

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

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

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

RESPONDENT CITY OF PORT ANGELES' ANSWER TO:

AMICI CURIAE BRIEF OF INTERNATIONAL ACADEMY OF ORAL
MEDICINE AND TOXICOLOGY; OREGON CITIZENS NETWORK
FOR SAFE DRINKING WATER; FLUORIDE ACTION NETWORK;
WASHINGTON ACTION FOR SAFE WATER; WHIDBEY
ENVIRONMENTAL ACTION NETWORK; AUDREY ADAMS;
LINDA MARTIN; BILL OSMUNSON DDS, MPH;
GERALD H. SMITH MD; AND FLUORIDE CLASS ACTION

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUES ADDRESSED	1
III.	FACTUAL BACKGROUND	2
IV.	LEGAL ARGUMENT	2
A.	The Initiatives Are Beyond the Scope of the Local Initiative Power Because They Address Administrative Subjects.	2
B.	The Initiatives Are Beyond the Scope of the Local Initiative Power Because Operation of the City’s Water Utility Was Granted Exclusively to the City’s Legislative Body.	7
C.	The Procedural Issues Raised By Amici Are Without Merit.	9
1.	The Trial Court Decision Was Not a Summary Judgment.....	9
2.	There Is No Federal Preemption.....	9
3.	Amici’s Request for Judicial Notice Should Be Denied.....	10
V.	CONCLUSION	11

TABLE OF AUTHORITIES

CASES

<i>City of Port Angeles v. Our Water-Our Choice</i> , 145 Wn. App. 869, 188 P.3d 533 (2008).....	2
<i>City of Seattle v. Yes For Seattle</i> , 122 Wn. App. 38, 93 P.3d 176 (2004), <u>review denied</u> , 153 Wn.2d 1228 (2005).....	8
<i>City of Sequim v. Malkasian</i> , 157 Wn.2d 251, 138 P.3d 943 (2006).....	7
<i>Clallam County Citizens v. City of Port Angeles</i> , 137 Wn. App. 214, 151 P.3d 1079 (2007).....	3
<i>Friends of Washington v. McFarland</i> , 159 Wn.2d 165, 149 P.3d 616 (2007).....	8
<i>Gustafson v. City of Lake Angelus</i> , 76 F.3d 778 (1996)	9
<i>Heider v. Seattle</i> , 100 Wn.2d 874, 675 P.2d 597 (1984).....	2
<i>Houser v. State</i> , 85 Wn.2d 803, 540 P.2d 412 (1975).....	11
<i>In re Marriage of Meredith</i> , 148 Wn. App. 887, 201 P.3d 1056 (2009).....	10
<i>Leonard v. Bothell</i> , 87 Wn.2d 847, 557 P.2d 1306 (1976).....	5, 6
<i>Priorities First v. City of Spokane</i> , 93 Wn. App. 406, 968 P.2d 431 (1998), <u>review denied</u> , 137 Wn.2d 1035 (1999).....	7
<i>Seattle Building and Constr. Trades Council v. City of Seattle</i> , 94 Wn.2d 740, 620 P.2d 82 (1980).....	2

STATUTES

42 U.S.C. § 300f(6)	6
42 U.S.C. § 300g-1(b)(1)(A)	6
42 U.S.C. § 300g-1(b)(11).....	10
RCW Ch. 35.88	8
RCW § 35A.11.020	7, 8
RCW § 35A.70.070	8
RCW § 57.08.012	4
WAC § 246-290-010	5, 6
WAC § 246-290-020	4
WAC § 246-290-220	4, 5, 7
WAC § 246-290-460	5, 7
WAC § 246-291-230	4

I. INTRODUCTION

The City of Port Angeles submits this answer to the amici curiae brief filed by International Academy of Oral Medicine and Toxicology; Oregon Citizens Network for Safe Drinking Water; Fluoride Action Network; Washington Action for Safe Water; Whidbey Environmental Action Network; Audrey Adams; Linda Martin; Bill Osmunson DDS, MPH; Gerald H. Smith MD; and Fluoride Class Action (collectively “Amici”). The great majority of Amici’s brief raises new issues and claims that were not presented to the trial court, for which there was no opportunity to develop a factual record before the trial court, and which are immaterial to the question of whether the two initiatives are within the local initiative power. The City has requested the Court to strike and not consider those issues and claims in a motion to strike filed with this answer.

II. ISSUES ADDRESSED

This only issue presented to and decided by the trial court was whether two initiatives submitted to the City of Port Angeles were within the local initiative power. Similarly, on appeal to Division Two of the Court of Appeals, the only issues decided by that Court were whether the proposed initiatives were within the local initiative power. *City of Port*

Angeles v. Our Water-Our Choice, 145 Wn. App. 869, 188 P.3d 533

(2008) This answer responds to those few portions of Amici's brief that are related to those issues in this case. The City also addresses several procedural issues raised by Amici.

III. FACTUAL BACKGROUND

The City adopts the statement of facts in the Brief of Respondents filed August 20, 2007.

IV. LEGAL ARGUMENT

A. **The Initiatives Are Beyond the Scope of the Local Initiative Power Because They Address Administrative Subjects.**

The power to adopt legislation directly through the local initiative process is limited to actions that are legislative in nature. *Heider v. Seattle*, 100 Wn.2d 874, 675 P.2d 597 (1984); *Seattle Building and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 748, 620 P.2d 82 (1980). The standard used by this Court to determine whether a function is legislative or administrative is the following:

The power to be exercised is legislative in nature if it prescribes a new policy or plan; whereas, it is administrative if it merely pursues a plan already adopted by the legislative body itself or some power superior to it.

Heider, 100 Wn.2d at 876; *Seattle Building and Constr. Trades*, 94 Wn.2d at 748. Like all public water systems in the state, the City's operation of

its municipal water system is done under a detailed and comprehensive regulatory plan specified by the Washington Department of Health and the Washington Board of Health. The nature of those comprehensive regulations has already been described in the Brief Of Respondents filed by the City, in the Supplemental Brief of Respondents filed by the City, and by the Amici Curiae Brief filed by the Association of Washington Cities and City of Forks. The City's operation of its water system, including decisions regarding the addition of additives such as chlorine, fluoride, or other chemicals is clearly taken pursuant to the plan adopted by the Board of Health and Department of Health. *Clallam County Citizens v. City of Port Angeles*, 137 Wn. App. 214, 220, 151 P.3d 1079 (2007) (the City proposed drinking water fluoridation is an action under the Department of Health because it could not occur without the Department of Health approval and continuing oversight).

Amici raise several arguments that the actions proposed under the initiatives are legislative.

First, Amici argue that a statute regulating water districts implies that the initiatives are legislative, not administrative, in nature. The statute cited by Amici merely states that a water district (not a city) may submit the proposition of fluoridation to the electors in the district.

RCW 57.08.012. This irrelevant authority says nothing about whether decisions regarding fluoridation are administrative or legislative; it merely gives water districts the authority to put that question to a vote – no matter the nature of the decision. Amici fail completely to address the controlling standard from this Court for determining administrative actions.

Second, Amici argue that the proposed initiatives are a new “plan,” and therefore legislative, because neither federal nor state regulation requires fluoridation. Amici are partly correct – fluoridation is not required by the Department of Health. In fact, no water additives are required by the Department of Health. Chlorine, for example, is not required by the Department of Health, although chloride levels in drinking water are regulated. But if any public water system in Washington does put additives in the water, for any purpose, the water system must comply with the detailed and comprehensive plan adopted and administered by the Department of Health and Board of Health.¹ For the City, Board of Health regulations require all additives to be compliant with the ANSI/NSF

¹ WAC 246-290-220 governs additives in Group A water systems, which are larger public water systems. *See* WAC 246-290-020. WAC 246-291-230 governs treatment in Group B water systems, which are those with less than 15 residential services, and requires them to comply with specifications or case-by-case approval from the Department of Health.

Standard 60² or individually approved by the Department on a case-by-case basis. WAC 246-290-220. For fluoridation, written approval from the Department of Health is required. WAC 246-290-460. Department regulations also require detailed planning, concentrations throughout the system, and a specific daily monitoring are required. *Id.*

Washington case law shows that an action does not need to be mandated in order to be done pursuant to a plan already adopted by the legislative body or some power superior to it. In *Heider*, for example, the City of Seattle had adopted a comprehensive street name ordinance, but was not required to rename any streets. But when the Seattle City Council decided to rename Empire Way to Martin Luther King, Jr. Way, that action was administrative because it pursued a plan enacted in the comprehensive street name ordinance. *Heider*, 110 Wn.2d at 877. Similarly in the *Leonard* case, the Bothell City Council had enacted a zoning code that included criteria for rezones, but did not require the rezoning of any property. *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976). But when the City Council passed an ordinance rezoning

² As defined in WAC 246-290-010, ANSI is the American National Standards Institute and NSF is NSF International, formerly National Sanitation Foundation. ANSI/NSF Standard 60 and Standard 61 are incorporated into Washington regulations at WAC 246-290-220.

141 acres in the City, this Court determined the action was administrative because it was taken pursuant to the guidance already adopted in the Bothell zoning code. *Leonard*, 87 Wn.2d at 850. This case is identical to *Heider* and *Leaonard*. Because decisions called for in the proposed initiatives must necessarily be taken pursuant to the detailed regulatory plan enacted by the Department of Health and Board of Health, those actions are administrative and, therefore, not within the scope of the local initiative power.

Third, Amici claim that the initiatives are a new plan because the EPA and Board of Health regulations allegedly govern only the removal of natural contaminants, not the addition of additives such as fluoride. Amici are incorrect. The EPA maximum contaminant levels govern all “contaminants” in drinking water that might have an effect on the health of persons. 42 U.S.C. 300g-1(b)(1)(A). Contaminant is defined as “any physical, chemical, biological, or radiological substance or matter whatsoever” without limits on how it came to be in the water. 42 U.S.C. 300f(6). Similarly, the Washington Department of Health and Board of Health regulations apply to substances in drinking water from any source. WAC 246-290-010 (definition of “contaminant”). And the Department of Health has specific and detailed regulations for additives to drinking water

including fluoride. WAC 246-290-220; WAC 246-290-460. The City's actions with respect to all substances in its drinking water that might have health effects are taken pursuant to this plan already adopted by the Department of Health and Board of Health and is administrative action.

B. The Initiatives Are Beyond the Scope of the Local Initiative Power Because Operation of the City's Water Utility Was Granted Exclusively to the City's Legislative Body.

Local initiatives are also beyond the scope of the initiative power if they would interfere with powers or functions that have been granted by the Legislature to the governing body of the City, rather than to the City as a corporate entity. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261-266, 138 P.3d 943 (2006); *Priorities First v. City of Spokane*, 93 Wn. App. 406, 410-411, 968 P.2d 431 (1998), *review denied*, 137 Wn.2d 1035 (1999) ("An initiative cannot interfere with the exercise of a power delegated by state law to the govern body of the City").

The City of Port Angeles is a code city operating under Title 35A. In that title, the Legislature specifically and expressly vested in the "legislative body of each code city" the power of "operating and supplying of utilities and municipal services commonly or conveniently rendered by cities and towns." RCW 35A.11.020.

Amici argue in their brief that the City also has general powers under Ch. 35.88 RCW and RCW 35A.70.070 to control additives to drinking water, and this delegation is not exclusive to the legislative body of the City. Amici are wrong for two independent reasons.

First, the statutes cited by Amici do not give authority to a city to regulate drinking water additives. RCW 35A.70.070 merely refers to the authority to “exercise control over water pollution” as provided in Ch. 35.88 RCW. But Ch. 35.88 RCW merely gives a city the power to control sources of pollution to sources of drinking water supply – i.e., reservoirs, associated pipes, rivers, springs, streams, creeks or tributaries. Neither of these statutes grants the authority to operate and supply a water system.

Second, the fact that there may be other, general authority allowing the City to operate a water utility is irrelevant if the initiatives interfere with the delegation to the City Council in RCW 35A.11.020. *City of Seattle v. Yes For Seattle*, 122 Wn. App. 38, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1228 (2005); *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2007).

In this case, the initiatives would interfere with the City’s operation and provision of a water utility, a power delegated to the City

Council by the Washington Legislature, and is therefore outside the scope of the local initiative power.

C. The Procedural Issues Raised By Amici Are Without Merit.

1. The Trial Court Decision Was Not a Summary Judgment.

Amici argue that the trial court made a summary judgment decision. Although this is a new issue on appeal and should not be considered, the City wishes to point out that Amici are incorrect. In Finding of Fact 3.2, the trial court explained that the parties had stipulated to a hearing on the merits, that the relevant facts submitted by the parties were not disputed, and that the trial court was treating the hearing as a trial on undisputed facts.³ No error was assigned to this finding of fact by the trial court, and it is therefore a verity on appeal.

2. There Is No Federal Preemption.

Federal law will preempt state regulatory authority only if Congress has expressed a clear intent to preempt state law. *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 782 (1996) (FAA regulation of planes in flight did not preempt city authority to control landings on lake).

³ The trial court decision is at Appellants' Clerks Papers ("ACP") at:25-35.

Amici have suggested that the federal Safe Drinking Water Acts preempts any state power to fluoridate drinking water.⁴ Amici base this argument on a portion of the Safe Drinking Water Act that prohibits the Administrator of EPA from setting national primary drinking water standards that would require the addition of substances for preventive health care. 42 U.S.C. 300g-1(b)(11). The intent of this statute is plain, and Amici's argument is backwards. In this statute, Congress left it open for the states to decide whether to add substances for preventive health care and merely told the EPA that it could not force the states to do so.

3. Amici's Request for Judicial Notice Should Be Denied.

A court will take judicial notice of adjudicative facts only when the fact is not subject to reasonable dispute either because (1) it is generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b); *In re Marriage of Meredith*, 148 Wn. App. 887, 904, 201 P.3d 1056 (2009) (factual information on special interest website was not a proper subject for judicial notice).

⁴ This is also a new issue on appeal and is a subject of the City's motion to strike.

Amici invite the Court to take judicial notice of alleged facts that are highly disputed and not subject to ready determination, as pointed out by respondent Washington Dental Services Foundation.

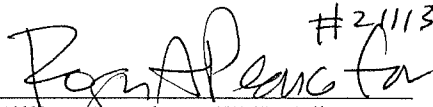
In support of their request, amici cite only *Houser v. State*, 85 Wn.2d 803, 540 P.2d 412 (1975). This authority is inapposite because the issue in *Houser* was whether the Court should take judicial notice of *legislative* facts when determining the constitutionality of a statute. *Houser*, 85 Wn.2d at 807. In this case, Amici are asking the Court to take judicial notice of *adjudicative* facts. The publications cited by Amici do not meet the restrictive standard for judicial notice of adjudicative facts, and the Court should deny Amici's request.

V. CONCLUSION

Respondent City of Port Angeles respectfully requests the Court to determine that the two initiatives are outside the scope of the local initiative power and to affirm the decision of the Court of Appeals.

DATED this 10th day of February 2010.

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per telephonic
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