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CASE REPORT

INITIATIVE POWERS - AUTOMATED TRAFFIC SAFETY CAMERAS. City clerks have a mandatory legal duty to transmit initiative petitions to the county auditor for signature verification. However, a writ of mandamus will not compel a city clerk to transmit an initiative petition that exceeds the scope of the local initiative power. *Eyman v. McGehee*, No. 67908-2-I, Division I Court of Appeals (Feb. 19, 2013). Initiative petitions requiring advisory votes on the subject of traffic cameras are beyond the scope of the initiative power, and pre-election challenges to such initiatives do not violate petitioners' constitutional rights. *City of Longview v. Wallin*, Division II Court of Appeals No. 43385-1-II (April 30, 2013).

I. Facts. In September 2010, the City of Redmond adopted an ordinance establishing a system of automated traffic safety cameras in accordance with RCW 46.63.170, which authorizes cities to use such cameras. On September 6, 2011, Division I of the Washington State Court of Appeals decided *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427 (2011) holding that an initiative regarding automated traffic safety cameras was invalid and exceeded the scope of the local initiative power because the legislature granted to local legislative bodies, rather than the electorate, the exclusive power to legislate on the subject of such cameras. On September 14, 2011, about one week later, initiative sponsors, including Tim Eyman, filed an initiative petition regarding automated traffic safety cameras. The city clerk declined to transmit the petition to the county auditor for verification of its signatures. Eyman filed an action seeking a writ of mandamus to compel the city clerk to forward the signatures to the county auditor. The trial court held that the city clerk had a clear legal duty to transmit the petition pursuant to RCW 35A.01.040 and RCW 35A.29.170. However, the trial court declined to issue Eyman's writ of mandamus compelling the city clerk to transmit the petition because writs will not be issued to compel "vain and useless" acts. The trial court concluded that because the petition was invalid, as already determined in *American Traffic Solutions*, the writ would not be issued.

II. Applicable Law and Analysis. The Court of Appeals upheld the trial court's decision. RCW 35A.29.170 provides that the city clerk "shall transmit the [initiative] petition to the county auditor who shall determine the sufficiency of the petition under the rules set forth in RCW 35A.01.040." RCW 35A.29.170 also provides that all initiative and referendum petitions "authorized to be filed under the provisions of this title" must be in substantial compliance with certain criteria related to its form and content. RCW 35A.01.040 mandates that "[w]ithin three working days after the filing a petition, the officer with whom the petition is filed shall transmit the petition to the county auditor for petitions signed by registered voters, or to the county assessor for petitions signed by property owners for determination of sufficiency."

The city clerk argued that Eyman's petition was not "authorized to be filed" under the provisions of Title 35A because it exceeded the scope of the local initiative power, as had been previously declared by the Court of Appeals only one week prior to the petition's filing. Consequently, the city clerk concluded that the petition need not be transmitted to the county auditor. However, the Court of Appeals disagreed and concluded that the relevant statutes used the word "shall," creating a mandatory duty to transmit the petitions. In addition, the court determined that it was not within the clerk's function to interpret whether a proposed initiative is authorized or not. Rather, such determinations are an exclusively judicial function.

Nevertheless, the Court agreed that the trial court properly denied Eyman's requested writ of mandamus, ruling it was a vain and useless act. A writ of mandamus is appropriate to compel the performance of an act which the law especially enjoins as a duty resulting from an office. However, mandamus "does not lie to compel the doing of a vain and useless thing." Because previous court decisions held that automated traffic safety cameras are an improper subject for initiative, the court declined to order transmission of the initiative petition because it would have been a useless act.

III. Conclusion. After receiving an initiative petition, city clerks should transmit the petition to the county auditor for a determination of sufficiency. In this case, a court decision already existed holding that a nearly identical initiative petition was invalid. However, in most cases, such a decision will not be available to ensure that if the city clerk declines to transmit the petition, a writ of mandamus will not be issued.

In addition to this case, Division I of the Court of Appeals also recently decided *City of Monroe v. Washington Campaign for Liberty*, No. 68473-6-I (Feb. 25, 2013) (unpublished). There, the City of Monroe received a similar initiative petition regarding automated traffic safety cameras, but it also contained a unique provision requiring an advisory vote on the use of traffic cameras. The city clerk in Monroe transmitted the petition to the county auditor for a determination of sufficiency, but the city council passed a resolution declining to enact the initiative's provisions or place it on the ballot. The City subsequently filed a declaratory judgment action, seeking a declaration that the initiative was invalid in its entirety. Seeds of Liberty, a petition sponsor, filed a special motion to strike the City's complaint under the anti-SLAPP statute.

When a special motion to strike a lawsuit is made according to the anti-SLAPP statute, the moving party must initially show that the claim is based upon an action involving public participation and petition. If the moving party satisfies this initial inquiry, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. The trial court determined that while the majority of the initiative petition was clearly invalid, it severed the section requiring an advisory vote on the subject of traffic cameras, determining the section was valid, and imposed mandatory penalties and attorney fees under the anti-SLAPP statute. The City appealed and argued both that the advisory vote section could not be severed and that declaratory judgment actions seeking to determine the validity of an initiative petition are not actions subject to SLAPP. The Court of Appeals unfortunately declined to address whether declaratory judgment actions seeking to determine the validity of an initiative petition are subject to the anti-SLAPP statute. Instead, the Court simply held that the City met

its burden of establishing a probability of prevailing on its claim because previous cases held that the entire subject matter of automated traffic safety cameras was beyond the scope of the initiative power. The Court concluded that requiring an advisory vote on any ordinance authorizing the use of traffic cameras impermissibly modified and restricted a city legislative body's authority on a subject that was reserved exclusively for its legislation.

Finally, Division II of the Court of Appeals decided *City of Longview v. Wallin*, No. 43385-1-II as a published case on April 30, 2013. This case was similar to the City of Monroe's case in that the initiative petition contained a provision requiring an advisory vote on the use of traffic cameras. There, the City of Longview filed a declaratory judgment action seeking a declaration that the initiative was invalid *before* the county auditor determined that there were sufficient signatures to place the initiative on the ballot. Mr. Wallin also filed a special motion to strike the City's complaint under the anti-SLAPP statute and further alleged that the action was not ripe for review. When the trial court granted the City's motion for summary judgment except for the portion of the initiative mandating an advisory vote (as occurred in Monroe's case), the City moved for reconsideration and Mr. Wallin filed a *second* motion to strike.

Division II took the same approach as Division I in the Monroe case, finding that the City had established its likelihood of success on the merits because the entire subject of traffic cameras was beyond the scope of the initiative power. Thus, Division II also declined to address whether declaratory judgment actions brought for the purpose of pre-election review were generally not subject to the anti-SLAPP statute. However, the court helpfully rejected Mr. Wallin's argument that the City's lawsuit was not ripe because, at the time the City filed its lawsuit, the initiative sponsors had already submitted over 3,000 voter signatures, well beyond the number required to place the initiative on the ballot. Consequently, the court determined that the "mature seeds of a dispute" had arisen. In addition, the court rejected Mr. Wallin's arguments that the City's lawsuit violated his constitutional rights to free speech and to petition the government, concluding (a) the initiative power in cities is statutorily based and is not guaranteed by the Washington constitution such that "local powers of initiative do not receive the same vigilant protection" as statewide initiatives, and (b) there is no First Amendment right to have any initiative, regardless of whether it is outside the scope of the initiative power, placed on the ballot.

If you have any questions regarding initiative petitions, please do not hesitate to contact your city attorney.