OGDEN MURPHY WALLACE
P.L.L.C.
ATTORNEYS AT LAW

CASE REPORT

LOCAL INITIATIVE POWER - ADMINISTRATIVE AND LEGISLATIVE CHARACTER OF INITIATIVES. Local initiatives seeking to stop fluoridation of the public water supply were administrative in nature, and therefore, the city council correctly declined to enact the initiatives or refer them to the ballot. *City of Port Angeles v. Our Water-Our Choice!*, 239 P.3d 589 (2010).

I. Facts. In 2003, the Port Angeles city council voted to fluoridate its city's water supply. The Washington Dental Service Foundation offered the City a grant to build a fluoridation system, and in 2005, the city council approved a contract with the Foundation for the design, construction, and installation of the system, which would be transferred to the City upon completion. Later that year, the system was completed and transferred to the City. In 2006, the city council amended the city code to allow for citizen initiatives and referendums under RCW 35A.11.080 - .100. Two months after this amendment, Our Water-Our Choice and Protect Our Waters filed separate initiatives seeking to stop fluoridation of the public water supply, each through different means. The city council declined to either enact the initiatives or refer them to the ballot.

II. Applicable Law and Analysis. Through RCW 35A.11.080, the legislature has authorized noncharter code cities to enact enabling legislation to allow for initiatives and referenda. However, RCW 35A.11.080 does not encompass the power to administer the law, but only to make new law or policy; therefore, administrative matters are not subject to initiative or referendum. Though it is often difficult to distinguish between legislative (new policy) and administrative action, the appropriate test is "whether the proposition is one to make new law or declare a new policy, or merely to carry out and execute law or policy already in existence."

The Supreme Court held that the initiatives proposed by Our Water and Protect Our Waters were beyond the scope of the initiative power because they were administrative in character, affirming the city council's decision to neither enact the initiatives or refer them to the ballot. Our Water and Protect Our Waters argued that the decision to fluoridate the public water supply was legislative because the decision was new, and consequently, the initiative to stop fluoridation was also new. In particular, they argued (and the dissenting opinion agreed) that the WACs regarding the public water supply did not require fluoridation, but only set fluoridation levels in the event that the decision was made to do so. The Court's majority concluded, however, that the decision to fluoridate was made pursuant to an existing water management plan and highly detailed state administrative regulations governing drinking water. As the Court stated, "these are not details of a new policy or plan indicative of a legislative act; these are modifications of a plan already adopted by the legislative body itself or some power superior to it." In addition, the Court noted that the decision to fluoridate was not "new"; it had been made approximately three years before the City authorized the initiative power to be used.

Perhaps the most notable portion of the opinion, however, was contained in a footnote at the conclusion of the opinion. The Court of Appeals, as an alternative grounds for rejecting the initiatives, relied on previous case law holding that powers which are granted directly to the legislative body of a city or county, rather than the corporate entity, are not subject to initiative or referendum. The Court of Appeals reasoned that because RCW 35A.11.020[1] granted city legislative bodies the power to operate water utilities, the initiatives were beyond the scope of the initiative power. However, the Supreme Court cautioned that the Court of Appeals opinion could be misunderstood. Because RCW 35A.11.080, authorizing noncharter code cities to adopt initiative and referendum powers, is located in the same chapter as RCW 35A.11.020, the Court reasoned that reading RCW 35A.11.020 expansively would render the initiative and referendum powers a nullity.

III. Conclusion. As stated above, the initiatives to stop fluoridation of the water supply were deemed to be administrative in character because they sought to interfere with an already-existing statutory and regulatory framework regarding drinking water. However, because of the Supreme Court's footnote, cities should not assume that every statute granting powers to the legislative body precludes an initiative on the subject. In particular, broad grants of power given to code cities under Chapter 35A.11 RCW should be invoked cautiously. For examples of statutes granting more specific powers to legislative bodies, see MRSC's "Initiative and Referendum Guide for Washington City and Charter Counties."

[1] RCW 35A.11.020 provides, "The legislative body of each code city shall have all powers [necessary for] operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns."