No. 82225-5

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE and PROTECT OUR WATERS,
Petitioners,

and

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

MOTION FOR RECONSIDERATION BY PETITIONERS OUR WATER-OUR CHOICE AND PROTECT OUR WATERS

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I. IDENTITY OF MOVING PARTIES

Our Water-Our Choice ("OWOC") and Protect Our Waters ("POW"), Petitioners, ask for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Reconsider the September 23, 2010 Opinion, correct points of law and fact, and based on these corrections draft a new Opinion with a new Majority that allows at least the Medical Independence Act Initiative to proceed to the ballot.

III. FACTS RELEVANT TO MOTION

The facts relevant to this motion are those in documents previously submitted to this Court as noted below. Copies of some of these documents are attached hereto in Appendix R.

IV. GROUNDS AND ARGUMENT

A. Introduction

The current Majority errs in law and fact which leads this Court to erroneously find the subject Initiatives to be administrative and beyond the scope of the local initiative power. Petitioners request that a new Majority find, at a minimum, that the Medical Independence Act should proceed to the ballot.

B. The Majority Mischaracterizes The Initiatives' Intent As "Seeking To Stop Fluoridation"

The Majority errs when it states in its "Factual Background" that OWOC and POW "filed separate initiatives seeking to stop fluoridation of Port Angeles's [sic] public waters." Opinion at 3. Petitioners request the replacement phrase "filed separate initiatives seeking to limit optional

chemicals in Port Angeles' public waters" be used to describe what the Initiatives are seeking. The term "optional chemicals" means chemicals added for purposes other than ensuring safe drinking water. Dissent at 3, Note 2. For the Medical Independence Act this term is fully defined by Section 2 of that Act. Appendix R-1 hereto.

1) What the Initiatives are seeking to do is determined by a de novo examination of the legislative intent

What the Initiatives are seeking to do is determined by a de novo examination of the legislative intent.[1] What the Initiatives are seeking to do is fundamental to a determination of whether the Initiatives are legislative or administrative. What the Initiatives are seeking to do is a question of law that this Court determines de novo based on the language of the Initiatives. *See Shoop v. Kittitas County*, 149 Wn.2d 29, 36, 65 P.3d 1194 (2003) (intent divined "from the plain language of the ordinance"). The Majority commits an error of law when it states the Initiatives are "seeking to stop fluoridation" of Port Angeles' public waters. This is not a reasoned interpretation of the plain language of the Medical Independence Act. The Majority commits an error of fact when it places this legal conclusion in the "Factual Background" statement of its Opinion. The statement that the Initiatives are "seeking to stop fluoridation" was not in the findings of fact of the trial court. ACP at 27-31 (Appendix R-51 to R-55 hereto). This case is based on undisputed facts,[2] and Petitioners have not and do not agree to this erroneous statement of fact.

Appellants focus this Motion for Reconsideration on seeking a new

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[1] *See State v. Gilbert*, 68 Wn.App. 379, 381, 842 P.2d 1029 (1993)
[2] ACP at 28, Para. 3.2.

Majority to agree that the Medical Independence Act[3] should proceed to the ballot. A reasoned interpretation would find that this Act seeks to permanently stop any person from medicating citizens with any "optional" substance added to any Port Angeles' public waters. Section 1, the intent section of this Act, concludes, "The citizens of Port Angeles now declare that the public water supplies should not be used to medicate citizens." This intent section does not state that the intent is to just stop fluoridation. Instead the language of this Initiative clearly expresses its intent is to address any use of Port Angeles' public waters to medicate citizens. This intent is specifically implemented by Section 2 of this Act which states:

> It shall be unlawful for any person, agent, or any public water system to put or continue to put any product, substance, or chemical in public water supplies for the purpose of treating physical or mental disease or affecting the structure or functions of the body of any person, or with any other intent of acting in the manner of a preventative or treating medication or drug for humans or animals.

Appendix R-1 hereto. This section also does not seek to just stop fluoridation. In fact, it does not even mention fluoridation.

Because Section 1 of this Act finds that fluoridation of the City's municipal public drinking water is for the "express purpose" of "medication," and Section 2 of this Act addresses all substances acting as "medication," it is a corollary that continuing to fluoridate the municipal public water would be illegal under this Act and would have to stop. Only the timing of implementation of this corollary effect is provided in Section 5 of this Act where the effective date of this ordinance is established and it clarifies that fluoridation of the municipal water supply will then cease.

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[3] ACP 172 provided herein as Appendix R-1.

Despite this Initiative's effect on fluoridation of municipal public water, the express intent from the plain language of this Initiative is considerably more general and is to outlaw anyone adding any [optional] substance to public drinking water to treat people or animals. Adding substances for water drinkability is generally not regulated by this Initiative.[4]

C. The Majority's Mischaracterization Of The Initiative Intent Leads To Its Erroneous Conclusion That The Medical Independence Act Is Administrative

Based on the plain language of the Medical Independence Act, its intent is to pass a permanent and general ordinance.[5] The Majority's mischaracterization of the legislative intent of this Act and mischaracterization of Petitioners' argument misleads the Majority to conclude that this Act is administrative.

The Opinion at 11 makes an error of fact when it misstates the argument of Petitioners/Appellants as follows, "OWOC and POW respond by arguing that the initiatives are essentially legislative because the decision to fluoridate was new." To the best of our knowledge, Petitioners never made this argument. In the June 1, 2009 Supplemental Brief of Petitioners at 14, it states (footnotes in original but renumbered),

> As discussed in Appellants' Opening Brief at 23-29, the initiatives are legislative because they "establish new law for the City for the purpose of locally regulating the purity of the water supply for all public water

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[4] Section 3 of the Medical Independence Act generally allows substances to be added to public water supplies to make water "safe or potable." There is a minor exception that prohibits such substances that would increase water fluoride levels by 0.1 ppm. This is not a fundamental provision of this Initiative and would be subject to a substantive invalidity challenge if it actually affected any public water supplier. Section 6, the severability provision, of this Act would allow this minor exception to be removed without impacting the intent of the Initiative.

[5] It regulates all persons in the community, all "optional" substances used to treat people and animals, and all public water supplies serving the City.

systems serving the City."[6] The new ordinances are also permanent and general in character.[7]

Petitioners expanded their argument that the "initiatives are legislative" in Petitioners' Answer[8] which Petitioners encourage the Justices to read (or read again). The key section of the Answer that addresses this issue begins at page 3 under the heading:

Local Initiatives That Prohibit Or Limit Any Person Putting Any Drug In Any Local Public Water Supply Are "Legislative"

The Majority does not identify, address, or respond to Petitioners' actual arguments.

Petitioners argue that the Initiatives are legislative because the ordinances are "permanent" and of "general character." Answer at 3. The Initiatives also apply "generally to the community" and under *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 969, 954 P.2d 250 (1998), they are legislative. Answer at 3, Note 8. The Medical Independence Act is of "general character" because it regulates all people in the community.[9] This Initiative is also of general character because it regulates a general class of

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[6] Appellants' Opening Brief at 24. While Div. II is correct that "Each initiative would regulate additives to Port Angeles' public water system" (Petition at A-7), this is not the full scope of the initiatives. The initiatives prohibit or regulate addition of any medicine to any public water supply serving the City now or in the future but do not regulate additives to make water safe or potable.

[7] Appellants' Opening Brief at 25. The only "medicine" regulated on a statewide basis by the state department of health is fluoride. WAC 246-290-72012 (where fluoride is identified as a "Water additive which promotes strong teeth"). [citation omitted] The Initiatives are new law because they regulate or prohibit all medicines not just fluoride (see Appellants' Opening Brief at 25 citing to Citizens at 348), they set higher standards just for the City and not for the state, they apply to all public water supplies serving the City now or in the future, and they apply to all persons.

[8] The term "Answer" refers to Petitioners' February 12, 2010 Answer to Amici Curiae Brief of Association of Washington Cities and City of Forks. This "Answer" without most of its Appendix is provided herein as Appendix R-3 to R-48.

[9] Section 2 of the Medical Independence Act makes it "unlawful for any person, agent, or any public water system" to take the action regulated. Appendix R-1 hereto. This Act applies "generally to the community" and is not limited to regulating water system purveyors.

substances.[10] This Initiative is permanent because it is ongoing and does not expire. The Opinion simply fails to recognize or apply this relevant law or explain why it is not applicable.

The Opinion at 10, Note 6 states:

> The petitioners also argue that the decision was legislative because there was no prior law regarding medicines in public waters. However, the trial court did not find that fluoride was a medicine, and OWOC and POW did not assign error to that lack of finding. The factual predicate for this argument is not provided by the record before us, and we do not reach it.

Whether or not fluoride acts as a medication or drug, the record before the Court is clear that Section 2 of the Medical Independence Act prohibits adding a general class of substances when intent is that they act "in the manner of a preventative or treating medication or drug." The language of this Initiative was used as a basis for the trial court's decision. ACP 28, Finding 3.2 (Appendix R-52 hereto).

Petitioners raised the following issue:

> When a city has not previously adopted any local water purity standards for all public water systems serving the inhabitants of the City, are the first initiatives that establish such standards considered to be legislative, particularly when they regulate the use of public drinking water systems to medicate citizens?

Supplemental Brief of Petitioners at 4, Issue 2. This Court does not need a finding by the trial court "that fluoride was a medicine." By de novo review of the ordinance language, this Court should reach the conclusion that the

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[10] Section 2 of the Medical Independence Act regulates "any product, substance, or chemical [put in] public water supplies for the purpose of treating physical or mental disease or affecting the structure or functions of the body of any person, or with any other intent of acting in the manner of a preventative or treating medication or drug for humans or animals." Appendix R-1 hereto. Additionally, this Initiative is of general character because it generally regulates all public water systems serving the city now or in the future. This Initiative makes it "unlawful" to put regulated substances "in public water supplies" which is not limited to the current municipal water supply.

intent of the Medical Independence Act is to include fluoride in a class of substances to be regulated. The majority simply ignores and "reads out" Section 2, the fundamental "operating" provision of this Act.

In Section 1, the intent findings of this Act, it states that fluoride was added to city "public drinking water for the express purpose of reducing tooth decay." Appendix R-1 hereto. Said Section 1 goes on to equate this fluoride addition to "medication for tooth decay." *Id.* In Section 2, the action section of this Act, it makes it unlawful to put substances in public water with intent of the substance being a "medication." In interpreting an ordinance, the intent is divined "from the plain language of the ordinance." *Shoop v. Kittitas County*, 149 Wn.2d 29, 36, 65 P.3d 1194 (2003). "When the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning." *Medcalf v. State, Dept. of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997). As a matter of de novo law review, this Court should find that the Medical Independence Act intent in making it unlawful to intentionally put "medication" in public water supplies has the corollary effect of making fluoride "medication for tooth decay" also unlawful. Only the timing of implementation of this corollary effect is provided in Section 5 of this Act where the effective date of this ordinance is established and it clarifies that fluoridation of the municipal water supply will then cease.

Also as a matter of law, the Majority should find that fluoride is added to public water supplies for the "purpose . . . of affecting the structure or functions of the body" and for that reason, as well, it is within the class of substances regulated by Section 2 of the Act. The Dissent at 5 correctly

recognizes that fluoride is added to prevent dental disease. Respondent Foundation states that it "supports drinking water fluoridation as an effective means of promoting oral health and limiting dental disease and decay." February 10, 2010 Answer of Foundation et al. to Amici Curiae Brief at 2. Appendix A-1 to A-4 of this Foundation Answer makes clear that fluoride is added to public water supplies with intent to affect the structure of the body, and in particular, the teeth. Appendix R-71 to R-74 hereto. There is no dispute about the fact that fluoride is added to affect the structure of the teeth to limit dental disease and decay. The dispute is about the safety and effectiveness for everyone of putting fluoride and other "optional" medications in public water supplies. Local voters should have the right to make permanent general law by initiative that will outlaw all such medications in all Port Angeles' public waters whether they are put in the water by water purveyors or by other persons.

As found by the Dissent at 3, and unrebutted by the Majority, local water codes carry no mention of chemical additive regulation, including optional additives such as fluoride. Therefore, the Medical Independence Act would be the first local ordinance to generally address additives added for purposes other than ensuring safe and potable drinking water. While there has previously been an action by the City to add fluoride to the municipal water system, the Medical Independence Act makes unlawful for any person to add to any public water system serving the city now or in the future, any substance in the class identified by Section 2 of this Act and this Act is the first general local ordinance to address this issue. The Dissent at 4 correctly observes that this is analogous to the facts in *Citizens* at 347-48, where a business tax being

leveed on a large class of businesses was found to be legislative despite the fact that it would change and interfere with a business tax previously levied on just one type of business. The Medical Independence Act outlaws a large class of "optional" additives and by analogy it should be found legislative despite the fact that it would change and interfere with continuing to put only one "optional" additive in one public water system.

D. The Majority Misinterprets The Law When It States That Local Government Action Is Administrative If It "Furthers (Or Hinders)" A Previously Adopted Plan

The Opinion at 15 errs when it holds that the Initiatives "are administrative in nature in that they attempt to interfere with and effectively reverse" an existing municipal water fluoridation program. This conclusion is based on the following re-statement of the law:

> 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."

Opinion at 8-9 (underlining supplied). This is an erroneous re-statement of the law.

A common law principle for determining if an action is legislative or administrative is stated in the Opinion at 10 (underlining supplied):

> 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.

The word "pursue" is defined as "to proceed in accordance with (a method, plan, etc.)"[11] The Opinion at 8-9 replaces the word "pursues" in the above common law principle with the words "furthers (or hinders)." This

[11] Webster's New Universal Unabridged Dictionary (2003).

replacement is inconsistent with Washington State case law.

Besides the case on review, there are only eleven cases that quote the phrase "some power superior." Four of these eleven cases find the action administrative because it actually "pursues" a plan previously adopted by the local legislative body.[12] One Division I case finds a proposed initiative action administrative because given the adoption of four legislative ordinances establishing the framework for constructing, financing and operating a new convention center, the only other action in pursuit of this convention center would be administrative.[13] One other case determined that although the action appeared legislative, the City did not have authority to take the action because the only "authority to enact" delegated to the City was administrative.[14] The remaining five of the eleven cases found the action to be legislative because it prescribes new policy.[15] In each of these five cases, the local government

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[12] *Durocher v. King County*, 80 Wn.2d 139, 152-54, 492 P.2d 547 (1972) (county zoning permit is administrative and not subject to referendum because it was granted pursuant to zoning ordinance); *Leonard v. City of Bothell*, 87 Wn.2d 847, 850-51, 557 P.2d 1306 (1976) (a rezone is administrative and not subject to referendum because it was granted pursuant to a county comprehensive plan); *Pentagram Corp. v. City of Seattle*, 28 Wn.App. 219, 224-25, 622 P.2d 892 (1981) (building permit is administrative because it was granted pursuant to building code); *Heider v. City of Seattle*, 100 Wn.2d 874, 875-77, 675 P.2d 597 (1984) (street name change is administrative and not subject to referendum because it was made pursuant to street-naming ordinance).

[13] *Bidwell v. City of Bellevue*, 65 Wn.App. 43, 45-49, 827 P.2d 339 (1992)

[14] *Seattle Bldg. and Const. Trades Council v. City of Seattle* (*Seattle*), 94 Wn.2d 740, 747-49, 620 P.2d 82 (1980).

[15] In *Ballasiotes v. Gardner*, 97 Wn.2d 191, 196-98, 642 P.2d 397 (1982), an ordinance that terminated previously approved lever machine voting and changing to punch-card voting was found to be a new policy subject to referendum despite the fact that it hindered the previously adopted plan to use lever machine voting . In *Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 865-66, 665 P.2d 1328 (1983), an action to increase electrical rates was found legislative despite the fact that new rates would further or hinder the prior city plan for electrical rates. In *Convention Center Coalition v. City of Seattle*, 107 Wn.2d 370, 373 and 376, 730 P.2d 636 (1986), a new adopted overall housing ordinance was found to be legislative despite the fact that it hindered or furthered the existing housing ordinance. In *Citizens for Financially Responsible Government v. City of Spokane* (*Citizens*), 99 Wn.2d 339, 347-48, 662 P.2d 845 (1983), a business tax being leveed on a large class of businesses was found to be legislative despite the fact that it would hinder or further a business tax previously levied just on one type of business. *See Citizens* at 341 and 348 ("Common sense compels the conclusion that a tax on all business is a new

actions furthered or hindered an existing plan of the local government as described *supra*, Note 15. This illustrates the error of law in using the "furthers (or hinders)" language in place of the "pursues" language in the Opinion at 8-9. This has resulted in an error of law in concluding that interference with an existing plan of the local government or of a power superior justifies the conclusion that the Initiatives are administrative. *See* Opinion at 15.

The Medical Independence Act does not "pursue" a plan of a local government or of a power superior and that Majority does not claim otherwise. The previous cases that relied on this principle to find actions administrative only addressed application of a comprehensive plan to grant a rezone, application of zoning code and a building code to issue a permit, and application of a street naming ordinance to rename a street. *Supra*, this motion at 10, Note 12. Because the Majority misinterprets the established common law principle in a manner that has no support in prior case law, the Opinion has no legal support for its conclusion that the Medical Independence Act is administrative.

Because the Medical Independence Act does not actually "pursue" a plan established by the local government or the State Legislature, this Court should apply the tests discussed supra, this motion at 5-6, and conclude that the Medical Independence Act is "permanent"[16] and of "general character"[17]

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policy, not simply an extension of a tax levied solely on utility companies.")

[16] This Acit is on-going with no expiration date.

[17] This Act applies to all persons in the community, applies to all substances that satisfy the criteria in Section 2 of this Act whether or not they meet ANSI/NSF Standard 60, and applies to all water supplies serving the City.

and it applies "generally to the community."[18] Because this Act does not "pursue" a plan of local government or of a power superior, it is "new policy."[19] Using all of the available tests, the Medical Independence Act is legislative. This Act is not administrative because it is not special[20] and temporary.

E. Petitioners Requested This Court To Extend The Law And Only Consider The "Fundamental And Overriding Purpose" In Determining If An Initiative Or Referendum Is Administrative Or Legislative

The Majority at 12 explains that *Coppernoll v. Reed*, 155 W.2d 290, 302-03, 119 P.3d 318 (2005) did not consider the "fundamental and overriding purpose" in order to determine if the subject Initiative was legislative or administrative.. The Petitioners in their Supplemental Brief and Amicus Answer did not claim that *Coppernoll* said otherwise. Instead Petitioners asked this Court to extend *Coppernoll* to use the "fundamental and overriding purpose" when considering whether a local initiative is administrative or legislative. It would not be uncommon for an initiative or referendum to include both administrative and legislative actions. Petitioners requested that this Court extend its ruling in *Coppernoll* and when determining if an initiative is administrative or legislative in pre-election review state that the Court only considers the "fundamental and overriding

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[18] This Act applies to all persons in the community.

[19] This Act generally regulates all "optional" medications which is a different class of substances compared to those currently regulated, regulates all persons in the community which is a different class of persons compared to the class of water purveyors currently regulated, and regulates all public water supplies which is a different class of public water supplies from the one municipal supply now regulated by the City.

[20] "It may be generally said that a special law is one which relates to particular persons or things while a general law is one which applies to all persons or things of a class." *Brower v. State*, 137 Wn.2d 44, 82, 969 P.2d 42 (1998)

purpose" of an initiative as determined de novo. This "fundamental and overriding purpose" would generally be determined by considering the plain language of the initiative. This is a question of interpreting an ordinance which is an issue of law. Such a extension of *Coppernoll* to the local initiative would give direction to the lower courts as to how to relate to an initiative that includes both administrative and legislative actions. Such an extension of the law in Coppernoll would serve the public policy to limit pre-election review and protect the integrity of the local initiative process. Such a ruling in the instant case might simplify the process for this Court to explain why it finds the Initiatives legislative or administrative.

F. The Majority Errs To The Degree That It States That The Medical Independence Act Seeks To Administer The Details Of The City's Existing Water System

The Opinion at 12-13 and 15 errors to the degree that it states that the Medical Independence Act seeks to administer the details of the city's existing water system. The primary intent of the Medical Independence Act is to make unlawful those "optional" chemicals used to medicate citizens that, consistent with the analysis in 2008 AGO No. 5, may not be added using the City's authority to operate a water utility. For an initiative to administer the details of operating a water system, those details must be within the granted authority to operate that water system. As argued by 2008 AGO No. 5 the power to operate a water system does not include the power to medicate citizens in a manner unrelated to providing safe and potable water.

G. The Majority Errs To The Degree That It States That Board Of Health Regulations Give Power To Decide To Fluoridate

The Opinion at 11 makes an error of law and fact when it states:

> The [Board] of Health regulations permit water systems to administratively adopt water fluoridation programs. WAC 246-290-460 (implicitly acknowledging the power of water purveyors to fluoridate and regulating implementation).

First, as background, Petitioners note that the Medical Independence Act regulates a class of substances and all persons in the community who might put these substances into any public water supply serving the city. This Act makes unlawful the addition to public water supplies of any of the substances that qualify under Section 2 of the Act whether they have ANSI/NSF Standard 60 certification or not. The Board of Health regulations (WAC 246-290) only regulate water purveyors. WAC 246-290-001(3). Water purveyors may only add substances to their water supplies that meet ANSI/NSF Standard 60. WAC 246-290-220(3). People not associated with water purveyors physically have the ability to access public water supplies. For example, a college freshman who puts a hose into a public water storage reservoir and pumps in a barrel of Vitamin D, would violate the Medical Independence Act. This freshman would not violate WAC 246-290 (because the freshman is not a water purveyor and WAC 246-290 only regulates water purveyors). If Vitamin D is or becomes certified under ANSI/NSF Standard 60, a water purveyor, with the proper authority[21], could add Vitamin D to its water supply. This would not violate WAC 246-290. However, this would still violate the Medical Independence Act. The above analysis would continue to be accurate if any other Medical Independence Act regulated

[21] The City has proper authority to add "optional" medications using police power when the criteria for using police power are met.

substance were substituted in the above analysis where the words "Vitamin D" now appear.

There must be statutory or constitutional authority for a public water purveyor to medicate its customers. "The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein." *Peninsula School Dist. No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 410, 924 P.2d 13 (1996). 2008 AGO No. 5 at 4 provides the analysis and makes the case that a grant of power to operate water utilities "does not delegate public health police powers" and "does not provide authority regarding decisions to fluoridate water."[22] Petitioners rely on this argument.[23] So while WAC 246-290-460 was adopted in 1983, the Legislature did not grant water districts power to fluoridate pursuant to RCW 57.08.012 until 1988. The Legislature has still not granted PUDs the power to fluoridate. 2008 AGO No. 5.

Therefore while WAC 246-290-460 acknowledges that some water purveyors have the power to fluoridate, it does not grant the power to fluoridate. And while under WAC 246-290-460, an administrative program is established for monitoring fluoridation for those who have the power and

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[22] 2008 AGO No. 5 is provided in Appendix R-60 to R-66 hereto. It discusses a series of AGO opinions and court cases and concludes that powers to operate water utilities are similar for PUDs, water districts and cities and "that such statutory language does not delegate public health police powers . . . and does not provide authority regarding decisions to fluoridate water." Appendix R-63. The opinion goes on to conclude that "PUDs do not have either general or specific authority to fluoridate water." Id. Cities have general police power to fluoridate or to add other medications (when police power criteria are met) and water districts have specific delegation to fluoridate from the Legislature through RCW 57.08.012. Because PUDs are regulated by WAC 246-290 just as cities and water districts are and because PUDs do not have the power to fluoridate pursuant to the argument in 2008 AGO No. 5, this Court should adopt this argument and conclude that WAC 246-290, and specifically WAC 246-290-460, does not delegate power to fluoridate.

[23] Answer at 16 (Appendix R-25 hereto).

make the decision to fluoridate, still any decision to fluoridate is not granted by the power to operate a utility but must come from other constitutional or statutory authority. The Opinion at 11 errs when it states, "The [Board] of Health regulations permit water systems to administratively adopt water fluoridation programs" to the degree that it implies that the decision to fluoridate itself is administrative and is authorized by WAC 246-290-460. *See* 2008 AGO No. 5 at 4. However, a more important point is that the Medical Independence Act regulates a general class of substances whereas the previous action of the City only made a decision about one substance. The Dissent, using an analogy to *Citizens* at 347-48, is correct in finding that the Medical Independence Act is legislative when it generally regulates a large class of substances despite the prior regulation of a single substance in that class.

H. The Majority Errs When It States That The Medical Independence Act Seeks To Interfere With Maximum Contaminant Level Regulations Of The Board Of Health

The Majority at 13 errs when it states that, "The Medical Independence Act explicitly seeks to interfere with [the maximum contaminant level (MCL)] existing system by limiting the amount of fluoride in the public water system." RCW 70.142.010 authorizes the Board of Health to establish MCLs. MCLs are needed to bring the state into compliance with the SDWA. The purpose of both the SDWA and RCW 70.142.010 are to set MCLs that trigger cleanup when MCLs are exceeded in a public water system. *See e.g.* RCW 70.142.050. This concept is explained in greater detail in the Answer

at 9-15.[24]

Petitioners are not asking to lower MCLs or set more strict clean-up standards and so RCW 70.142.010 and 70.142.040 are irrelevant. Therefore the Medical Independence Act does not "interfere" with the MCL system. Instead Petitioners are asking for at least one more member of this Court to concur that the Medical Independence Act is legislative when it seeks to outlaw adding substances from that class of "optional" chemicals defined in Section 2 of this Act that are unrelated to the power to operate a water system and, instead, related to medicating people or animals.

The Majority at 13-15 errs when it finds that outlawing a class of optional medication chemicals from addition to public water supplies modifies or interferes with an existing MCL plan that itself only addresses clean-up standards which is a fundamentally different policy. The Majority at 13-15 errs by finding that the Medical Independence Act is not new local policy for the City of Port Angeles.

The Majority at 14, Note 7 cites to *1000 Friends*, 159 Wn.2d 165 and suggests that the task of complying with the detailed regulations in WAC 246-290 is generally inconsistent with a general grant of authority to the municipal corporate body to make these decisions.[25] But the premise in *1000 Friends*

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[24] Appendix R-18 to R-24. The National Research Council, *Fluoride in Drinking Water* (2006) was submitted by the Foundation and two pages of that document are used to explain the difference between MCLs that trigger cleanup and fluoride as an additive. Appendix R-37-39 hereto.

[25] Petitioners understand the term "these decision" to refer to decisions similar to those made by the Board of Health in adopting WAC 246-290. WAC 246-290 is adopted pursuant to RCW 43.20.050(2)(a) which directs the Board of Health to adopt regulations to ensure public drinking water is safe and reliable. It does not direct the Board of Health to make a decision whether or not to fluoride public waters or whether or not to add other "optional" medicines to public waters. Such decisions are regulated by the constitutional and statutory scheme and left to others to decide. In the case of the City, such decisions

is not present in the instant case. In *1000 Friends*, the statutes giving "power to enact" required "extensive provision for citizen involvement. RCW 36.70A.020(11), .035, .140." *1000 Friends* at 179. The *1000 Friends* Court found this statutory requirement could not allow a referendum to reverse detailed regulations adopted with extensive citizen involvement pursuant to state policy. *Id.* at 188.

In the instant case, the Medical Independence Act addresses a subject (additives that are not used to make water safe and potable) that is different than MCL clean-up issues that are addressed in RCW 70.142. The purpose of RCW 43.20.050 and WAC 246-290 through -296 is to make public drinking water healthy, safe, and reliable. RCW 43.20.050(2)(a). A local initiative outlawing the addition into public drinking water of substances unrelated to making water healthy, safe, and reliable addresses a different subject than RCW 43.20.050 and its implementing regulations.

The issue raised in the Medical Independence Act is simple. This Initiative asks if voters want to outlaw additions to public water supplies serving the City of optional medication substances unrelated to water safety and potability. The new Majority should find that the City has the power to enact and there is no interference with RCW 43.20.050 and its implementing regulations.

I. The New Majority Should Find The Corporate City Has The Power To Enact The Medical Independence Act

If a new Majority agrees that the Medical Independence Act is

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regulating water supplies serving the City are within the scope of the police power and beyond the scope of "operating a utility." *Supra*, this motion at 15 and Note 22.

legislative, then this new Majority must also find that the power to enact this ordinance is shared with the corporate City. Petitioners concur with the analysis of this issue in the Dissent. As the Dissent at 7 states, addressing this issue is "essential to the analysis" if an initiative is found legislative. The Opinion at 14, Note 7 appears to concur with the Dissent that the powers granted by RCW 35A.11.020 are permissive when the Majority states, "reading RCW 35A.11.020 expansively [such that the corporate city has no power it can exercise using the initiative] strains the statutory fabric." The Opinion at 14, Note 7 appears to agree with the Dissent when it states that RCW 35A.11.020 "does not necessarily speak to whether the state legislature intended to grant those powers only to its municipal counterpart."

Responding to this issue, Petitioners note that RCW 35A.80.010 grants the power to provide utility service for a code city to the corporate city and authorizes the corporate city to operate utility services under RCW 35.92 which also gives the power to operate waterworks to the corporate city. If this Court finds the power to operate a water utility is necessary to have power to enact the Medical Independence Act, it should find that the corporate city shares this power with the City Council.

However, consistent with 2008 AGO No. 5 and *Kaul v. City of Chehalis*, 45 Wn.2d 616, 619-20, 277 P.2d 352 (1954), the power to enact a public health ordinance is "police power" granted to the City by the Constitution. Section 1 of the Medical Independence Act gives its intent to allow people to control their own medical care and not be subject to unacceptable enforced medication. ACP at 172 (Appendix R-1 hereto). Further, the legislature has explicitly given power to enact to the corporate

city to pass ordinances to eliminate pollution being added to its public water supplies. RCW 35.88.020 and 35A.70.070(6).

J. Additional Minor Errors

The correction of the following minor errors will benefit a New Opinion.

1) The Majority makes an typo on a date

The Opinion at 3 states that a fluoridation system was completed and transferred to the city on May 18, 2005. The correct date is May 18, 2006. ACP at 29 (Appendix R-53 hereto).

2) The Majority errs in its Factual Background

The Opinion at 3 errs when it finds in its Factual Background section that the Medical Independence Act "would declare that the right to public water is a property right that has been taken without compensation due to fluoridation." This is not a finding of fact made by the trial court. ACP at 27-31 (Appendix R-51 to R-55 hereto). It is not a finding of fact at all but rather is a legal conclusion that the majority apparently made when considering Section 1, the intent section, of this Initiative. The relevant language from Section 1 is:

> The citizens herewith determine that access to a public water supply constitutes a property right shared by all users of that water supply. They find that the property rights of persons to whom medicated water is unacceptable are impaired by addition of the medication to the common supply of water and that this is a takings which has not been compensated in any way.

Appendix R-1 hereto. This portion of the Initiative should be considered a

legislative intent and finding agreed to by those who vote for this Initiative.[26] In this regard it is similar to the "legislative intent and finding" section of a statute and it "lacks operative force." *In re Detention of R.W.*, 98 Wn.App. 140, 988 P.2d 1034 (1999). This Court should determine whether the provisions with "operative force" are legislative or administrative.

3) The Majority errs when it states that the FDA exception in the Water Additives Safety Act is "essentially meaningless"

Note 1 in the Opinion at 4 mischaracterizes the FDA exception that appears in the Water Additives Safety Act when it states that it is "essentially meaningless." It is important that the Majority does not mischaracterize the responsibility of the FDA. Therefore, Appellants request that this Court either eliminate said Note 1 or correct it.[27]

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[26] This portion of the Initiative states that access to a public water supply by users of that water supply constitutes a property right of those users. Typically, users obtain this property right by obtaining a hook-up to the water supply and by contracting to pay for the water used. This portion of the Initiative finds that this property right is impaired (and taken without compensation) when the water is purposefully medicated with a medicine unacceptable to the user. This portion of the Initiative addresses all "medication" and is not limited to fluoridation as concluded by the Opinion at 3 in its factual background section.

[27] MOU 225-79-2001 (FCP at 180-83 - Appendix R-67 to R-70 hereto) is an agreement to resolve conflicting legal authorities granted to the EPA and FDA. The conflicting EPA and FDA legal authorities are described in this MOU at 2-3 (FCP at 181-82). This MOU only seeks to resolve FDA authority over food in (FFDCA 201(f) (21 U.S.C. 321(f))), FFDCA 402 (21 U.S.C. 341)), FFDCA 406 (21 U.S.C. 346)), FFDCA 409 (21 U.S.C. 348)), and FFDCA 410 (21 U.S.C. 349)). MOU at 2 (FCP at 181).

However, the FDA has separate authority over drugs. FFDCA 201(g)(1) (21 U.S.C. 321(g)(1) and FFDCA 501 et seq. (21 U.S.C. 351 et seq.) Portions of the cited sections of FFDCA are provided in Appendix R-34 and R-75 to R-81 hereto. The term "drug" is defined both in 21 U.S.C. 321(g)(1) (Appendix R-34 hereto) and in RCW 69.04.009 as including

> (1) articles recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or other animals;

The Water Additives Safety Act defines regulated substances that shall not be added to drinking water as including "drugs as defined in RCW 69.04.009." ACP 178 (Appendix

4) The Opinion at 7 makes several errors of fact and law

The Opinion at 7 makes several errors of law and fact when it states:

> The Washington State Legislature vested the Department of Health with the power and duty to regulate the health and safety of drinking water. RCW 43.20.050(2)(a) [footnote 3 in original]. The department has responded with detailed regulations governing public water systems. Ch. 246-290 WAC. This chapter includes a specific regulation on fluoridation, WAC 246-290-460. Pursuant to the SDWA and the regulations promulgated by Washington's Department of Health, there are approximately 40 chemicals that may be added to public water supplies.

While the errors could be corrected in many ways, Appellants propose the following revision:

> The Washington State Legislature vested the Board of Health with the power and duty to regulate the health and safety of drinking water. RCW 43.20.050(2)(a) [same footnote 3]. The board has responded with detailed regulations governing public water systems. Ch. 246-290 WAC. This chapter includes a specific regulation on fluoridation. WAC 246-290-460. Pursuant to the regulations promulgated by Washington's Board of Health, chemicals, if added to public water supplies by public water purveyors, must meet ANSI/NSF Standard 60. WAC 246-290-220(3).

The first error in the Opinion at 7 is the reference to the "Department of Health" and "department" when RCW 43.20.050(2)(a) that is quoted in said footnote 3 explicitly gives the power to the Board of Health which is a different agency. In the administrative history notes under each section in Ch. 246-290, the legislative authority is typically RCW 43.20.050 which confirms the fact that these regulations were adopted by the board and not the

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R-2 hereto). Therefore, if an entity wants to add a drug as defined in RCW 69.04.009 to public drinking water, it could be adding a drug as defined in FFDCA 201(g)(1) (21 U.S.C. 321(g)(1)). Such drugs would be subject to FDA approval despite the existence of the MOU such that the Opinion at 4, Note 1 makes an error of law in calling the FDA exception "essentially meaningless." This argument, in less detail, was previously presented to this Court in Petitioners' Answer at 5, Note 18. For convenience, this Answer is provided in Appendix R-3 to R-48 hereto.

department. The Opinion at 11, 13, and 14 (three places), and 15 and the Dissent at 2, 4, 5, and 9 make the same error.

The Safe Drinking Water Act (SDWA) directs the Federal Environmental Protection Agency to establish "treatment technique requirements" which appear in the National Primary Drinking Water Regulations (40 CFR 141 et seq.). *See e.g.* 42 USC 300g-5(e); 42 USC 300g-4(d). Such "treatment technique requirements" may include addition of chemicals, such as bleach, but only to reduce contaminants. Id. The SDWA explicitly forbids requirements to add substances for "preventive health care purposes" such as adding fluoride for fluoridation.[28] The Board of Health regulations require chemicals, if used by public water purveyors in public water supplies, to meet ANSI/NSF Standard 60. WAC 246-290-220(3).

The statement that "there are approximately 40 chemicals that may be added to public water supplies" is a misstatement of fact apparently based on a mis-reading of the Declarations of Thomas Locke (FCP at 207) and Stephen P. Sperr, P.E. (FCP at 209). This statement is not true and it is not a fact accepted by Appellants or by the trial court (ACP at 27-31)[29] and therefore should be eliminated as an agreed fact in the Opinion. Appellants went to the

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[28] See Answer at 14, Notes 49-50 (Appendix R-23 hereto). The Answer at 14, Note 50 cites to the SDWA at 42 U.S.C. sec. 300g-1(b)(11) which states:

> No national primary drinking water regulation may require the addition of any substance for preventive health care purposes unrelated to contamination of drinking water.

Appendix R-95 hereto. This should make it clear that the addition of preventative or treating medications, including fluoride, is not done pursuant to the SDWA. Said Note 50 cites to National Research Council, *Fluoride in Drinking Water* (2006) but errs when it refers the reader to Answer Appendix A-1 and A-2 for this citation. The correct pages in the Answer Appendix are A-25 to A-27 thereto. Appendix R-37 to R-39 hereto.

[29] Appendix R-51 to R-55 hereto.

NSF website http://www.nsf.org/Certified/PwsChemicals/ and reported that as of February 11, 2010 there were "35,389 products approved by NSF/ANSI Standard 60 as Drinking Water Treatment Chemicals with 114 different chemical names." Answer at 4-5, Note 15 (Appendix R-13 to R-14 hereto).

5) The Opinion at 8 errs when it states that decisions to fluoridate a water district are not subject to local oversight

The Majority at 8, in discussing the decision whether or not to fluoridate made by the board of commissioners of a water district, makes an error of law when it states:

> Nothing in chapter 57.08 RCW creates the power of initiative or referendum to check such board decisions. The grant of power to water districts is not subject to local oversight, even by local boards of health.

While there is no formal power denoted as being initiative or referendum to check such board decisions and such decisions are not subject to oversight by local boards of health, the power of water districts to fluoridate is subject to local oversight by the electors.[30]

6) The Majority mischaracterizes *Clallam County Citizens*

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[30] RCW 57.08.012 states:

> A water district by a majority vote of its board of commissioners may fluoridate the water supply system of the water district. The commissioners may cause the proposition of fluoridation of the water supply to be submitted to the electors of the water district at any general election or special election to be called for the purpose of voting on the proposition. The proposition must be approved by a majority of the electors voting on the proposition to become effective.

It appears that this statute establishes a process of local oversight when the commissioners "cause the proposition of fluoridation of the water supply to be submitted to the electors of the water district" the "proposition must be approved by a majority of the electors voting on the proposition to become effective." It remains an open question as to whether submitting the proposition to the electors of the water district is or is not part of a process required by this statute when the board of commissioners exercises its option to fluoridate.

The Majority at 11-12 cites to *Clallam County Citizens*, 137 Wn. App. at 220 for the proposition that the decision to fluoridate was made "pursuant" to the Department of Health's program. *Clallam County Citizens* at 220 found fluoridation was in the Department of Health's program because the "proposed fluoridation could not occur without the Department of Health's approval and continuing oversight." There was no discussion as to whether the decision to fluoridate itself was administrative or legislative.

V. CONCLUSION

Based on the foregoing, Petitioners find the Majority errs it its conclusion and Petitioners ask that a new Majority reconsider the Opinion and include a conclusion that the Medical Independence Act is legislative and the corporate City has power to enact this legislation. It is implicit in the Dissent that the only relevant issues are whether a local initiative is legislative and whether there is power to enact. But the trial court also found multiple issues of substantive invalidity. ACP at 32-34 (Appendix R-56 to R-58 hereto). The new Majority should make explicit the implicit position of the Dissent that issues of substantive invalidity (issues related to whether an ordinance, if passed, would be in conflict with state or federal laws or constitutions) are not appropriate for pre-election review of a statewide or local initiative.

Dated this 13th day of October, 2010.

Respectfully submitted,

GERALD STEEL PE

By: _____
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CERTIFICATE OF SERVICE

I certify that on the 13th day of October, 2010, I caused a true and correct copy of this certificate and the Motion for Reconsideration by Petitioners Our Water-Our Choice and Protect Our Waters to be served on the following by first class mail:

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Dated this 13th day of October, 2010, at Olympia, Washington.

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APPENDIX INDEX