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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR CLALLAM COUNTY

8 CITY OF PORT ANGELES,

9 Plaintiff,

10 v.

11 OUR WATER-OUR CHOICE, and
12 PROTECT OUR WATERS,

13 Defendants,

14 v.

15 WASHINGTON DENTAL SERVICE
16 FOUNDATION, LLC,

17 A Party in Interest,

18 OUR WATER-OUR CHOICE, and
19 PROTECT OUR WATERS,

20 Plaintiffs/Petitioners,

21 v.

22 PORT ANGELES CITY CLERK, CITY OF
23 PORT ANGELES, and WASHINGTON
DENTAL SERVICE FOUNDATION, LLC,

24 Defendants/Respondents
25
26

No. 06-2-00823-8

No. 06-2-00828-9

RESPONSE BRIEF OF WASHINGTON
DENTAL SERVICE FOUNDATION TO
OPENING BRIEF OF OWOC AND POW

WASHINGTON DENTAL SERVICE FOUNDATION
RESPONSE BRIEF

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I. INTRODUCTION

The Washington Dental Service Foundation, LLC ("WDSF") responds to the opening brief from political action committees Our Water-Our Choice ("OWOC") and Protect Our Waters ("POW"). OWOC and POW have brought a petition for a writ of mandamus, which seeks to compel the City of Port Angeles ("City") to place two proposed initiatives on the ballot. The two political action committees cannot show that the City defaulted in the performance of a clear, existing legal duty to act. As a result, the Court should dismiss the OWOC and POW action for failure to state a claim on which relief may be granted.

First, the City Clerk has forwarded the petitions to the County Auditor. As a result, the political action committees complain that the City Clerk did not timely forward the initiative petitions to the County Auditor.

Second, the parties have stipulated, and this Court has ordered, that the City has no further legal duties with respect to the petitions until after the City's declaratory judgment lawsuit is finally decided by this Court.¹ Therefore, the political action committees' complaint that the City Council has not (within twenty days after receipt of the Auditor's certification) either enacted the proposed ordinances or placed the proposed ordinances on the ballot is also unsupported.

Third, and most important, the City has no legal duty to act because the proposed petitions are beyond the scope of the initiative power for noncharter Code cities. Even though this is the central issue in this case, and was the central issue before the City Council when it decided to file the declaratory judgment action, the political action committees fail to address this issue in their opening brief.

¹ Stipulation and Order (1) Consolidating Actions; (2) Permitting Intervention, (3) Forwarding Initiative Petitions to County Auditor; and (4) Setting Hearing Schedule and Trial Date (September 25, 2006).

II. FACTS

A statement of uncontested facts is set forth in Washington Dental Service Foundation's Opening Brief In Support Of Declaratory Judgment filed by WDSF and in Plaintiff's Opening Brief In Support Of Declaratory Judgment filed by the City. Those statements of fact and accompanying declarations are already before the Court and are incorporated herein by this reference.

The declarations accompanying the WDSF and City opening briefs provide this Court with useful background information and context for its decision. To decide this case and dismiss the political action committees' petition for writ, however, the Court need only to refer to the facts in the petition and documents referred to in the petition. CR 12(b)(6). As shown in the opening briefs of WDSF and the City, the proposed ordinances are plainly beyond the scope of the initiative power for three separate reasons: (1) the proposed ordinances affect administrative rather than legislative matters; (2) the proposed ordinances involve powers or functions that have been granted by the Washington Legislature to the City Council rather than to the city as a corporate body; and (3) the proposed ordinances directly conflict with controlling state law.

III. ARGUMENT

A. **Mandamus Is An Extraordinary Remedy and the Political Action Committees Bear a Demanding Burden to Prove Mandamus Is Justified.**

Mandamus is an extraordinary writ. *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). The Court may issue a writ of mandamus only to "compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." RCW 7.16.160.

The political action committees have failed to satisfy the three elements necessary for mandamus: (1) the party subject to the writ is under a clear duty to act; (2) the applicant has no plain, speedy and adequate remedy in the ordinary course of law; and (3) the applicant is

1 beneficially interested. *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003).
2 Plaintiff bears a "demanding" burden of proving all three elements. *Id.* at 403.

3 The existence of a duty to act is a question of law. *Id.* In initiative cases, Washington
4 courts have not hesitated to deny petitions for mandamus when the proposed initiative is beyond
5 the scope of the initiative power. *E.g., Save Our State Park v. Board of Clallam County*
6 *Commissioners*, 74 Wn. App. 637, 875 P.2d 673 (1994) (denying petition for mandamus where
7 Legislature had granted planning authority to County legislative body).

8 In this case, the City has no clear and existing duty to act given the fact that the proposed
9 initiatives are beyond the scope of the initiative power.

10 **B. The City Is Not Required to Seek Injunctive Relief.**

11 As a matter of law, the political action committees' argument that the City was required
12 to file an action for injunctive relief must be dismissed. The Washington Supreme Court has
13 expressly approved cities bringing pre-election, declaratory judgment actions to determine
14 whether the subject of an initiative is beyond the scope of the initiative power. *City of Sequim v.*
15 *Malkasian*, 157 Wn.2d 251, 259-260, 138 P.2d 943 (2005). (approving pre-election action for
16 declaratory judgment and determining that the proposed initiative contravened the authority over
17 bonds given to the city council as the legislative body of Sequim); *Whatcom County v. Brisbane*,
18 125 Wn.2d 345, 884 P.2d 1326 (1994) (county brought declaratory judgment action and
19 Supreme Court held that initiative/referendum power was not available to amend ordinances
20 enacted pursuant to the Growth Management Act). Therefore, it was perfectly proper for the
21 City to bring a declaratory judgment action to determine whether the proposed ordinances are a
22 proper subject for direct legislation by initiative.

23 The political action committees' reliance on the *Philadelphia II* case is misplaced. The
24 *Philadelphia II* court held that courts will review a proposed initiative prior to election in order
25 to determine whether the initiative is beyond the scope of the initiative power. *Philadelphia II v.*
26 *Gregoire*, 128 Wn.2d, 707, 716-17, 911 P.2d 389 (1996) (upholding trial court dismissal of a

1 petition for writ of mandamus because proposed initiative was beyond the scope of legislative
2 authority and therefore outside the scope of the initiative power).

3 As in *Philadelphia II*, it is conceivable that, in some cases, a local government might
4 need to request injunctive relief prior to a court hearing on the merits. Had the City needed to do
5 so in this case, it could easily have moved for injunctive relief in its declaratory judgment action.
6 See *Ronken v. Board of County Commissioners*, 89 Wn.2d 304, 572 P.2d 1 (1977) (injunctive
7 relief may be granted in declaratory judgment action and court may grant further relief based on
8 declaration whenever necessary or proper). In this case, no such action was required because the
9 parties in the case stipulated (and this Court ordered) that the City has no duty to take any further
10 actions pending the Court's final decision on these consolidated cases.

11 **C. The City Has No Existing Duty to Act Pending the Outcome of the City's**
12 **Declaratory Judgment Action.**

13 On September 25, 2006, the parties entered into, and the Court signed and entered, the
14 Stipulation and Order (1) Consolidating Actions; (2) Permitting Intervention, (3) Forwarding
15 Initiative Petitions to County Auditor; and (4) Setting Hearing Schedule and Trial Date (the
16 "Stipulation And Order"). The Stipulation And Order provides that:

17 8. Not later than September 26, 2006, the City will cause the City
18 Clerk to promptly forward the POW and OWOC initiative petitions to the County
Auditor for determination of sufficiency.

19 9. The City has no legal obligation to take further actions with respect
20 to the POW and OWOC initiative petitions, pending the final order of the
Superior Court in the consolidated cases under Cause Nos. 06-2-00823-8 and
06-2-00828-9.

21 For the convenience of the Court, a copy of the Stipulation and Order is appended to this
22 response brief.

23 Thus, with respect to the City Clerk, any supposed duty is satisfied, because pursuant to
24 the parties' agreement, the City Clerk has already forwarded the initiative petitions to the County
25 Auditor. As pointed out by POW and OWOC, the County Auditor certified the signatures on
26 October 7, 2006.

1 With respect to the City Council's supposed duty to approve the proposed ordinances or
2 place them on the ballot, no such duty could have arisen before October 27, 2006 – twenty days
3 after the Auditor's letter. Over one month earlier, however, the parties had entered into the
4 Stipulation And Order. Accordingly, the City Council has no duty to which mandamus would
5 apply – pending the final order of this Court on the City's Complaint For Declaratory Judgment.

6 In summary, the political action committees' arguments have no merit because (1) as
7 stipulated by the parties, the City Clerk has already forwarded the initiative petitions to the
8 County Auditor and (2) as stipulated by the parties and ordered by this Court, the City has no
9 legal obligation to take any further actions with respect to the POW and OWOC initiative
10 petitions pending the final order of this Court in this consolidated case.

11 **D. The City Has No Duty to Act Because the Proposed Initiatives Are Beyond the**
12 **Scope of the Initiative Power for Noncharter Code Cities.**

13 Most importantly in this case, the City has no duty to place the ordinances proposed in
14 the initiative petitions on the ballot because the proposed ordinances are outside the scope of the
15 initiative power. The arguments and legal authorities on this issue are set forth in detail in
16 Washington Dental Service Foundation's Opening Brief In Support Of Declaratory Judgment
17 and in Plaintiff's Opening Brief In Support Of Declaratory Judgment. Those arguments are
18 incorporated by reference here and need not be repeated in full. In summary, the proposed
19 ordinances are beyond the scope of the initiative power for three independent reasons.

20 **1. The Ordinances Proposed in the OWOC and POW Initiatives Affect**
21 **Administrative and Not Legislative Matters.**

22 Proposed initiatives are limited to actions that are legislative in nature. *E.g., Bidwell v.*
23 *Bellevue*, 65 Wn. App. 43, 46, 827 P.2d 339 (1992). Here, the initiatives do not make legislative
24 policy decisions – such as a decision to provide for a municipal water supply or to adopt general
25 plans for the operation of a water supply system. Instead, the initiatives purport to mandate
26 detailed administrative actions regarding what chemicals may be placed in the City's water

1 system, how those chemicals must be tested, and what concentrations of chemicals are allowable.
2 These are administrative matters that are beyond the scope of the initiative power.

3 **2. The Proposed Initiatives Will Interfere With the Exercise of the Power to**
4 **Operate Utilities That Is Expressly Granted to the City Council in**
5 **RCW 35A.11.020.**

6 Proposed initiatives may not interfere with the exercise of a power delegated by state law
7 to the governing body of the City. *E.g., Priorities First v. City of Spokane*, 93 Wn. App. 406,
8 410-411, 968 P.2d 431 (1998). Stated another way, a proposed initiative cannot deprive the
9 City's legislative body of the power to do what the Legislature has specifically permitted that
10 legislative body to do. *Id.* Here, the Legislature has made a clear grant of power to the
11 "legislative body" of a noncharter code city to render "governmental, or corporate services,
12 including operating and supplying of utilities and municipal services commonly and
13 conveniently rendered by cities or towns." RCW 35A.11.020. Operating and supplying a
14 municipal drinking water utility is quite clearly within the scope of this grant of authority to the
15 City Council, and that is precisely what the OWOC and POW initiatives propose to govern.
16 Accordingly, the proposed initiatives are beyond the scope of the initiative power for that
17 second, independent reason.

18 **3. The Proposed Local Ordinances Directly Conflict with State Law Regarding**
19 **Drinking Water Standards and With the Washington Constitution's**
20 **Prohibition of Impairment of Contracts.**

21 For local initiatives, the proposed ordinance may not violate state law or constitutional
22 provisions. *E.g., Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d
23 740, 620 P.2d 82 (1980). Here, the proposed initiatives violate controlling state law in numerous
24 ways, including the following:

- 25 • Both proposed ordinances would violate the Washington Constitution's provision
26 against the impairment of contracts, because they would substantially impair the
contractual obligations of the City and WDSF without reasonable justification. *See*
Bidwell v. Bellevue, 65 Wn. App. 43, 827 P.2d 339 (1992).

- 1 • The proposed "Water Additives Safety Act" is premised on drinking water standards
2 being set by the United States Food & Drug Administration ("FDA"), but the FDA
3 does not set standards for drinking water. Rather, Congress has placed that authority
4 exclusively with the United States Environmental Protection Agency ("EPA").
5 42 U.S.C. § 300f(7); 42 U.S.C. § 300f(8); 42 U.S.C. §300g-1(b).
- 6 • Both proposed ordinances purport to set specific limits for contaminants in drinking
7 water. State statute requires that these limits must be set by either the state board of
8 health or by local health departments. RCW 70.142.010; RCW 70.142.040. In
9 addition, state statute requires that these standards must be based on "best available
10 scientific information." *Id.* The purported contaminant limits in the proposed
11 ordinances violate both these requirements of state statute.
- 12 • The proposed "Water Additives Safety Act" contains detailed requirements for the
13 analysis of substances to be added to drinking water. These requirements are
14 inconsistent with State Department of Health regulations, which require a uniform
15 process for water purveyors to demonstrate operational and technical compliance with
16 the federal and state mandated standards for drinking water. *E.g.*, WAC 246-290-
17 100.

18 For all three reasons outlined above, the proposed initiatives are beyond the scope of the local
19 initiative power for noncharter Code cities.

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WASHINGTON DENTAL SERVICE FOUNDATION
RESPONSE BRIEF - 7

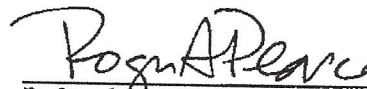
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1
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3 IV. CONCLUSION

4 For the reasons set forth above, and the reasons set forth in the opening briefs supporting
5 declaratory judgment submitted by the City and by WDSF, the Court should dismiss the political
6 action committees' petition for writ of mandamus.

7 RESPECTFULLY SUBMITTED this 24th day of October 2006.

8 FOSTER PEPPER PLLC

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11 P. Stephen DiJulio, WSBA #7139
12 Roger A. Pearce, WSBA #21113
13 Attorneys for Washington Dental Service
14 Foundation, LLC
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ATTACHMENT

Stipulation and Order (1) Consolidating Actions; (2) Permitting Intervention; (3) Forwarding Initiative Petitions to County Auditor; and (4) Setting Hearing Schedule and Trial Date

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BARBARA CHRISTENSEN

SUPERIOR COURT OF WASHINGTON IN AND FOR CLALLAM COUNTY

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

Plaintiffs/Petitioners,

v.

PORT ANGELES CITY CLERK, and
CITY OF PORT ANGELES,

Defendants/Respondents.

No. 06-2-00828-9

STIPULATION AND ORDER
(1) CONSOLIDATING ACTIONS;
(2) PERMITTING INTERVENTION,
(3) FORWARDING INITIATIVE
PETITIONS TO COUNTY AUDITOR, and
(4) SETTING HEARING SCHEDULE AND
TRIAL DATE

I. STIPULATION

Plaintiffs/Petitioners, Our Water—Our Choice ("OWOC") and Protect Our Waters ("POW"), by and through their attorney of record, Gerald Steel, PE; Defendants/Respondents, Port Angeles and Port Angeles City Clerk (collectively "City"), by and through the City's attorney of record, William E. Bloor, City Attorney; and Washington Dental Service Foundation, LLC, ("WDSF") by and through its attorneys, Foster Pepper PLLC, P. Stephen DiJulio and Roger A. Pearce, stipulate as follows:

1. On September 8, 2006, and September 11, 2006, POW filed initiative petitions with the City, seeking to have the City Council enact, or submit to a vote of the registered voters of the City, an ordinance entitled the Water Additives Safety Act.

STIPULATION AND ORDER - 1

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1 2. On September 8, 2006, and September 12, 2006, OWOC filed initiative petitions
2 with the City to have the City Council enact, or submit to a vote of the registered voters of the
3 City, an ordinance entitled the Medical Independence Act.

4 3. The City and WDSF are parties to an agreement entitled Agreement Regarding
5 Gift of Fluoridation System.

6 4. On September 18, 2006, the City filed a Complaint for Declaratory Judgment
7 under Clallam County Cause No. 06-2-00823-8. That action seeks a declaration that the
8 initiatives for the Medical Independence Act and the Water Additives Safety Act are beyond the
9 scope of the initiative power. The City named WDSF as a party to the declaratory judgment
10 action.

11 5. On September 19, 2006, OWOC and POW filed this action under Clallam County
12 Cause No. 06-2-00828-9. This action seeks an order to compel the City Clerk to forward the
13 POW and OWOC initiative petitions to the County Auditor, to find that the initiative petitions
14 are legally sufficient, and to order an election for the purpose of voting on the ordinances
15 proposed in the POW and OWOC initiatives.

16 6. The actions under Clallam County Cause Nos. 06-2-00823-8 and 06-2-00828-9
17 involve the same general subject matter and should therefore be consolidated for all purposes.

18 7. WDSF has an interest that would be affected by the ordinances proposed in the
19 POW and OWOC initiative petitions. WDSF should therefore be joined as a party defendant in
20 Cause No. 06-2-00828-9.

21 8. No later than Tuesday September 26, 2006, the City will cause the City Clerk to
22 promptly forward the POW and OWOC initiative petitions to the County Auditor for
23 determination of sufficiency.

24 9. The City has no legal obligation to take further actions with respect to the POW
25 and OWOC initiative petitions, pending the final order of the Superior Court in the consolidated
26 actions under Cause Nos. 06-2-00823-8 and 06-2-00828-9.

STIPULATION AND ORDER - 2

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10. The parties agree that the agreed Order below may be submitted to Clallam Court Commissioner William G. Knebes for signing and entry.

11. The parties agree to the following briefing schedule in the consolidated action:

Opening Briefs of OWOC/POW, City and WDSF October 13, 2006

Responding Briefs of OWOC/POW, City and WDSF October 24, 2006

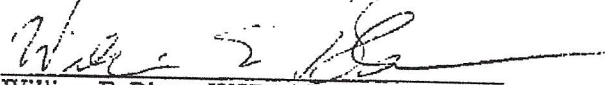
Reply Briefs of OWOC/POW, City and WDSF November 3, 2006

The parties further agree that service of papers on each other in the consolidated cases may be done by Email or Facsimile, with hard copy to be mailed the same day.

12. The parties agree that the hearing on the merits in the consolidated cases will be set on or as soon as possible after November 27, 2006, and the parties further agree to arrange a date for such hearing before a Superior Court judge for Clallam County or, if necessary, before a visiting Superior Court judge.

So stipulated the 25 day of September 2006.

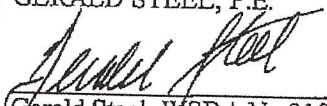
WILLIAM E. BLOOR, CITY ATTORNEY


William E. Bloor, WSBA No. 4084

Attorney for City of Port Angeles and Port Angeles City Clerk

So stipulated the 21st day of September 2006.

GERALD STEEL, P.E.


Gerald Steel, WSBA No. 31084

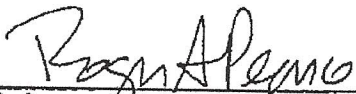
Attorney for Our Water—Our Choice PAC and
Protect Our Waters PAC

STIPULATION AND ORDER - 3

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1 So stipulated the 21st day of September 2006.

2 FOSTER PEPPER PLLC

3 

4 P. Steven DiJulio, WSBA #7139

5 Roger A. Pearce, WSBA #21113

6 Attorneys for Washington Dental Service Foundation, LLC

7 **II. ORDER**

8 Pursuant to the stipulation above, it is hereby ORDERED as follows:

9 1. The actions under Clallam County Cause Nos. 06-2-00823-8 and 06-2-00828-9
10 should be, and hereby are, consolidated for all purposes.

11 2. The Washington Dental Service Foundation is hereby joined as a party defendant
12 in the action under Cause No. 06-2-00828-9.

13 3. The City shall have no further legal obligations with respect to the POW and
14 OWOC initiative petitions, pending the Superior Court's final order in the consolidated cases
15 under Clallam County Cause Nos. 06-2-00823-8 and 06-2-00828-9.

16 4. The parties shall abide by the following briefing schedule for all matters raised in
17 Clallam County Cause Nos. 06-2-00823-8 and 06-2-00828-9:

18 Opening Briefs of	October 13, 2006
OWOC/POW, City and WDSF	
19 Responding Briefs of	October 24, 2006
OWOC/POW, City and WDSF	
20 Reply Briefs of	November 3, 2006
OWOC/POW, City and WDSF	

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24 STIPULATION AND ORDER - 4

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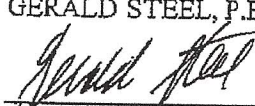
1 5. A hearing on the merits will be scheduled before a Clallam County Superior
2 Court judge or visiting judge on or as soon as possible after November 27, 2006.

3
4 SO ORDERED this 25 day of September, 2006.

5
6 WILLIAM KNEBES
7 COURT COMMISSIONER
8 WILLIAM G. KNEBES
Clallam County Commissioner

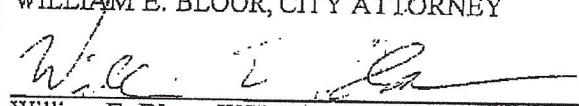
9 Presented by:

10 GERALD STEEL, P.E.

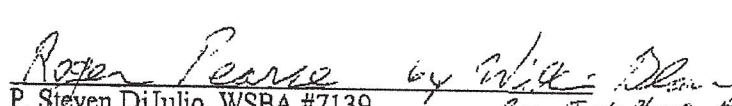
11 
12 Gerald Steel, WSBA #31084
13 Attorney for Our Water—Our Choice PAC and
Protect Our Waters PAC

14 Agreed; Notice of Presentation Waived:

15 WILLIAM E. BLOOR, CITY ATTORNEY

16 
17 William E. Bloor, WSBA #4084
18 Attorney for City of Port Angeles and
Port Angeles City Clerk

19 FOSTER PEPPER PLLC

20
21 
22 P. Steven DiJulio, WSBA #7139
23 Roger A. Pearce, WSBA #21113
Attorneys for Washington Dental Service Foundation, LLC

Per Telephone Authorization

24
25
26 STIPULATION AND ORDER - 5

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