiative power because it conflicted with state law, which already determines the water rights for the Spokane River. The trial court noted that this provision was particularly problematic because it dealt with an aquifer that is actually located in Idaho, which is outside of the city's authority. The trial court also ruled that this provision was administrative in nature because it would deal with how an existing regulatory scheme is implemented. We affirm.

This broad provision is directly contrary to the water rights system established by the State and is outside the scope of the city's authority.

¶26 The third provision attempts to give employees the protections of the *Bill of Rights* against their employer in the workplace. The trial court ruled that this provision was outside of the scope of the local initiative power because (1) municipalities cannot expand constitutional protections and (2) this provision would conflict with state and federal labor laws. We affirm. Expanding the *Bill of Rights* to apply to private persons and entities, not just state actors, is a federal constitutional issue that is outside the scope of local authority. *See Ford v. Logan*, 79 Wn.2d 147, 156, 483 P.2d 1247 (1971) ("Amendment of our constitution is not a legislative act and thus is not within the initiative power reserved to the voters.").

¶27 The fourth provision would strip the legal rights of any corporation that violated the rights secured in the charter. This appears to be a response to the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 342-43, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), which held that corporations have rights under the federal constitution. The trial court ruled that this provision was outside of the scope of the local initiative power because it directly conflicts with federal and state law. We affirm this ruling because municipalities cannot strip constitutional rights from entities and cannot undo decisions of the United States Supreme Court.

CONCLUSION

¶28 While preelection challenges to initiatives are disfavored, two types of challenges can be brought prior to election. For those allowable challenges, we continue to apply our existing standing rules. Under those rules, petitioners had standing to challenge this initiative. As to the underlying issue, we hold that the initiative exceeded the scope of local legislative authority and thus should not be put on the ballot.

MADSEN, C.J., and JOHNSON, FAIRHURST, STEPHENS, WIGGINS, GONZÁLEZ, GORDON MCCLOUD, and YU, JJ., concur.

Reconsideration denied April 1, 2016.

Annotated Revised Code of Washington by LexisNexis

Published on www.pdc.wa.gov (<https://www.pdc.wa.gov>)

[Home](#) > Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot

Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot

Statement #1

Expenditures made by a person or political committee to place a measure on a ballot, to influence the wording of a ballot title or to require that a government agency place a measure on the ballot are campaign expenditures reportable under RCW 42.17A.

Statement #2

Expenditures made by a government agency to defend its official actions related to whether or not a measure should be placed on a ballot or to the wording of a ballot title are not reportable as campaign expenditures.

Discussion:

The proponents of a proposed ballot measure are clearly acting to support or advance that measure when they take an action to require that it be placed before the voters. It is also in their interest to have the measure stated in terms most favorable to them. The proponents, therefore, have discretion in the action they take regarding the issue. They are also not closely bound by law in the range of actions they may take. The government agency, on the other hand, is closely regulated by law in its actions regarding measures that are presented to it. It first of all is expected to remain neutral in its approach to ballot proposals. The way in which a measure is processed is specified and the government is given little leeway in its actions. If a government agency takes an official action (e.g., to write a ballot title or to refuse to place a measure on a ballot) it must be assumed that the agency is acting in good faith. If the government action is challenged, the agency then has little or no discretion in whether to defend its action. Thus, while the agency's act may serve the ultimate end of opposing a ballot proposal, since the agency lacks discretion in the situation, it has not made a campaign expenditure as envisioned by RCWA 42.17A.

Cite as PDC Interpretation No. 91-02

Approved: June 25, 1991

Reference: RCW 42.17A.240

Source URL: <https://www.pdc.wa.gov/learn/index-of-interpretations-by-subject/legal-fees-related-placing-or-not-placing-proposition-ballot>

Strong Home Rule Language: (RCW 35A.01.010)

“The purpose and policy of this title is to confer upon two optional classes of cities . . . **the broadest powers of local self-government** consistent with the Constitution of this state. **Any specific enumeration of municipal powers** contained in this title or in any other general law **shall not be construed in any way to limit** the general description of power contained in this title, and any such specifically enumerated powers shall be construed as in addition and supplementary to the powers conferred in general terms by this title....”

The Optional Municipal Code's Strong Home Rule Language: (RCW 35A.01.020)

“The legislative body of each code city shall have power to organize and regulate its internal affairs within the provisions of this title and its charter, if any; **and to define the functions, powers, and duties of its officers and employees...**

“...Such body may adopt and enforce ordinances of all kinds relating to and regulating its **local or municipal affairs** and appropriate to the good government of the city....”

The Optional Municipal Code's Strong Home Rule Language: (RCW 35A.01.020)

The legislative body of each code city **shall have all powers** possible for a city or town to have under the Constitution of this state, and **not specifically denied** to code cities by law. By way of illustration and not in limitation, such powers may be exercised in regard to the acquisition, sale, ownership, improvement, maintenance, protection, restoration, regulation, use, leasing, disposition, vacation, abandonment or beautification of public ways, real property of all kinds...
[corporate powers]

The Optional Municipal Code's
Strong Home Rule Language:
(RCW 35A.01.020)

... and in the rendering of local **social, cultural, recreational, educational, governmental, or corporate services**, including operating and supplying of **utilities and municipal services** commonly or conveniently rendered by cities.
(Services powers)

The Optional Municipal Code's Strong Home Rule Language: (RCW 35A.01.050)

“The general grant of municipal power conferred by this chapter and this title **is intended to confer the greatest power of local self-government** consistent with the Constitution of this state **and shall be construed liberally in favor of such cities**. Specific mention of a particular municipal power or authority contained in this title or in the general law shall be construed as in addition and supplementary to, or explanatory of the powers conferred in general terms by this chapter.”

The Optional Municipal Code's Strong Home Rule Language: (RCW 35A.01.050)

“Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits **all powers of taxation** for local purposes except those which are expressly preempted by the state”

The Optional Municipal Code's Strong Home Rule Language: (RCW 35A.01.050)

“A code city may exercise the authority...to license and revoke the same for cause, to regulate, make inspections and to impose excises for regulation or revenue in regard to all places and kinds of business, production, commerce, entertainment, exhibition, and upon all occupations, trades and professions and any other lawful activity...”

So...Is that clear, or what?

(...in law, nothing much is clear)

The Optional Municipal Code's Strong Home Rule Language: (RCW 35A.01.050)

“A code city may exercise the authority...to license and revoke the same for cause, to regulate, make inspections and to impose excises for regulation or revenue in regard to all places and kinds of business, production, commerce, entertainment, exhibition, and upon all occupations, trades and professions and any other lawful activity....”

Cary v. Bellingham (1952)

“In *Power Inc. v. Huntley*, 39 Wash.2d 191, 235 P.2d 173, we said: ‘**We recognize the right to levy an excise tax on the privilege of doing business or exercising corporate franchises and to base that tax on income; but the tax must be, ‘in truth, levied for the exercise of a substantive privilege granted or permitted by the state.’**”

Cary v. Bellingham (1952)

“The right to earn a living by working for wages is not a ‘substantive privilege granted or permitted by the state.’ It is, as described by the supreme court of the state of Wyoming: ‘* * * one of those inalienable rights covered by the statements in the Declaration of Independence and secured to all those living under our form of government by the liberty, property, and happiness clauses of the national and state Constitutions.’”

 PUBLIC DISCLOSURE COMMISSION 714 CAPITOL WAY RM 206 PO BOX 40908 OLYMPIA WA 98504-0908 (360) 753-1111 Toll Free 1-877-601-2828		Political Committee Registration		C1PC (1/12)		MAR 29 2016	
Committee Name (Include sponsor in committee name. See next page for definition of "sponsor." Show entire official name. Do not use abbreviations or acronyms in this box.) Opportunity for Olympia				Acronym: OFO		Telephone: (360) 742-0488	
Mailing Address PO Box 1254				Fax: ()		E-mail: info@OpportunityForOlympia.com	
City Olympia		County Thurston		Zip + 4 98507			
NEW OR AMENDED REGISTRATION? <input checked="" type="checkbox"/> NEW. Complete entire form. <input type="checkbox"/> AMENDS previous report. Complete entire form.				COMMITTEE STATUS <input type="checkbox"/> Continuing (On-going; not established in anticipation of any particular campaign election.) <input checked="" type="checkbox"/> 2016 election year only. Date of general or special election: _____ (Year)			
1. What is the purpose or description of the committee? <input type="checkbox"/> Bona Fide Political Party Committee - official state or county central committee or legislative district committee. If you are not supporting the entire party ticket, attach a list of the names of the candidates you support.							
<input checked="" type="checkbox"/> Ballot Committee - Initiative, Bond, Levy, Recall, etc. Name or description of ballot measure: Income tax for funding college tuition.						Ballot Number FOR AGAINST _____ <input checked="" type="checkbox"/> <input type="checkbox"/>	
<input type="checkbox"/> Other Political Committee - PAC, caucus committee, political club, etc. If committee is related or affiliated with a business, association, union or similar entity, specify name:							
For single election-year only committees (not continuing committees): Is the committee supporting or opposing (a) one or more candidates? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, attach a list of each candidate's name, office sought and political party affiliation. (b) the entire ticket of a political party? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, identify the party:							
2. Related or affiliated committees. List name, address and relationship. <input type="checkbox"/> Continued on attached sheet.							
3. How much do you plan to spend during this entire election campaign, including the primary and general elections? Based on that estimate, choose one of the reporting options below. (If your committee status is continuing, estimate spending on a calendar year basis.) If no box is checked you are obligated to use Full Reporting. See instruction manuals for information about reports required and changing reporting options.							
<input type="checkbox"/> MINI REPORTING Mini Reporting is selected. No more than \$5,000 will be raised or spent and no more than \$500 in the aggregate will be accepted from any one contributor.				<input checked="" type="checkbox"/> FULL REPORTING Full Reporting is selected. The frequent, detailed campaign reports mandated by law will be filed as required.			
4. Campaign Manager's or Media Contact's Name and Address Ray Guerra PO Box 1254, Olympia, WA 98507						Telephone Number: (360) 742-0488	
5. Treasurer's Name and Address. Does treasurer perform only ministerial functions? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> See WAC 390-05-243 and next page for details. List deputy treasurers on attached sheet. <input type="checkbox"/> Continued on attached sheet.						Daytime Telephone Number: (206) 218-3108	
Abbot Taylor 349 16th Ave E #302, Seattle, WA 98112							
6. Persons who perform only ministerial functions on behalf of this committee and on behalf of candidates or other political committees. List name, title, and address of these persons. See WAC 390-05-243 and next page for details. <input type="checkbox"/> Continued on attached sheet.							
Abbot Taylor 349 16th Ave E #302, Seattle, WA 98112						Treasurer	
7. Committee Officers and other persons who authorize expenditures or make decisions for committee. List name, title, and address. See next page for definition of "officer." <input type="checkbox"/> Continued on attached sheet.							
8. Campaign Bank or Depository KeyBank		Branch Capitol Hill		City Seattle			
9. Campaign books must be open to the public by appointment between 8 a.m. and 8 p.m. during the eight days before the election, except Saturdays, Sundays, and legal holidays. In the space below, provide contact information for scheduling an appointment and the address where the inspection will take place. It is not acceptable to provide a post office box or an out-of-area address. Street Address, Room Number, City where campaign books will be available for inspection 350 15th Ave E, Seattle, WA 98112 In order to make an appointment, contact the campaign at (telephone, fax, e-mail): (360) 742-0488							
10. Eligibility to Give to Political Committees and State Office Candidates: A committee must receive \$10 or more each from ten Washington State registered voters before contributing to a Washington State political committee. Additionally, during the six months prior to making a contribution to a state office candidate your committee must have received contributions of \$10 or more each from at least ten Washington State registered voters. <input checked="" type="checkbox"/> A check here indicates your awareness of and pledge to comply with these provisions. Absence of a check mark means your committee does not qualify to give to Washington State political committees and/or state office candidates.					11. Signature and Certification. I certify that this statement is true, complete and correct to the best of my knowledge. Committee Treasurer's Signature  Date 3/28/2016		

SEE INSTRUCTIONS ON NEXT PAGE