

Advisory Memorandum:

The Power of Initiative and Referendum

as pertains to Whatcom County

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I. Introduction

The people's power of initiative and referendum plays an important role in local government. The purpose of the Advisory Memorandum is to assist county officials and others with evaluating whether, under the Constitution, statutes and case law of the State of Washington, a proposed initiative or referendum is the proper subject of an initiative or referendum.

The Advisory Memorandum outlines the legal tests and general procedures that courts have used to determine whether a local measure is a proper subject for initiative or referendum. This Memorandum also outlines the legal process that government officials and county residents may anticipate if a proposed initiative or referendum is challenged.

In sum, the Advisory Memorandum explains:

- The powers granted to the people of Whatcom County for initiative and referendum under the Whatcom County Charter ("County Charter") Article 5 – The Public Interest;
- The criteria courts use to determine whether the subject matter of an initiative or referendum is within the scope of the County Charter and properly the subject of an initiative or referendum; and
- The legal process that may be used to challenge a proposed initiative or referendum, including the proper parties to a legal challenge, whether a lawsuit may be brought pre-election or post-election, and who may bear the cost of litigation.

This Advisory Memorandum does not address other aspects of determining whether an initiative or referendum is valid, like the procedures for certifying a petition for the ballot or the constitutionality of a proposed initiative or referendum. It is also not intended to, and does not substitute for, legal advice for any given initiative or referendum.

The Prosecuting Attorney takes no position on a specific initiative or referendum. The Prosecuting Attorney will reserve taking a position or expressing a public opinion about a specific measure until after consulting with the county legislative body, and in most cases, at a time after the initiative or referendum has obtained the required signatures and been validated. The purpose of the Memorandum is to provide a resource to government officials and others regarding this important and complex subject matter. Any questions regarding a specific initiative or referendum should be referred, in the case of a private citizen, to a private attorney. County officials should direct questions to the Prosecuting Attorney's Office.¹

¹ For more general information regarding city and county initiatives and referenda, please reference the Municipal Research and Services Center's (MRSC) *Initiative and Referendum Guide for Washington City and Charter Counties*, Report No. 28 (Jan. 2006). This Guide can be found at www.mrsc.org/Publications/irg06.pdf. The Guide provides a general overview of the powers of initiative and referendum for Washington's cities and counties.

Caution is advised using general resources. Other cities, counties, or the State of Washington may have different constitutional or charter provisions, statutes and case law regarding initiatives and referendum, which would make references from those jurisdictions inapplicable in Whatcom County. As explained below, in some instances other jurisdictions are helpful, but in others, they may not be helpful or may be misleading.

II. Executive Summary

The powers of initiative and referendum are fundamental rights granted to the people through the state Constitution and the County Charter. These are two important powers of our state and county democracy.

A county initiative allows county residents to propose an ordinance by signing a petition and following other procedures set forth in Article 5 of the County Charter. A county referendum allows voters to suspend the effectiveness of all or part of an adopted ordinance until after the matter has been referred to the voters for approval. The affirmative act of initiative, and the negative act of referendum, constitute direct legislation by the people.

As a legislative act, the filing of a petition for initiative or referendum sets in motion an election and law-making process of which government officials and others should be aware.

Valid Procedures. The procedures for filing a petition should be closely followed. This Memorandum does not address those procedures in detail, but notes that Article 5 of the County Charter provides detailed rules for how to file a petition for initiative or referendum. A petition that does not satisfy these procedures will be invalid.

Valid Subject Matter. A proposed initiative or referendum must have a subject matter that is within the scope of the powers of the County Charter and state law. Like other county laws enacted by the County Council, initiatives and referenda are limited by state and county law. A proposed initiative or referendum without a proper subject matter may be subject to a pre-election or post-election challenge.

Role of Courts. The only way for the subject matter of a proposed initiative or referendum to be challenged is through a lawsuit. The superior courts have the inherent authority to decide whether a specific petition is within the scope of the powers of initiative or referendum.

A lawsuit requires persons with opposing interests. The petition's sponsor will most likely be named a defendant in the lawsuit, and may be liable for his or her attorneys' fees. The proper plaintiff to challenge an initiative or referendum is any person with sufficient standing to challenge it, including citizens, corporations, interest groups, government organizations, the County, or the State.

Pre-Election or Post-Election Challenge. Finally, if a legal challenge is brought, the challenge may be started after the County Auditor has certified the proposal for the ballot. If the lawsuit challenges only the subject matter of the proposal, the lawsuit may be filed before or after an election on the proposed initiative or referendum. If a challenge is filed before an election, a court will need to schedule hearings and make a decision before ballots are printed.

III. Discussion

A. Source of Power for Initiatives and Referenda in Whatcom County

The powers of initiative and referendum are “deeply ingrained in our state’s history, and widely revered as a powerful check and balance on the other branches of government.”² Properly presented, initiatives bypass the County’s legislative process and introduce legislation directly to the people. Referenda amend or “veto” all or part of duly-enacted ordinances, checking and balancing legislative authority.³ These powers are direct forms of democracy that remind us that “governments derive their just powers from the consent of the governed[.]”⁴

In Whatcom County, the people’s power of initiative and referendum is provided in Article 5 of the County Charter. The County Charter constitutes the organic law of the County, similar to the State Constitution for the State.⁵ In the scheme of state law, the County Charter is authorized by and subordinate to the state Constitution and state legislation. Citizens who use the County’s legislative power of initiative and referendum must look to the state Constitution, statutes, and case law for limitations on legislative powers, as would the County Council.⁶

The state Constitution provides that a county may enact a home rule charter “for its own government, subject to the Constitution and laws of this state.”⁷ As Washington’s Supreme Court has recognized, home rule charters further county self-governance, but the limit on the County’s charter powers “is that their action cannot contravene any constitutional provision or any legislative enactment.”⁸

² Futurewise v. Reed, 161 Wn.2d 407, 409 (2007).

³ See Even, Jeffrey T., “Direct Democracy in Washington: A Discourse on the People’s Powers of Initiative and Referendum,” 32 Gonzaga Law Rev. 247, 249-50 (1996/97) (discussing the distinctions between initiatives and referenda).

⁴ Const. Art. 1 § 1.

⁵ See Maleng v. King County Corrections Guild, 150 Wn.2d 325 (2003) (stating that “a home rule charter is the organic law of a county, just as the constitution is for the State.”).

⁶ See Coppernoll v. Reed, 155 Wn.2d 290, 299 (2005) (stating that “the people’s legislative power is coextensive with the legislature’s”, and analyzing the people’s right to legislate as the court would analyze the legislature’s).

⁷ Const. Art. 11§ 4 (emphasis added).

⁸ King County Council v. Public Discl. Comm’n, 93 Wn.2d 559, 562-63 (1980). The supreme court has reiterated that “county home rule was intended to further self-governance in purely local affairs so long as those exercising their rights of self-governance abided by” the state constitution, state statutes, and “considerations of public policy of broad concern.” Whatcom County v. Brisbane, 125 Wn.2d 345, 349 (1994) (quoting in part Snohomish Cty. v. Anderson, 123 Wn.2d 151, 158 (1994) (quotation marks and ellipses omitted). The court also, more succinctly, stated: “The Washington State Constitution expressly relegates home rule charters to an inferior position vis-à-vis the Constitution and laws of this state.” Id. (quotation marks and ellipses omitted).

The State Constitution authorizes initiatives and referenda at the state level, as the people's "first" and "second" powers.⁹ The County's powers of initiative and referendum are quite similar and derive from Article 5 of the County Charter.

For initiatives, Article 5 provides, in part:

Any act, bill or ordinance or amendment to an ordinance may be proposed by filing, with the [county] Auditor an initiative petition.

For referenda, Article 5 provides, in part:

It [the referendum] may be ordered on any act, or bill, or ordinance, or any part thereof passed by the County Council except such ordinances as may be necessary for the immediate preservation of the public peace, health or safety or support of the County government and its existing public institutions.¹⁰

The people of Whatcom County are, therefore, authorized to bring proposals for initiatives and referenda so long as the proposals do not conflict with the County Charter or state law. Courts assess whether the subject matter of a proposed initiative or referendum is valid within this legal framework.

B. Criteria for Assessing the Subject Matter of Initiatives and Referenda

The subject matter of an initiative or referendum may determine whether or not it will be effective. If the proposal's subject matter is within the people's power under the County Charter and state law, the proposal is likely to withstand legal scrutiny and be placed on the ballot for a vote by the people. If it is not, a court may invalidate the initiative or referendum, rendering it ineffective.

In assessing the scope and subject matter of an initiative or referendum, Washington's courts have held that the initiative or referendum must:

- ***Comply with the County Charter:*** Comply with the express provisions of the County Charter for introducing a petition, both substantive and procedural;

⁹ Washington's Constitution provides, "The first power reserved by the people is the initiative." Const. Article 2 § 1 (a). The Constitution further provides:

The second power reserved by the people is, the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions,

Const. Art. 2 § 1 (b). The procedures for filing state initiatives and referenda are provided in RCW chapter 29A.72, which does not apply to county initiatives and referenda. This Memorandum focuses only on the County's powers of initiative and referendum.

¹⁰ County Charter Art. 5 § 5.40 (2)

- ***Have a legislative subject matter:*** Contain a subject matter that is legislative and not administrative in character; and
- ***Not conflict with state law:*** Not conflict with or supersede the state Constitution, state statutes or rules, broad expressions of state policy, or an exclusive grant of authority from the state legislature to the County Council.

These three tests are simple in concept but complex in application. Whether or not an initiative or referendum has a valid subject matter must be examined on a case-by-case basis. The above tests, further explained below, provide a starting point for a more individualized, detailed, and in-depth analysis of any particular initiative or referendum.

1. Comply with the County Charter

a. Initiatives

A proposed initiative must follow the procedures set forth in Article 5 of the County Charter.¹¹ These procedures assure that the process for advancing a measure by initiative or referendum is fair and balanced. This Memorandum does not focus on those procedures, but notes that the procedures must be followed as a prerequisite to judicial review of the subject matter of an initiative.

The County Charter authorizes people's initiatives. However, there are certain limitations on the subject matter of initiatives, namely:

- No initiative shall contain more than one (1) issue;
- No initiative proposal requiring the expenditure of additional funds for an existing activity or of any funds for a new activity or purpose shall be filed unless provisions are specifically made therein for new or additional sources of revenue which may thereby be required; and
- Redistricting of the Legislative districts shall not be subject to the initiative process.¹²

One Issue. First, the requirement that no initiative shall contain more than one issue derives from section 2.30 of the County Charter, which provides that "no ordinance shall contain more than one subject." The state Constitution has a similar requirement.¹³ Generally, an

¹¹ See Paxton v. City of Bellingham, 129 Wn. App. 439 (2005) (holding that where petition sponsors did not follow the proper procedures by not collecting enough signatures for the petition, the proposed initiative was invalid).

¹² County Charter § 4.41, 4.42 (implementing RCW 29A.76.010)

¹³ Article II, section 19 of Washington's Constitution similarly provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." As one commentator pointed out, "States enacted these provisions to check legislative abuse. For example, legislators used single bills to enact laws on diverse subjects, no one of which had the political impetus to pass on its own." Buehler, Dustin, "Washington's Title Match: The Single-Subject and Subject-in-Title Rules of Article II, Section 19 of the Washington State Constitution," 81 Wash. L. Rev. 595 (Aug. 2006).

initiative embraces a single subject if its parts are “rationally related” to one another.¹⁴ Whether or not a proposed initiative embraces a single subject can be a complex analysis, and will be reviewed by the courts on a case-by-case basis.¹⁵

No Additional Funds. Second, if an initiative requires the expenditure of additional funds, it is not valid unless it specifically identifies a new or additional source of revenue. We are not aware of relevant court cases discussing this requirement, but the plain language of this section appears to be that if initiatives require new expenditures, the initiative must identify new or additional sources of revenue for those expenditures.

No Redistricting. Third, no initiative may propose the redistricting of legislative districts. As provided in state statute and the County Charter, redistricting is determined by local committee.¹⁶

Charter Power. Finally, while the County Charter provides that an initiative may be ordered on “any” ordinance, Washington’s courts have limited the power of initiative to the power granted to local government in general, which means that the people’s power is subject to state constitutional and statutory limitations.¹⁷

b. Referenda

In regards to referendum, the County Charter provides:

It [the referendum] may be ordered on any act, or bill, or ordinance, or any part thereof passed by the County Council *except such ordinances as may be necessary for the immediate preservation of the public peace, health or safety or support of the County government and its existing public institutions* [(#emergency exception)].¹⁸

Emergency Exception. The power of referendum is expressly limited by the so-called “emergency exception.” The emergency exception in the County Charter is quite similar to the emergency exception in the state Constitution, which also excepts from referendum any state act, bill, or law that “may be necessary for the immediate preservation of the public peace, health or safety.”¹⁹

¹⁴ Pierce County v. State, 150 Wn.2d 422, 431 (2003). See also Am. Jr. 2d Initiative and Referendum § 22 Supp. Mar. 2008) (“Joinder of different and distinct subjects in single petition”) (discussing the requirement of a single subject matter in initiatives).

¹⁵ See Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183,205 (2000) (discussing the court’s interpretation of an initiative and the single subject rule).

¹⁶ See RCW § 29A.76.010 (setting the criteria for county redistricting); County Charter § 4.41, 4.42 (implementing RCW § 29A.76.010).

¹⁷ Further discussed in section B.3, below.

¹⁸ County Charter Art. 5 § 5.50 (emphasis added).

¹⁹ Const. Art. II § 1 (b).

The state Constitution also excepts from referendum such laws as may be necessary for the “support of the state government and its existing public institutions . . .”²⁰ This exception and the emergency exception have been interpreted as separate and distinct.²¹

Washington’s courts give deference to a legislative declaration of emergency contained in a statute or ordinance. Courts presume that a local governing body’s declarations of fact regarding an emergency are “deemed conclusive, unless they are ‘obviously false and a palpable attempt at dissimulation.’ Where an act is ‘doubtful’ in this regard, the doubt will be resolved in favor of the declaration of emergency.”²²

In court decisions interpreting the state Constitution’s identical language, courts have interpreted the emergency exception “as being synonymous with an exercise of the State’s police power.”²³ The County possesses a police power coextensive with the State’s.²⁴ But to extinguish the right of referendum and survive judicial scrutiny, a declaration of emergency may not rest only on police power – police power must be combined with an actual emergency.²⁵ Washington’s courts have held that “the exception does not extend to all things touching the general welfare. It does not extend to things relating to mere public expediency or public convenience.”²⁶

For example, where a City Council declared an ordinance that assisted a private company with building a parking garage to be “urgent and emergent,” the state Supreme Court upheld the City Council’s declaration, after closely examining the justifications for it. The referendum was not, on that and other grounds, allowed to move forward on the ordinance.²⁷ Where the state legislature declared as an emergency the funding needed for the stadium, to keep the Seattle Mariners in Seattle, the Supreme Court carefully examined the evidence

²⁰ Id.

²¹ See State ex rel. Helm v. Kramer, 82 Wn.2d 307, 312 (1973) (“It has long been recognized by our decisions in construing this section of the constitution, . . . that these are two distinct exceptions – the first as to the existence of an emergency for the preservation of the public peace, health and safety, and the second as to the support of state government and its existing public institutions, irrespective of an emergency.”).

²² CLEAN v. City of Spokane, 133 Wn.2d 455, 471-72 (1997), cert. denied 525 U.S. 812, 119 S.Ct. 45, 142 L.Ed.2d 35 (1198) (quoting CLEAN v. State, 130 Wn.2d 782, 808 (1996)).

²³ CLEAN v. State, 130 Wn.2d 782, 804 (1997). See also Even, Jeffrey T., “Direct Democracy in Washington: A Discourse on the People’s Powers of Initiative and Referendum,” 32 Gonzaga Law Rev. 247, 249-50 (1996/97) (similarly discussing the emergency exception).

²⁴ See Const. Art. XI § 11 (“Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”).

²⁵ See CLEAN v. State, 130 Wn.2d at 804.

²⁶ Id. at 805 (quoting State ex rel. Case v. Howell, 85 Wash. 281, 285, 147 P. 1162 (1915)).

²⁷ See id. at 472.

supporting the declaration of emergency, then accepted the legislature's findings.²⁸ But where the state legislature declared as an emergency legislation authorizing gambling activities, without setting forth facts supporting the declaration, the court held the statement of emergency insufficient to negate the power of referendum.²⁹

In sum, where a referendum seeks to amend or veto a duly-enacted ordinance, which ordinance contains a factual declaration of emergency, courts will presume the declaration to be a valid exercise of the government's police power, so long as evidence shows that the emergency is, in fact, pressing and necessary. Absent compelling evidence to the contrary that the declaration of emergency is false, no referendum may be held on the ordinance.

Charter Power: As with initiatives, while the County Charter provides that a referendum may be ordered on "any" ordinance, Washington's courts have limited the power of referendum, as discussed in section B.3, below.

2. Have a Legislative Subject Matter

The powers of initiative and referendum are legislative powers.³⁰ They are the people's power to create and repeal legislation, and place the people in the shoes of the legislative body. The subject matter of initiatives and referenda must, therefore, be "legislative" in character, rather than "administrative."³¹ Administrative acts are reserved to the governing body of a county, like the County Council or the Executive Branch of the County, subject to the people's approval through the normal legislative and public administrative processes.

The distinction between what is "legislative" and "administrative" is not simple. Some administrative acts are performed by the legislative body.³²

Washington's courts have provided an often-repeated test for the distinction between legislative and administrative acts, which bears quoting:

Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as

²⁸ CLEAN v. City of Spokane, 133 Wn.2d at 471-72.

²⁹ See State ex rel. Humiston v. Meyers, 61 Wn.2d 772 (1963).

³⁰ As the state Supreme Court has reasoned:

A fundamental limit on the initiative power inheres in its nature as a legislative function reserved to the people. . . . It is clear from the constitutional provision that the initiative process, as a means by which the people can exercise directly the legislative authority to enact bills and laws, is limited in scope to subject matter which is legislative in nature.

³¹ The state Supreme Court has long held that "[a] home rule charter, being subject to the constitution and of this state, cannot extend the power of referendum to other than legislative acts." Durocher v. King County, 80 Wn.2d 139, 149-50 (1972).

³² See Durocher v. King County, 80 Wn.2d 139, 149-50 (1972) (holding that a county council subject to a charter with express separation-of-powers provisions has the power to act administratively).

administrative . . . The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be *whether the proposition is one to make new law or to execute law already in existence*. The power to be exercised is legislative in its nature if it prescribes a *new policy or plan*; whereas, it is administrative in its nature if it *merely pursues a plan already adopted by the legislative body* itself, or some power superior to it.³³

As the court stated, the decision regarding whether an act is legislative or administrative boils down to whether the proposed action implements a new policy or plan, or is simply carrying out previously-adopted legislation.

For example, courts have held that an initiative or referendum is *legislative* in character when it proposed:

- A new amendment, but not repeal, of part of a county charter;³⁴
- A new choice of site for building a stadium;³⁵
- The implementation of a new punch card ballot system;³⁶
- Authorizing a new business and occupation tax.³⁷

On the other hand, courts have held that an initiative or referendum is *administrative* in character, and not the proper subject of an initiative or referendum, when it proposed:

- Re-zoning property or modifying an existing comprehensive land use plan;³⁸
- Changing the name of an existing street through referendum;³⁹

³³ Leonard v. City of Bothell, 87 Wn.2d 847, 850 (1976) (quoting Durocher v. King County, 80 Wn.2d at 152-53) (emphases added).

³⁴ See Maleng v. King County Corrections Guild, 150 Wn.2d 325 (2003) (holding that an initiative proposing a county charter amendment to reduce the size of the county council was properly “legislative” in character); State ex rel. Linn v. Superior Ct., 20 Wn.2d 138 (1944) (holding that an initiative was “legislative” when it proposed amendments to the Seattle City Charter). But see Ford v. Logan, 79 Wn.2d at 155 (holding that an initiative cannot repeal part of a count’s home rule charter).

³⁵ See Paget v. Logan, 78 Wn.2d 349, 356-57 (1970).

³⁶ See Ballasiotes v. Gardner, 97 Wn.2d 191 (1982).

³⁷ See Citizens for Financially Responsible Gov’t v. Spokane, 99 Wn.2d 339 (1983).

³⁸ See Save Our State Park v. Bd. Of Clallam County Comm’rs, 74 Wn. App. 637 (1994) (striking down a proposed initiative that would repeal part of the county zoning code, because it was administrative); Leonard v. City of Bothell, 87 Wn.2d at 851 (striking down a proposed referendum that proposed modifying a comprehensive land use plan, because it was administrative).

³⁹ See Heider v. City of Seattle, 100 Wn.2d 874 (1984) (holding that “[t]he street name change is analogous to an amendment to a zoning code” and therefore administrative and not legislative).

- Selecting a contractor and other conditions regarding an existing building contract;⁴⁰
- Administering the details of a water-fluoridation system;⁴¹
- Implementation of prior agreements to pursue a bored-tunnel project.⁴²

Keeping in mind the above criteria, the decision regarding whether the proposed action is legislative or administrative will be decided by the courts on a case-by-case basis.

3. No Conflict with State Power

Although the County Charter authorizes initiatives and referenda on “any” ordinance, courts have explained that the subject matter of the proposal must be within the general legal framework of the County Charter. No county law or action, including those proposed by initiative or referendum, may directly conflict with or supersede state law.

As the Washington Supreme Court has reasoned, “[t]he sovereignty of the people of individual localities gives way to the people of the State’s greater sovereignty[.]”⁴³ More succinctly stated, “[t]he fundamental proposition which underlies the powers of municipal corporations is the subordination of such bodies to the supremacy of the legislature.”⁴⁴ This legal theory is known as conflict preemption. It is a principal that applies equally to legislative bodies and their citizens’ equivalent – the sponsors of initiatives and referenda.

Under conflict preemption, a proposed initiative or referendum must not conflict with or supersede: (1) the state Constitution, state statutes or rules, or broad expressions of state policy; *or* (2) an exclusive grant of authority from the state legislature to the County Council. If an initiative or referendum conflicts with either expression of state authority, it is preempted by that authority.

A good example of conflict preemption is in the cases regarding the Growth Management Act (GMA), RCW chapter 36.70A. The GMA is a comprehensive set of statutes designed to coordinate statewide county growth planning, including growth management and protecting the environment, property rights, and critical areas. In a series of cases, the state Supreme Court has held that any proposed initiative or referendum that submits legislation

⁴⁰ See Ruano v. Spellman, 81 Wn.2d 820 (1973).

⁴¹ See City of Port Angeles v. Our Water – Our Choice!, 239 P.3d 589, 595 (2010).

⁴² See City of Seattle v. Protect Seattle Now et al., No. 11-2-11719-7 (King County Super. Ct. May 20, 2011).

⁴³ See 1000 Friends of Washington v. McFarland, 159 Wn.2d 165, 167 (2007).

⁴⁴ Id.

regarding the GMA, or attempts to change a county's requirements under the GMA, conflicts with and is preempted by the State's authority under the GMA.⁴⁵

The state Supreme Court recently addressed this principle in *1000 Friends of Washington v. McFarland* ("1000 Friends"). In *1000 Friends*, a referendum sought to veto a set of ordinances that regulated critical areas and would have amended the county zoning code, which code was implemented to comply with the GMA.⁴⁶ An environmental advocacy group and King County sued the petition sponsor for declaratory relief, arguing that county ordinances enacted under the GMA were not subject to referendum because, among other things, the referendum would interfere with the State's power to legislate under the GMA *and* with the authority the State gave to the County's legislative body to determine how to comply with the GMA.

On appeal, the Supreme Court took the opportunity to confirm its decades-long ruling that the people's power of referendum cannot conflict with or supersede the State's power. The Court reasoned:

'A general law enacted by the legislature is superior to, and supersedes, all charter provisions inconsistent therewith. Any charter provision, therefore, which has the effect of limiting or restricting a legislative grant of power to the legislative authority or other officer of a city is invalid.' *Put another way, the voters of the county cannot alter a grant of authority to, or the imposition of responsibility onto, the local government by the state legislature.*⁴⁷

The Court reasoned that under the GMA, the state Legislature had granted to the county's governing authority the power to create and implement local law that complied with the GMA. The Court held that any referendum that interfered with that grant of power was preempted by the state Legislature's power to: (1) create state-wide policy regarding growth management; and (2) delegate to county governing authorities the power to implement that state-wide policy.

Referenda and initiatives on other subjects have similarly been struck down when they conflict with state statutes, or with statutes that authorize action by the local legislative body. For example, state courts have held that initiatives conflicted with a grant of state power, and were therefore invalid, where:

- The proposed initiative would have imposed additional requirements on revenue bonds issued by the city, conflicting with

⁴⁵ See generally *id.*; *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382 (2004) (holding that under the GMA, an initiative pertaining to creek restoration conflicted with the county legislative body's authority under the GMA); *Snohomish County v. Anderson*, 123 Wn.2d 151 (1994) (holding that under the GMA, an ordinance mandating development and implementation of countywide planning policies was not subject to referendum); *Whatcom County v. Brisbane*, 125 Wn.2d 345 (1994) (holding that under the GMA, a critical areas ordinance was not subject to referendum under Whatcom County's home rule charter).

⁴⁶ See *1000 Friends*, 159 Wn.2d at 170-71.

⁴⁷ *Id.* at 173-74 (quoting *Neils v. City of Seattle*, 185 Wash. 269, 276 (1936)) (emphasis added).

a state statute delegating to the legislative body of the city the authority over revenue bonds;⁴⁸

- The proposed initiative would have required voter approval prior to a city's issuance of negotiable bonds for the lease of a convention center, conflicting with a state statute authorizing the city to enter into lease agreements without voter approval, and with state and federal constitutional provisions regarding impairment of contracts;⁴⁹ or
- The proposed initiative would have repealed a portion of the county's zoning code, conflicting with a state statute delegating zoning authority exclusively to the board of county commissioners.⁵⁰

In sum, when state legislation or state power clearly occupies a legislative field, or the state has expressly delegated authority over a certain area to the local legislative body, that power supersedes the people's power of initiative or referendum. The subject matter of the initiative or referendum may be subject to initiative or referendum at the *state* level, but not at the *county* level.

C. The Legal Process for Challenging the Subject Matter of an Initiative or Referendum

1. Parties to a Legal Challenge

Once a proposal for an initiative or referendum has been filed and has followed the procedures for being placed on the ballot, the County Auditor must verify the number of signatures received on the petition for the ballot.⁵¹ After the petition is received with the appropriate number of signatures, and the Auditor validates it for the ballot, any person or entity with proper standing to bring a lawsuit – regarding the proposed initiative's or referendum's *subject matter* - may do so by filing a complaint in state court.⁵²

⁴⁸ See City of Sequim v. Malkasian, 157 Wn.2d 251 (2006).

⁴⁹ See Bidwell v. City of Bellevue, 65 Wn. App. 43, 49-50 (1992).

⁵⁰ See Save Our State Park v. Bd. Of Clallam Cty. Comm'rs, 74 Wn. App. 637 (1994). See also Leonard v. City of Bothell, 87 Wn.2d 847, supra n. 39 (similarly holding).

⁵¹ See Charter §§ 5.40 (regarding initiatives); 5.60 (regarding referenda).

⁵² **Standing.** Challenges to an initiative or referendum are often filed pursuant to Washington's Uniform Declaratory Judgments Act. (UDJA), chapter 7.24 RCW. Standing requirements under the UDJA would apply to any potential plaintiffs. See generally Coppernoll v. Reed, 155 Wn.2d 290, 300 (2005) (discussing standing requirements and justiciability under the UDJA).

The only way for a party to challenge the legality of a proposed initiative or referendum is through a lawsuit.⁵³ No administrative process exists for challenging a proposal.

County ordinance allows a person or an organization to file an initiative.⁵⁴ The petition's sponsor will most likely be named as a defendant in a lawsuit. As the state Supreme Court has held:

Numerous cases illustrate that the sponsor of the proposed measure, the person or persons who engaged in the efforts and actions to draft an initiative or referendum, gather signatures, circulate the measure, and place the measure on the ballot, defends the measure it proposes prior to election.⁵⁵

Accordingly, prior to election, the sponsor may be named a defendant in the case and responsible for the legal defense of the initiative or referendum.

After an election, it is not clear whether the sponsor is a necessary party to the case, though case law indicates that the sponsor is a proper party. In City of Sequim v. Malkasian, the initiative's sponsor, Paul Malkasian, continued to defend an initiative even after the initiative had been voted on and became law. The court of appeals held that after the lawsuit "evolved" into a post-election challenge, Malkasian was not a proper defendant.⁵⁶ The Supreme Court disagreed. The court held that where the local governing body opposed the measure as beyond the scope of the power of initiative, the sponsor was the proper defendant, even after the initiative was ratified by the voters.⁵⁷

The plaintiff to the lawsuit may be any person or entity with standing to bring the action.⁵⁸ For the County, the Prosecuting Attorney is the person mandated by law to represent the County.⁵⁹ The Prosecuting Attorney must file a lawsuit if the County believes that the subject matter of the initiative or referendum is beyond the scope of the Charter's powers of initiative or referendum.

⁵³ See generally Philadelphia II v. Gregoire, 128 Wn.2d 707, 714-15 (1996) (holding that courts, not the Attorney General, are the arbiters of the validity of a proposed initiative); Save Our State Park v. Hordyk, 71 Wn. App. 84 (1993) (holding that a county auditor does not have the authority to reject an initiative petition for failing to meet substantive requirements).

⁵⁴ See Charter § 5.40 (regarding an initiative).

⁵⁵ City of Sequim v. Malkasian, 157 Wn.2d 251, 269 (2006) (citing numerous cases).

⁵⁶ Id. at 254, 138 P.3d at 945.

⁵⁷ See id. at 269, 138 P.3d at 952-53.

⁵⁸ See supra n. 51 (discussing standing under the UDJA).

⁵⁹ See RCW § 36.27.020 (setting forth the duties of the Prosecuting Attorney).

2. Pre-Election or Post-Election Challenge

A proposed initiative or referendum may be challenged after the Auditor has certified it for the ballot, but before the election is held, *if* the subject matter of the initiative or referendum is at issue. A pre-election challenge is *not* available if a party is challenging the constitutionality of the initiative or referendum, which this Memorandum does not address. But a challenge to a local initiative's or referendum's scope and subject matter may, normally, be brought prior to or shortly after the election.

A court's pre-election review of an initiative or referendum is "highly disfavored" for several reasons.⁶⁰ The right of initiative and referendum is a fundamental right with which courts do not like to interfere, and until the initiative or referendum is voted on, the application and lawfulness of the proposed law may not be ripe for judicial review. Pre-election judicial review may "constitute unwarranted judicial meddling with the legislative process."⁶¹

Accordingly, only two types of challenges to local initiatives or referenda are allowed to proceed pre-election: (1) the initiative does not meet the procedural requirements for placement on the ballot; or (2) the subject matter of the initiative is "beyond the people's initiative power."⁶² This second class of challenge is often allowed pre-election for local initiatives or referendum.⁶³ "It is well-settled that it is proper to bring such narrow challenges prior to an election."⁶⁴ But if an initiative or referendum "otherwise meets procedural requirements, is legislative in nature, and its fundamental and overriding purpose is within the [legislature's] power to enact, it is not subject to pre-election review."⁶⁵

A court may find only part of an ordinance, rule, regulation or law is subject to referendum.⁶⁶ For example, the City of Seattle filed a pre-election challenge to Referendum 1 (R-1).⁶⁷ R-1 was signed by a sufficient number of Seattle voters to put Ordinance No. 123542

⁶⁰ Futurewise v. Reed, 161 Wn.2d at 401

⁶¹ Id.

⁶² Id. This discussion of pre-election judicial review is limited to judicial review of county initiatives or referenda. The courts review *state* initiatives or referenda differently. See id. (discussing a court's pre-election review of a state initiative).

⁶³ Coppernoll v. Reed, 155 Wn.2d 290, 299 (2005).

⁶⁴ City of Sequim v. Malkasian, 157 Wn.2d at 260. See also City of Seattle v. Yes for Seattle, 122 Wn. App. 382 (2004) (reiterating that the court may review, pre-election, the subject matter of a proposed initiative); Maleng v. King Cty. Corrections Guild, 150 Wn.2d 325 (2003) (upholding a county initiative that was subject to a pre-election challenge).

⁶⁵ Futurewise v. Reed, 161 Wn.2d at 411 (quotation marks omitted).

⁶⁶ See also Charter § 5.50 (allowing challenge to all or part of any act, or bill, or ordinance).

⁶⁷ See City of Seattle v. Protect Seattle Now et al., No. 11-2-11719-7 (King County Super. Ct. May 20, 2011). For more information and briefing submitted by the City of Seattle, see www.seattlegov.com/law/news/CityvProtect.htm.

to a public vote.⁶⁸ The City Council enacted Ordinance 123542 on February 18, 2011, which accepted three agreements between the City of Seattle and the Washington State Department of Transportation.⁶⁹ The agreements addressed the utility design, environmental remediation and construction coordination to replace the Alaskan Way Viaduct with a deep-bore tunnel.⁷⁰

The court ruled Ordinance No. 123542 was administrative in nature and not subject to referendum because it implemented agreements and policy decision set forth in an ordinance two years prior, except for Section 6.⁷¹ The court found Section 6, which authorized the City Council to decide whether to issue the notice to proceed with work under the agreements, was legislative in character. Therefore, only Section 6 of Ordinance No. 123542 will appear on the August 16, 2011 ballot.⁷²

Even after a successful election, a challenge to the subject matter may be ruled on by the courts. The case of *City of Sequim v. Malkasian* illustrates this point. In *Malkasian*, the court reviewed a challenge to the subject matter of a local initiative eight years after the election on the initiative.⁷³ The lawsuit was filed pre-election, but not decided on appeal until long after the election. The defendant argued that because the voters had already approved the measure, the challenge was moot. The Supreme Court disagreed.

The court reasoned that whether a lawsuit is brought pre- or post-election, “the subject matter of the initiative is either proper for direct legislation or it is not.”⁷⁴ The court held that the action was not moot because, while the court could not impose an injunction, it could impose other effective remedies, like invalidating the initiative. The court held that the subject matter of the initiative was beyond the scope of initiative power because the initiative conflicted with the state legislature’s grant of power to the local governing body. The court thus invalidated the initiative.⁷⁵

Whether or not a particular proposed initiative or referendum may be challenged pre-election or post-election must be examined on a case-by-case basis. The general rule for challenges to a county initiative’s or referendum’s subject matter is that the challenge may be filed prior to or soon after the election.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Malkasian, 157 Wn.2d at 256-57.

⁷⁴ Id. at 260.

⁷⁵ Id. at 265-66.

3. Attorneys' Fees and Costs

Parties to litigation over an initiative or referendum can normally expect to bear the cost of their attorneys' fees. Under the prevailing American Rule, parties bear the cost of their own attorneys' fees absent a contract, statute or equitable theory authorizing fee-shifting to another party.⁷⁶ No statute authorizes attorney's fees for challenges to proposed initiatives or referendum, and this type of dispute does not involve a contract.

Litigants have unsuccessfully attempted to recover their attorney's fees under equitable theories. In *City of Sequim v. Malkasian*, the petition's sponsor sought to recover attorneys' fees and costs under the equitable "common fund" theory.⁷⁷ The court held that the common fund doctrine did not apply to the litigation, and denied his request.

In *CLEAN v. City of Spokane*, intervenors in litigation regarding an initiative requested the court fashion "a new equitable doctrine" that would allow them to recover their attorneys' fees. The court declined the request.⁷⁸ And in *Pierce County v. State*, the court summarily held that parties to the case were not entitled to attorney's fees under the common fund doctrine.⁷⁹

Under current case law, litigants will not be able to recover their attorneys' fees for being parties to litigation challenging local initiatives and referenda, but may be able to recover their costs.

IV. Conclusion

In sum, the powers of initiative and referendum are powerful tools, instrumental to county government. The powers are, however, limited, in the same manner that other legislative powers of the County are limited, namely, by state law.

⁷⁶ See *id.* at 271.

⁷⁷ See *id.* (discussing defendant Malkasian's request for attorneys' fees and costs).

⁷⁸ See *CLEAN v. City of Spokane*, 133 Wash.2d at 476.

⁷⁹ See *Pierce County v. State*, 150 Wn.2d at 441-42.

Appendix A

Recent Cases as of 2011

Cases decided by Washington's courts regarding an initiative or referendum within the last six years.

1. *City of Seattle v. Protect Seattle Now et al.*, No. 11-2-11719-7 (King County Super. Ct. May 20, 2011). Holding that Ordinance No. 123542 (regarding agreements to construct a deep-bore tunnel to replace the Alaskan Way Viaduct) is administrative in nature except for Section 6. Held that Section 6 was legislative in nature and therefore, subject to referendum and ordered to be placed on the August 16, 2011 ballot.
2. *City of Port Angeles v. Our Water – Our Choice!*, 239 P.3d 589 (2010) – Holding that initiatives attempting to interfere with and effectively reverse the implementation of Port Angeles's water fluoridation program are administrative in character. Does not address the issue of if the legislature vested the authority to operate the water system to the city legislative body as opposed to the city as a corporate whole or whether these initiatives are substantively invalid.
3. *Futurewise v. Reed*, 161 Wn.2d 407 (2007) – Holding that, in regards to a state initiative, I-960, which proposed amending state statutes to require two-thirds legislative approval or voter approval for legislative action to raise taxes, and to require advisory votes on tax increases, the initiative was not subject to pre-election review.
4. *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165 (2007) – Invalidating a referendum that sought to veto a set of ordinances that regulated critical areas and proposed amending the county zoning code, because the referendum conflicted with the state's policies under the Growth Management Act (GMA), and its grant of power to the local governing body under the GMA.
5. *City of Sequim v. Malkasian*, 157 Wn.2d 251 (2007) – Holding that an initiative voted on and approved by county voters, which imposed additional requirements on revenue bonds issued by the city, was beyond the scope of the power of initiative; and even though the lawsuit continued after the election was held, the sponsor of the initiative was the proper named defendant in the lawsuit and was liable for his attorney's fees.

Appendix B

Specific Grant of Power to the Local Legislative Body

Below are examples of specific grants of power by the State legislature to a local legislative body, as similarly provided in Appendix J of the MRSC's "Initiative and Referendum Guide for Washington City and Charter Counties," Report No. 28 (Jan. 2006), see supra n. 3.

Under RCW § 36.32.120, the legislature has granted specific powers to the legislative bodies of charter counties, including Whatcom County. As of the writing of this Advisory Memorandum, those powers are:

- a. The erection and repairing of courthouses, jails, and other public buildings for use by the county;
- b. Layout, discontinue, or alter county roads and highways and do other necessary acts relating to them;
- c. License and fix rates for ferriage and grant grocery and other licenses authorized by law;
- d. Fix the amount of county taxes and to collect taxes;
- e. Allow accounts legally chargeable to the county and audit the accounts of county officers handling county money;
- f. The care and management of county property, funds, and business, and prosecute and defend all actions for and against the county;
- g. Make and enforce police and sanitary regulations not in conflict with state law;
- h. Compound and release debts due to the county;
- i. Administer oaths or affirmations necessary to discharging county duties and commit for contempt witnesses refusing to testify; and
- j. Declare by ordinance what shall be deemed a nuisance by the county, and prevent, remove, and abate a nuisance, including levying special assessments to abate a nuisance.

Appendix C

Checklist for Legal Considerations

Below is a checklist providing general guidelines that should be considered before filing a petition for an initiative or referendum with Whatcom County. This checklist is not intended to, and does not substitute for, legal advice for a specific initiative or referendum. Specific questions about the legality of a proposed initiative or referendum should be directed to an attorney licensed to practice law in the State of Washington.



Procedures. Does the petition for the proposed initiative or referendum follow the procedures set forth in the Home Rule Charter, Article 5 Section 5.40, or 5.60?



Subject Matter. Does the petition have a valid subject matter? (See discussion in *Advisory Memorandum*, Section III.B)



Limitations:

- Does the subject matter of the proposed initiative or referendum contain only one issue?
- Have provisions for new or additional sources of revenue been provided if it requires expenditure of additional funds?
- Is it not attempting to redistrict any of the Legislative Districts?



Legislative subject matter: Does the proposed initiative or referendum contain a subject matter that is probably “legislative” and not “administrative” in character?



Not conflict with state law: Does the proposed initiative or referendum conflict with or supersede the state Constitution, state statute or rules, broad expressions of state policy, or an exclusive grant of authority from the state legislature to the County Council?



No other exceptions: Does the proposed initiative or referendum fall within other exceptions to bringing an initiative or referendum, like emergency ordinances or a repeal of the County Charter?



Legal Substance. Does the substance of the initiative or referendum comply with state and federal law, including constitutional requirements?



Sponsor. Does the sponsor of the initiative or referendum know that he or she may be named as a party in a lawsuit challenging the initiative or referendum?



Attorney’s Fees. Does the sponsor of the initiative or referendum know that he or she may be responsible for attorneys’ fees incurred for defending the initiative or referendum in court?