IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, a Washington municipal corporation, Respondent, v. OUR WATER-OUR CHOICE!, a Washington political action committee; LYNN WARBER, campaign chair of OUR WATER-OUR CHOICE!; PROTECT OUR WATERS, a Washington political action committee; and ANN MATHEWSON, Treasurer of PROTECT OUR WATERS, Petitioners, v. WASHINGTON DENTAL SERVICE FOUNDATION, LLC, a Washington limited liability company, A Party in Interest.	)	No. 82225-5 En Banc
OUR WATER-OUR CHOICE, PAC, and PROTECT OUR WATERS, PAC, Petitioners, v.	)	Filed September 23, 2010

PORT ANGELES CITY CLERK, and)
CITY OF PORT ANGELES,)
)
Respondents.)
)

CHAMBERS, J. — Public drinking water quality is highly regulated by the United States and Washington State governments. Extensive regulations dictate what may and may not appear in the water. But public drinking water is also, intrinsically, a matter of local concern and in this state is largely provided at the local level by municipalities and local water districts.

The city of Port Angeles operates a municipal water system. In 2003, the Port Angeles City Council voted to fluoridate its city's water supply. In 2006, the petitioners before us sought to repeal that decision through two initiatives. The city and the Washington Dental Service Foundation (Foundation) (which funded the fluoridation system) contend the initiatives are beyond the scope of the local initiative power because, among other things, the subject matter of the initiatives is administrative in nature. We agree and affirm the Court of Appeals on somewhat different grounds.

FACTUAL BACKGROUND

The city of Port Angeles, a noncharter code city, has been running its own municipal water system since 1924. Around 2000, the board of commissioners of the nearby Olympic Medical Center suggested that the city fluoridate its water supply. Two years later, "[a] coalition of medical, dental, and health care professionals" followed up on the suggestion by approaching the utility advisory

committee, encouraging it to consider fluoridation. Wash. Dental Serv. Found. Clerk's Papers at 237. Around that time, the Foundation offered a grant to the city to build a fluoridation system. On February 18, 2003, after some study, the city council held a very long public meeting on the subject and passed a motion approving fluoridation of the water system.

On March 1, 2005, the city council approved a contract with the Foundation. Under that contract, the Foundation agreed to pay for the design, construction, and installation of a fluoridation system and transfer it to the city. The city agreed to fluoridate the public water supply for at least 10 years and to reimburse the Foundation its costs (up to $433,000) if it failed to do so. On May 18, 2005, the system was completed and transferred to the city. The next year, and apparently for the first time, the city council amended the city code to allow for citizen initiatives and referendums under RCW 35A.11.080-.100. Port Angeles Municipal Code (PAMC) 1.14.010 (codifying Ordinance 3252 (July 14, 2006)).

Some residents resisted the move to fluoridate. One group sued on environmental grounds and lost. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 227, 151 P.3d 1079 (2007). On September 8 and 12, 2006, two months after the city council amended the municipal code to allow for initiatives and referendums, Our Water—Our Choice (OWOC) and Protect Our Waters (POW) filed separate initiatives seeking to stop fluoridation of Port Angeles's public waters. OWOC's initiative, 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. Appellant's Clerk's Papers (ACP)

at 11. That initiative would make it unlawful 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." *Id*. POW's initiative, the "Water Additives Safety Act," would make it a crime to "add any substance to a public drinking water supply with the intent to treat or affect the physical or mental functions of the body of any person or which is intended to act as a medication for humans," with exceptions for "substances which are added to treat water to make water safe or potable" and substances approved by the Food and Drug Administration (FDA) for use in public water systems. *Id.* at 13.[1] The initiative also would require the manufacturer, producer, or supplier of any additives to provide a "certificate of independent analysis" showing purity with each shipment. *Id*.

The city council declined to either enact the initiatives or refer them to the ballot. Instead, the council sought declaratory judgment that the initiatives were beyond the scope of the local initiative power because they concerned administrative matters; because the Washington State Legislature had vested the responsibility to run the water system to the council, not the city; and because the initiatives were substantively invalid. The Foundation intervened on behalf of the city. The initiative sponsors filed for a writ of mandamus directing the city clerk to

[1] The FDA exception is essentially meaningless since the Environmental Protection Agency, not the FDA, regulates public drinking water systems. *See* Food & Drug Admin., U.S. Dep't of Health & Human Servs., Memorandum of Understanding Between the Environmental Protection Agency and the Food and Drug Administration, MOU 225-79-2001 (June 22, 1979), *available at* http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm116216.htm.

forward the petitions to the county auditor for validation, among other things. The parties agreed to allow the auditor to count the signatures, and the auditor found that enough had been gathered to qualify the initiatives for the ballot. The trial court consolidated the cases and found for the city on all issues. After this court declined direct review, the Court of Appeals affirmed. *City of Port Angeles v. Our Water-Our Choice,* 145 Wn. App. 869, 188 P.3d 533 (2008). The challengers again petitioned this court for review, which we granted. 165 Wn.2d 1053, 208 P.3d 556 (2009).

ANALYSIS

We must decide whether these initiatives are beyond the scope of local initiative power and therefore are subject to preelection attack. These are questions of law and our review is de novo. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 172, 149 P.3d 616 (2006) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)). Generally, judicial preelection review of initiatives and referendums is disfavored. *Coppernoll v. Reed*, 155 Wn.2d 290, 301, 119 P.3d 318 (2005). However, courts will review local initiatives and referendums to determine, notably, whether "the proposed law is beyond the scope of the initiative power." *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980) (citing *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976)).

A. The Scope of Local Initiative Power

With Amendment 7 to the Washington Constitution, the people secured for themselves the right to legislate directly. Wash. Const. art. II, § 1; *Ruano v.*

Spellman, 81 Wn.2d 820, 823, 505 P.2d 447 (1973). However, Amendment 7 does not apply to municipal governments, which under our constitution are not fully sovereign. Wash. Const. art. II, § 1; *1000 Friends*, 159 Wn.2d at 167; *Lauterbach v. City of Centralia*, 49 Wn.2d 550, 554, 304 P.2d 656 (1956) ("A municipal corporation is a body politic established by law as an agency of the state—partly to assist in the civil government of the county, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district" (citing *Columbia Irrigation Dist. v. Benton County*, 149 Wash. 234, 235, 270 P. 813 (1928))). While our constitution does not extend the initiative and referendum power to cities, our legislature has authorized, but has not required, noncharter code cities like Port Angeles to enact enabling legislation authorizing referendums and initiatives. RCW 35A.11.080.[2] But neither article II, section 1 nor RCW 35A.11.080 encompasses the power to *administer* the law, and administrative matters, particularly local administrative matters, are not subject to initiative or referendum. *Ruano*, 81 Wn.2d at 823 (citing *Ford v. Logan,* 79 Wn.2d 147, 154, 483 P.2d 1247 (1971)).

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[2] The qualified electors or legislative body of a noncharter code city may provide for the exercise in their city of the powers of initiative and referendum, upon electing so to do in the manner provided for changing the classification of a city or town in RCW 35A.02.020, 35A.02.025, 35A.02.030, and 35A.02.035, as now or hereafter amended.

The exercise of such powers may be restricted or abandoned upon electing so to do in the manner provided for abandoning the plan of government of a noncharter code city in RCW 35A.06.030, 35A.06.040, 35A.06.050, and 35A.06.060, as now or hereafter amended.

RCW 35A.11.080.

B. Water Quality Regulation Background

The United States Safe Drinking Water Act (SWDA), Pub. L. No. 93- 523, § 2(a), 88 Stat. 1660, 1661 (1974), regulates all drinking water systems in the United States. States are permitted to provide greater protection than the minimums established by the SDWA. 42 U.S.C. § 300g-2(a)(1). 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).[3] 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. Mostly these chemicals are used to "treat water and make it safe, palatable and aesthetically acceptable." ACP at 207 (decl. Clallam County Health Officer). Fluoride is one of the permitted chemicals. WAC 246-290-460.

[3]That statute currently provides in part:

> (2) In order to protect public health, the state board of health shall:
> (a) Adopt rules for group A public water systems, as defined in RCW 70.119A.020, necessary to assure safe and reliable public drinking water and to protect the public health. Such rules shall establish requirements regarding:
> (i) The design and construction of public water system facilities, including proper sizing of pipes and storage for the number and type of customers;
> (ii) Drinking water quality standards, monitoring requirements, and laboratory certification requirements;
> (iii) Public water system management and reporting requirements;
> (iv) Public water system planning and emergency response requirements.

RCW 43.20.050.

While class A municipal water suppliers like Port Angeles are not required to fluoridate, if they choose to, the rule sets quantities and monitoring required. WAC 246-290-020 through -460.

Port Angeles has operated its own municipal water system for nearly 100 years, and its own municipal code includes a fairly detailed regulatory scheme. Ch. 13.24 through .48 PAMC (regulating public water system). It appears that the city has not incorporated a water and sewer district to manage city waters. There is no mention of it in the city code. *See also* Mun. Research Servs. Ctr. of Wash., Washington Water and Sewer Districts Listed by County, http://www.mrsc.org/Subjects/governance/spd/SPD-WatSew.aspx (last visited Sept. 16, 2010) (listing water districts). If it had, it is unlikely this case would have come before us. The legislature has explicitly vested the power to decide whether or not to fluoridate in the board of commissioners of a water district. RCW 57.08.012. 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. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health,* 151 Wn.2d 428, 434, 90 P.3d 37 (2004).

C. Administrative vs. Legislative Action

Municipal legislative bodies regularly perform both legislative and administrative functions. The trial court found that these initiatives were administrative in nature and thus not the proper subject for initiatives. *See Ruano,* 81 Wn.2d at 823. 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. *Id.* at 823-24; *Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984). Discerning whether a proposed initiative is administrative or legislative in nature can be difficult. Justice Brachtenbach suggested that at least for the case before the court at the time, the appropriate question was "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." *Ruano,* 81 Wn.2d at 823 (citing *People v. City of Centralia,* 1 Ill. App. 2d 228, 117 N.E.2d 410 (1953)).

Ruano concerned the King County stadium. After the county council had voted to build it and the bonds had been sold to finance it, an initiative was filed to prevent construction. *Id.* at 822, 825. Noting that the original ordinance authorizing the project was legislative in nature and that no referendum had been proposed to repeal it, the court found that the later initiative attacked only administrative decisions that were beyond the scope of the initiative power. *Id.* at 824-25.[4] Similarly, this court held that the Seattle City Council acted administratively, and thus was not subject to referendum, when it passed an ordinance changing the name of Empire Way to Martin Luther King Jr. Way. In a brief opinion, this court dismissed a proposed referendum[5] repealing the name change as outside the scope

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[4] In *Ruano,* the court noted that voters of King County approved the construction of the stadium in 1968. *Ruano,* 81 Wn.2d at 821. The initiative to block the stadium was filed three years later. *Id.* at 822. That timing played some role in the court's analysis. *Id.* at 824-25. Because the right of initiative and referendum were not available in Port Angeles until mere months before appellants filed their initiatives, we do not reach the timeliness of their challenges.

[5] We apply the same analysis to challenges to local initiatives and referendums. *1000 Friends*, 159 Wn.2d at 185 n.10 (citing *State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 384, 387, 386, 494 P.2d 990 (1972)).

of the referendum power. After again acknowledging there were several ways of determining whether an action was legislative or administrative, we said:

> 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.
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> 5 E[ugene] McQuillin, [Municipal Corporations] § 16.55, at 194 [(3d rev. ed.)]; *Durocher v. King Cy.*, 80 Wn.2d 139, 152-53, 492 P.2d 547 (1972); *Ruano v. Spellman*, *supra* at 823.
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> . . . The name change ordinance merely amended Seattle's comprehensive street names ordinance. Therefore, the ordinance should be characterized as administrative, since it was enacted "[pursuant to] a plan already adopted by the legislative body itself . . ."

Heider, 100 Wn.2d at 876 (some alterations in original) (quoting *Citizens for Fin. Responsibility in Gov't v. City of Spokane,* 99 Wn.2d 339, 347, 662 P.2d 845 (1983)); *accord Leonard,* 87 Wn.2d at 850, 852 (finding the decision to rezone property was administrative and not subject to referendum).

D. Port Angeles's Fluoridation Plan

The city and the Foundation argue that the city council's decision to fluoridate the water was made pursuant to both the city's existing water management plan and detailed state administrative regulations governing water, and thus was as administrative as Seattle's decision to rename streets. Both courts below agreed.

OWOC and POW respond by arguing that the initiatives are essentially legislative because the decision to fluoridate was new.[6] We need not decide

whether that in itself is sufficient to show that a plan was administrative or legislative because the record does not support the contention that the fluoridation plan was new at the time the initiatives were filed. The initiatives were filed three and one-half years after the city council approved fluoridating and one and one-half years after the city council entered into a contract to build and install the system.

OWOC and POW also cite to a California case that found the decision to fluoridate was intrinsically legislative. *Hughes v. City of Lincoln,* 232 Cal. App. 2d 741, 747, 43 Cal. Rptr. 306 (1965) ("Intrinsically therefore, as well as in its police power origin, the decision to fluoridate is legislative rather than administrative."). But they make no attempt to show that the 1965 California Court of Appeals made that decision against a substantially similar statutory and regulatory scheme that exists in Washington today. As described above, water quality in the United States, and in Washington State specifically, is highly regulated. The Department 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). There is a finding in a related case that Port Angeles's decision to fluoridate the water was made pursuant to the Department of Health's program. *Clallam County Citizens,* 137 Wn. App. at 220. POW and OWOC have not shown that the California system was similar to our own such that *Hughes* is helpful.

[6] 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 a finding. The factual predicate for this argument is not provided by the record before us, and we do not reach it.

OWOC and POW also contend that the court should only consider the "fundamental and overriding purpose" of the initiatives in determining whether they are administrative or legislative, relying on *Coppernoll,* 155 Wn.2d at 302. Their reliance on *Coppernoll* is not well taken. As we explained in *Futurewise*, "[i]f an initiative otherwise meets procedural requirements, *is legislative in nature*, and its 'fundamental and overriding purpose' is within the State's broad power to enact, it is not subject to preelection review." *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007) (emphasis added) (quoting *Coppernoll,* 155 Wn.2d at 302-03). *Coppernoll* concerned a largely substantive preelection challenge to a statewide initiative that would have, among other things, restricted noneconomic damages in medical malpractice action to $350,000 per claimant. *Coppernoll,* 155 Wn.2d at 293-95. *Coppernoll* did not hold (or even consider, given the questions that were presented) that court review of whether a local initiative was administrative or legislative was limited to the "fundamental and overriding purpose" of an initiative. Instead, it assumed the subject matter was legislative in nature and the court used the term "fundamental and overriding purpose" as a razor to cut away untimely substantive constitutional challenges to the statewide initiative's validity. *Id.* at 303.

We agree with the city and the Foundation that these initiatives are administrative in nature. They explicitly seek to administer the details of the city's existing water system. The legislature gave the Department of Health the authority and responsibility to set maximum contaminant levels in drinking water based on the best available scientific information, which it has done. RCW 70.142.010; chs. 246-290 through -296 WAC. Only local health departments of counties with at least

125,000 in population may set stricter standards, again, based on the best available scientific information. RCW 70.142.040. The Medical Independence Act explicitly seeks to interfere with this existing system by limiting the amount of fluoride in the public water system. Similarly, the Water Additives Safety Act states, among other things, that "it is prohibited to add to a public water supply any substance which is contaminated with filth," with "contaminated with filth" defined as "a term applicable to contaminants taken singly or as a group which are present in a product intended to be added to drinking water and which are present in quantities which would, when dispensed at the manufacturer's Maximum Use Level, allow the final consumer-ready product to exceed for one or more contaminants the Maximum Contaminant Level Goals ('MCLGs') as published by the U.S. Environmental Protection Agency." ACP at 13. This directly impacts existing water regulations promulgated by state and federal agencies. The water additives initiative also seeks to set limits on the amount of fluoride that can be present in the water and imports testing and documentation standards from health regulations governing pharmaceuticals into the public water regime. *Id.* (citing WAC 246-895-070(9)). 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,'" indicative of an administrative act. *Heider*, 100 Wn.2d at 876 (internal quotation marks omitted) (quoting *Citizens for Fin. Responsibility in Gov't,* 99 Wn.2d at 347).[7]

[7] The Court of Appeals struck the initiatives on the alternative grounds that the state legislature intended the city's legislative body, rather than the city as a whole, to manage its water system. While we do not reach this issue, we note that there may be language in the opinion below that

CONCLUSION

We hold that the initiatives before us are administrative in nature in that they attempt to interfere with and effectively reverse the implementation of Port

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could be misunderstood. The Court of Appeals began its analysis by quoting a statutory general grant of power to code city legislative bodies:

> The trial court correctly determined that the initiative power does not extend to regulating public water systems because the legislature granted city legislative bodies the power to operate water utilities. See RCW 35A.11.020 ("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.").

145 Wn. App. at 880-81. While the citation is correct, read out of context, it could have unintended consequences. Given that the same chapter of the RCW specifically authorizes noncharter code cities to "provide for the exercise . . . of the powers of initiative and referendum upon electing to do so," RCW 35A.11.080, reading RCW 35A.11.020 expansively strains the statutory fabric. In our view, RCW 35A.11.020 grants code cities broad, though specific, powers notwithstanding "Dillon's Rule" (which limits municipal powers to those specifically granted or necessarily implied) and does not necessarily speak to whether the state legislature intended to grant those powers only to its municipal counterpart. *See* Michael Monroe Kellogg Sebree, Comment*, One Century of Constitutional Home Rule: A Progress Report?*, 64 Wash. L. Rev. 155, 158 (1989) (limiting local governments to "those powers expressly conferred by state constitutional provisions, state statutes, and, where applicable, the home rule charter; those powers necessarily or fairly implied in, or incident to, the powers expressly granted; and those powers essential to the declared objects and purposes of the municipality or quasi-corporation" (citing 1 John F. Dillon, Commentaries on The Law of Municipal Corporations § 237, at 448-50 (5th ed. 1911))). Otherwise, RCW 35A.11.080 is largely a nullity. *See 1000 Friends*, 159 Wn.2d at 182 (we look to the entirety of the statutory scheme to determine whether local initiatives and referendums are consistent). Second, again, the state legislature charged the Department of Health with the power and responsibility to regulate the health and safety of drinking water, and the department has promulgated regulations. RCW 43.20.050(2)(a). The department has responded with detailed regulations. Ch. 246-290 WAC. The task of complying with detailed regulations is generally inconsistent with a general grant of authority to the municipal corporate body to make these decisions. *See generally 1000 Friends*, 159 Wn.2d 165.

We respectfully disagree with our dissenting colleagues that reaching this issue is "essential to the analysis." Dissent at 7. We agree that some words are appropriate. However, whether the state legislature has delegated to the local legislative body, or the local corporate body, the power and responsibility to act is a completely separate question than whether a particular ordinance promulgates new policy, or implements existing policy.

Angeles's water fluoridation program first adopted in 2003 and further implemented in 2005 pursuant to an existing city regulatory system and a regulatory system established by the Washington State Legislature and the Department of Health. We do not reach whether the legislature vested the authority to operate the water system to the city legislative body as opposed to the city as a corporate whole or whether these initiatives are substantively invalid.

We grant the respondents' motion to strike[8] and deny all other motions. We affirm the courts below.

[8]The respondents move to strike large portions of both the amicus brief filed in support of the petitioners and the petitioners' answer to that amicus brief as beyond the scope of review. These motions are granted. The petitioners' supporting amicus also seeks belated leave to file its brief on behalf of several entities that either did not seek or were denied leave to file an amicus brief in this case. The motion is denied. The respondents have moved for sanctions under RAP 18.9(a) against the amicus's attorney for disregarding the order granting permission to file. While sanctions may be authorized, we do not feel they are warranted. The petitioners seek to strike the restatement of issues presented in the respondents' supplemental brief. The motion is denied. The petitioners also ask this court to make a finding of fact that more than one water system serves Port Angeles. But while there is evidence in the record supporting this, the trial court declined to make such a holding. The petitioners have given us no reason to disturb the trial court's judgment on this matter.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Susan Owens

Justice Charles W. Johnson

Justice Debra L. Stephens