

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MUKILTEO CITIZENS FOR SIMPLE )  
GOVERNMENT, an unincorporated ) No. 84921-8  
association of Mukilteo residents, )  
 )  
Appellants, )  
 )  
v. ) En Banc  
 )  
CITY OF MUKILTEO, a Washington )  
municipal corporation; CHRISTINE )  
BOUGHMAN, in her official capacity as )  
City Clerk for the City of Mukilteo; )  
SNOHOMISH COUNTY, a political )  
subdivision of the State of Washington; )  
CAROLYN WEIKEL, in her official )  
capacity as Snohomish County Auditor, )  
 )  
Respondents, ) Filed March 8, 2012  
 )  
NICHOLAS SHERWOOD; ALEX RION; )  
and TIM EYMAN, )  
 )  
Respondents/Intervenors. )  
\_\_\_\_\_ )

MADSEN, C.J.—This case involves a preelection challenge to an initiative measure, Proposition 1, which repealed an ordinance governing the use of automated

traffic safety cameras in the city of Mukilteo. The trial court declined to grant an injunction, and Proposition 1 was placed on the November 2, 2010, Snohomish County general election ballot.

We hold that because the legislature expressly granted authority to the governing body of the city of Mukilteo to enact ordinances on the use of automated traffic safety cameras, the subject matter of Proposition 1 is not within the initiative power.

#### FACTS

Mukilteo is a noncharter code city that operates under Title 35A RCW. The city has adopted the code city initiative and referendum power provided under RCW 35A.11.080-.100. Mukilteo Municipal Code (MMC) 1.14.010; *see* Clerk's Papers (CP) at 42. Under RCW 35A.11.100, the powers of initiative and referendum in noncharter code cities are to be exercised as set forth in RCW 35.17.240-.360.

In 2005, the Washington State Legislature authorized local governments to enact ordinances that allow the use of automated traffic safety cameras to issue notices of traffic infractions. Former RCW 46.63.170 (2005). On May 17, 2010, the city of Mukilteo enacted Ordinance 1246, authorizing and setting forth the guidelines for use of automated traffic safety cameras. On the same day, the city council authorized the mayor to enter into a contract with American Traffic Solutions to supply the city with automated traffic cameras.

In June 2010, a petition for Mukilteo Initiative 2 was commenced. Shortly thereafter, residents of the city of Mukilteo submitted Initiative 2 to the Mukilteo city

clerk for inclusion on the ballot. Initiative 2 forbade the city of Mukilteo from installing an automated traffic safety camera system unless approved by two-thirds of the voters, limited the amount of fines that could be imposed for infractions arising from camera surveillance, and repealed the existing ordinance allowing automated traffic safety cameras. Initiative 2 also provided that any new automated traffic safety ordinance had to be put on the ballot for an advisory vote. The petition's proposed ballot title was Mukilteo Initiative 2.

On June 21, 2010, the Mukilteo City Council rescinded its authorization for the mayor to enter into a contract on behalf of the city with American Traffic Solutions. At a July 19, 2010 meeting, the Mukilteo City Council approved Resolution 2010-22, which directed the Mukilteo city clerk to provide the Snohomish County auditor with a certified copy of the resolution and asked the auditor to place Initiative 2 on the November 2, 2010, city ballot. The resolution included a recital that states "the City Council desires to hear from the qualified electorate on the issues addressed in the Initiative Petition, regardless of whether the subject matter is subject to the initiative process." CP at 84.

After the July 19, 2010 meeting, the Mukilteo Citizens for Simple Government (MCSG), an unincorporated association of Mukilteo residents, filed a complaint in Snohomish County Superior Court against the city of Mukilteo, the city clerk, Snohomish County, and the county auditor seeking a declaration that an initiative was beyond the scope of the local initiative powers and an injunction preventing the inclusion of the measure on the ballot. The initiative's sponsors were permitted to intervene in the action.

The superior court ruled that the challenge to the initiative was premature and denied the motion for injunction. Mukilteo Citizens filed a notice of direct appeal of the court's ruling and an emergency motion for accelerated review. We declined accelerated review but granted the request for direct review.

In the meantime, Initiative 2 was placed on the November 2010 city of Mukilteo ballot as Proposition 1.<sup>1</sup> The measure passed with a 70.71 percent favorable vote.<sup>2</sup> On April 25, 2011, the Mukilteo City Council adopted Ordinance 1275, repealing Ordinance 1246 (chapter 10.05 MMC).<sup>3</sup> The council enacted chapter 10.06 MMC, which revoked authorization for the use of automated traffic safety cameras in Mukilteo.

#### ANALYSIS

As a threshold issue, we are asked to decide whether MCSG has standing to challenge the validity of this ballot measure. “An organization ‘has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’” *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 595, 192 P.3d 306 (2008) (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)). MCSG’s members have standing to sue in their own right as it consists of Mukilteo residents who

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<sup>1</sup> *Snohomish County Local Voters’ Pamphlet, General Election* (Nov. 2, 2010).

<sup>2</sup> Snohomish County General Election Results, available at <http://www.co.snohomish.wa.us/auditor/Elections/1110Final/ecurrent-1110.htm>.

<sup>3</sup> Mukilteo Ordinance 1275.

are eligible to vote. The interest MCSG seeks to protect (use of red-light cameras) is germane to a stated organizational purpose (public safety), and the relief requested (invalidation of Proposition 1) does not require the participation of individual members. Accordingly, we hold MCSG has standing to bring this challenge.

Several of the arguments raised in this case turn on whether Proposition 1 was an initiative or an advisory vote. MCSG contends that Proposition 1 was an invalid initiative, while the city of Mukilteo argues it was an advisory vote. An initiative is direct legislation by the people, while an advisory vote is a nonbinding poll of the citizen population. *See* RCW 35.17.260; RCW 29A.72.290. RCW 35.17.260 establishes rules governing initiatives that, when satisfied, require a city to either pass the proposed ordinance without alteration or submit the proposed ordinance to the registered voters. There are no statutory or constitutional provisions imposing a duty on a city council to call for an “advisory” vote.

To discern the nature of Proposition 1 we begin with the language of the measure. The petition that was submitted to the Mukilteo City Council stated: “We, the undersigned voters of Mukilteo, require that, unless passed by the City Council, this ordinance Mukilteo Initiative No. 2—be submitted to a vote of the registered voters of the City of Mukilteo, subject to the requirements of *RCW 35.17.260*.” CP at 82 (emphasis added). RCW 35.17.260 is, as mentioned, the statute governing requirements for submission of a local initiative. Under this statute, a city council has only two options when an initiative petition is submitted to it; either enact the measure as an ordinance or

submit it to the voters to determine whether to enact the measure. The statute provides no other course. By invoking the statute, the petitioners called for enactment of the measure as an initiative.

Initiative 2 would add a new chapter to the municipal code to be “ENACTED BY THE PEOPLE OF THE CITY OF MUKILTEO” (“[a] new chapter 10.06 is *hereby added to the Mukilteo Municipal Code*”). CP at 82 (emphasis added). Mukilteo Initiative 2 expressly sets out the language of a proposed new ordinance and unquestionably contemplates a vote of the people to enact it by initiative. The measure submitted to the council establishes procedural bars for the council to hurdle, should it wish to enact another ordinance allowing camera tickets, and provides for the repeal of Ordinance 1246.

Upon receipt of Initiative 2, the city council proceeded in accord with procedures for submitting an initiative to the voters. The city council passed Resolution 2010-22, which stated that the council had been presented with an “Initiative Petition requesting enactment of an ordinance to prohibit use of automated traffic safety cameras,” and resolved: “Pursuant to RCW 35.17.260,” the council requests the Snohomish county auditor “to place upon the general election ballot . . . a proposition for the purpose of submitting to the qualified electors . . . whether or not to enact an *initiative ordinance*.” CP at 84-85 (emphasis added). The city council explicitly stated that Proposition 1 was an initiative and directed the Snohomish County auditor to place the proposition on the ballot pursuant to RCW 35.17.260.

Proposition 1 included a ballot title and explanatory statement mirroring the language of Mukilteo Initiative 2. It required the Mukilteo City Council to repeal Ordinance 1246 and restricted the council’s ability to act with respect to future ordinances governing automated traffic safety cameras. Proposition 1’s ballot title states:

Mukilteo Initiative No. 2 concerns automatic ticketing machines. This measure would prohibit Mukilteo from using camera surveillance to impose fines unless two-thirds of the Council and a majority of the voters approve, limit fines, repeal Ordinance 1246 allowing the machines, and mandate an advisory vote.

Should this measure be enacted into law?

*Snohomish County Local Voters’ Pamphlet, General Election (Nov. 2, 2010).*

As it appeared in the official *Snohomish County Local Voters’ Pamphlet*, Proposition 1 also complied with the procedural requirements for initiatives. RCW 29A.72.050(2) provides a ballot title form that local initiatives are to follow:<sup>4</sup>

For an initiative to the people, or for an initiative to the legislature for which the legislature has not proposed an alternative, the ballot title must be displayed on the ballot substantially as follows:

Initiative Measure No. . . . concerns (statement of subject). This measure would (concise description). Should this measure be enacted into law?

- Yes . . . . .
- No . . . . .

As required by the statute, Proposition 1’s title contains (1) the initiative measure number—“Mukilteo Initiative No. 2,” (2) the word “concerns” is followed by a statement

<sup>4</sup> Pursuant to RCW 29A.36.071(1), in a ballot title for a local measure, including referenda and any other question submitted to the voters, “[t]he ballot title must conform with the requirements and be displayed substantially as provided under RCW 29A.72.050.”

of the subject matter, i.e., “concerns automatic ticketing machines,” (3) the concise description of the measure is provided, i.e., “This measure would prohibit Mukilteo from using camera surveillance to impose fines unless two-thirds of the Council and a majority of the voters approve, limit fines, repeal Ordinance 1246 allowing the machines, and mandate an advisory vote,” and (4) it contains a proper “yes or no” question, i.e., “Should this measure be enacted into law?” Because Proposition 1’s ballot title contained all of the elements spelled out in RCW 29A.72.050(2), it appears to have followed the procedural requirements for initiatives. *Compare Snohomish County Local Voters’ Pamphlet, supra, with RCW 29A.72.050(2).*

The city, though, argues that Proposition 1 concerned only an advisory vote. This is unsupported in context. On the same ballot as Proposition 1 appeared, the very next item submitted to the voters was Proposition 2, a clear example of an advisory vote.<sup>5</sup> Proposition 2 was titled “Advisory Vote on South Mukilteo Annexation.” *Snohomish County Local Voters’ Pamphlet, General Election Sample Ballot* (Nov. 2, 2010).

Proposition 2 read as follows:

The Mukilteo City Council is considering annexation of the area commonly referred to as the South Mukilteo Annexation Area. This annexation would add approximately 11,000 residents and approximately double the City’s commercial acreage. What is your position on the proposed South Mukilteo Annexation?

*Id.* The proposition then asked the voters to indicate whether they supported, opposed, or had no opinion about annexation.

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<sup>5</sup> Mukilteo Proposition 2 was the ballot measure directly following Proposition 1 on the sample ballot.

When compared with Proposition 2, a clearly marked advisory vote, the city's contention that Proposition 1 was an advisory vote is unsupportable.

The interveners attempt to reframe the issue as one in which the city was simply soliciting input from the electorate. The intervenors rely on one phrase found in Resolution 2010-22 for this argument.

[T]he City Council desires to hear from the qualified electorate on the issues addressed in the Initiative Petition, regardless of whether the subject matter is subject to the initiative process.

CP at 84; *see* Br. of Resp't's/Intervenors-Defs. at 11. This language, which is ambiguous at best, is insufficient to overcome the clear intent of the proponents to bind the city council or the plain language of Proposition 1 asking voters to enact law. In the alternative, the intervenors claim that "[w]hile the face on the initiative does not assert that it is an advisory vote, if the voters approve the measure it could be simply treated as one." Br. of Resp't's/Intervenors-Defs. at 12. This assertion is contrary to the statutes governing initiatives and advisory votes.

Finally, we reject the intervenors' contention that if the city chose not to consider Initiative 2 as advisory and instead treated it as enacting an ordinance, this would simply be an example of conditional legislation. As explained below, the initiative on its face would enact legislation that is beyond the scope of the initiative power, and calling it conditional legislation does not alter that fact.

We hold that Proposition 1 was historically, in substance, and procedurally an initiative.

Next, we consider whether the subject of safety camera tickets is beyond the scope of the initiative power. “An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself.” *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). “[A] grant of power to the city’s” legislative authority or legislative body “means exclusively the mayor and city council and not the electorate.” *Id.* at 265. When the legislature enacts a general law granting authority to the legislative body (or legislative authority) of a city, that legislative body’s authority is not subject to “repeal, amendment, or modification by the people through the initiative or referendum process.” *Id.*; see also *State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 382, 384, 494 P.2d 990 (1972); *Leonard v. City of Bothell*, 87 Wn.2d 847, 852-53, 557 P.2d 1306 (1976). We look to the language of the relevant statute to determine the scope of the authority granted from the legislature to the local governing body. See *Malkasian*, 157 Wn.2d at 262-63; *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011).

In RCW 46.63.170(1)(a), the legislature granted to local legislative bodies the exclusive power to legislate on the subject of the use and operation of automated traffic safety cameras: “The use of automated traffic safety cameras for issuance of notices of infraction is subject to the following requirements: (a) The appropriate local legislative authority must first enact an ordinance allowing for their use.” Also, automated traffic safety cameras may be used during the 2009-2011 fiscal biennium “if the local legislative

authority first enacts an ordinance authorizing the use.” RCW 46.63.170(1)(c). The legislature’s grant of authority does not extend to the electorate.

Proposition 1 attempted to expressly restrict the authority of Mukilteo’s legislative body to enact red light cameras by requiring a two-thirds vote of the electorate for approval and by limiting the amount of traffic fines. Because automated traffic safety cameras are not a proper subject for local initiative power, Proposition 1 is invalid because it is beyond the initiative power.<sup>6</sup>

### CONCLUSION

We hold that MCSG had standing to challenge Proposition 1. Additionally, we hold that Proposition 1 was historically, in substance, and procedurally an initiative.

Finally, we hold that Proposition 1 exceeds the scope of the initiative power because it

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<sup>6</sup> The dissent is correct that we may only reach the merits of a case if there is a “justiciable controversy” pursuant to chapter 7.24 RCW. *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994). Absent a “justiciable controversy” the issue is moot. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993). However, “[a]n issue is not moot if a court can provide any effective relief.” *Malkasian*, 157 Wn.2d at 259 (citing *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)). We have unmistakably held that a postelection subject matter challenge to an initiative falls within the definition of “justiciable controversy.” *Malkasian*, 157 Wn.2d at 261.

Even assuming mootness, this court adopted the following criteria to determine if a case, although moot, warrants review: “(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.” *Hart v. Dep’t of Soc. & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). There is also an “arguable” fourth factor: “the level of genuine adverseness and the quality of advocacy of the issues.” *Id.* All four factors demonstrate that review is warranted this case; this is a public dispute; an authoritative determination is desirable to provide future guidance to public officers; this issue is not only likely to recur, it is recurring (currently, the intervenors have active petitions on their website to challenge the adoption of red light cameras in the cities of Bellingham, Longview, Monroe, Redmond and Wenatchee. Washington State BanCams.com, <http://bancams.com/petition> (last visited Mar. 2, 2011); and this case has been adequately briefed and argued.

involves powers granted by the legislature to the governing bodies of cities; under RCW 46.63.170 only the city of Mukilteo is authorized to enact ordinances governing the use and operation of automated traffic safety cameras.

We reverse the trial court's order denying declaratory relief.

**AUTHOR:**

Chief Justice Barbara A. Madsen

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**WE CONCUR:**

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Justice Debra L. Stephens

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Justice Charles K. Wiggins

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Justice Susan Owens

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Justice Mary E. Fairhurst

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