Hon. Veronica A. Galván
With Oral Argument
November 3, 2017
10:00 am

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

PROTECT PUBLIC HEALTH and CITY OF SEATTLE, Plaintiffs, vs. JOSHUA FREED, IMPACTION, CITIZENS FOR A SAFE KING COUNTY, KING COUNTY, and JULIE WISE, in her official capacity, Defendants.	No. 17-2-21919-3 SEA CITY OF SEATTLE'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I. RELIEF REQUESTED

The City of Seattle (City) requests a ruling that King County Initiative 27 (I-27) is beyond the scope of the initiative power because 1) it seeks to exercise the County's budgeting authority which is vested solely in the County's "legislative authority," 2) it seeks to place controls on land use activities, a power granted exclusively to the legislative authorities of cities and counties, and 3) it purports to impose regulations county-wide in excess of the County's authority.

The City also requests an order enjoining King County Elections from placing any part of I-27 on the February 2018 ballot.

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II. STATEMENT OF FACTS.

In March 2016, King County Executive Dow Constantine, Seattle Mayor Ed Murray, Renton Mayor Denis Law and Auburn Mayor Nancy Backus convened the Heroin and Prescription Opiate Addiction Task Force ("Task Force"). The Task Force, co-chaired by the King County Department of Community and Human Services and Public Health – Seattle & King County, was charged with developing strategies to improve access to treatment and other supportive services for individuals experiencing opioid use disorder. Heroin and Prescription Opiate Addiction Task Force Final Report and Recommendations September 15, 2016 ("Task Force Report"), p. 1, (Declaration of Carlton W. M. Seu, filed Sept. 22, 2017 ("Seu Dec."), Ex. 2.

The City, through its participation in both the King County Board of Health ("Board of Health") and Public Health – Seattle & King County (the "Health Department"), has been an active participant in the Heroin and Prescription Opiate Addiction Task Force ("Task Force"). Seattle's representatives on the Board of Health voted in favor of the Task Force's final recommendation, which included the establishment of Community Health Engagement Locations (CHEL) sites.[1] The Task Force's recommendation included a pilot project under which the two CHEL sites would be established on a three-year provisional basis, one within Seattle, and the other outside the city.

On June 28, 2017, the King County Council passed King County Ordinance 18544 making various appropriations. Section 37 of that Ordinance appropriated $118,091,000 to King County's Mental Illness and Drug Dependency Fund of which $2,127,000 shall be expended solely for implementing the Heroin and Opiate Addiction Task Force Final Report and Recommendations, dated September 15, 2016. King County Ordinance 18544, Section 37 (Second Declaration of Carlton

[1] Seattle City Councilmembers Bagshaw and Juarez voted in favor of the recommendation. Councilmember Gonzalez was excused and was not present. See, http://www.kingcounty.gov/depts/health/board-of-health/proceedings/~/media/depts/health/board-of-health/documents/proceedings/2017-january-proceedings.ashx

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W. M. Seu ("2nd Seu Dec"), Ex. 5 at p. 20).

Section 37 also contained a spending restriction stating, "Of this appropriation, no funds shall be expended or encumbered to establish except in any city which chooses to establish such a location by vote of its elected governing body any community health engagement locations, as described in the Heroin and Opiate Addiction Task Force Final Report and Recommendations, dated September 15, 2016, presented by the heroin and opiate addiction task force to the King County executive and mayors of the cities of Auburn, Renton and Seattle." *Id.*

The City stands to benefit from the appropriation made by the King County Council. Section 37 of Ordinance 18544 clearly indicates an intent by the County Council that funding of the Task Force's recommendations, including the establishment of two pilot CHEL sites, is contemplated.

Moreover, Section 37's appropriation is made from King County's Mental Illness and Drug Dependency (MIDD) Fund. *Id.*; Declaration of Jeff Sakuma (Sakuma Dec.), ¶ ¶ 3-5. Pursuant to Seattle's Interlocal Agreement with King County concerning Seattle's participation and funding of the Public Health Department,[2] King County officials worked with Seattle's Human Services Department (HSD) to determine program goals, functions, and funding concerning the MIDD. Sakuma Dec., ¶ 6. In early 2017, HSD and King County discussed the funding of a CHEL site to be located in Seattle. While the precise cost of a CHEL site was unknown, it was estimated to be more than $1 million. Sakuma Dec. ¶ 7. If the City of Seattle were to continue to affirm its commitment to site a CHEL in the city, the City expects that MIDD dollars would become available to partially fund those efforts. Sakuma Dec., ¶ 8.

I-27, Section 1, amends the King County Code to prove a new section in Chapter 4A.650 that

[2] The 2011 Interlocal Agreement is attached to the [First] Declaration of Carlton W. M. Seu, Exhibit 1, filed on September 22, 2017.

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provides:

> A. No public funds may be spent on the registration, licensing, construction, acquisition, transfer, authorization, use, or operation of a supervised drug consumption site.
>
> B. For purposes of this section, "supervised drug consumption site" means any building, structure, site, facility, or program with a function of providing a space or area for the use, consumption, or injection of heroin or any other controlled substance listed in Schedule I by RCW 69.50.204, except for those substances which may be possessed in accordance with RCW 69.50.4013.
>
> C. Any person or class of persons may commence a civil action in King County superior court against the county for violating this section and, upon prevailing, may be awarded reasonable attorneys' fees and costs, such legal or equitable relief as may be appropriate to remedy the violation, and a civil penalty of up to five thousand dollars.

I-27, Section 1 (2nd Seu Dec., Ex. 6). Section 1 of I-27 is beyond the scope of the initiative power because it is a budgeting provision. Under Chapter 36.40 RCW, which governs county budgets, the power to enact county budgeting provisions is vested exclusively in a county's "legislative authority," meaning the County Council and its Executive.

Section 2 of I-27 amends King County Code Chapter 12.81 to create a new section that provides as follows:

> A. It is unlawful for any person to operate or maintain any building, structure, site, facility or program with a function of providing a space or area for the use, consumption, or injection of heroin or any other controlled substance listed in Schedule I by RCW 69.50.204, except for those substances which may be possessed in accordance with RCW 69.50.4013.
>
> B. Any person or class of persons may commence a civil action in King County superior court against the county or any other person violating this section and, upon prevailing, may be awarded reasonable attorneys' fees and costs, such legal or equitable relief as may be appropriate to remedy the violation, and a civil penalty of up to five thousand dollars."

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I-27, Section 2. Section 2 of I-27 seeks to control land use activities and is therefore a development regulation. Under the Growth Management Act, only the legislative authority of a county or city may impose development regulations.

I-27, therefore, is beyond the scope of the initiative power in its entirety.

III. STATEMENT OF ISSUES

A. Is Section 1 of I-27 beyond the scope of the initiative power because it seeks to impose a budgeting provision, which can only be done by a county's legislative authority?

B. Is Section 2 of I-27 beyond the scope of the initiative power because it seeks to impose a developmental regulation, which, under the Growth Management Act, can only be done by a county or city legislative authority and/or because the imposition of county-wide regulations exceeds the county's authority?

C. Should the Court keep I-27 off the ballot, even if only part of it is beyond the scope of the initiative power, because separate provisions of initiatives are not severable?

IV. EVIDENCE RELIED UPON

The City of Seattle relies on the following:

1. [First] Declaration of Carlton W. M. Seu, filed September 22, 2017, and Exhibits attached thereto; and

2. Second Declaration of Carlton W. M. Seu and Exhibits attached thereto; and

3. Declaration of Jeff Sakuma and Exhibit attached thereto.

V. AUTHORITY

A. The City has standing to bring its claims under the Uniform Declaratory Judgment Act.

The City has standing to bring its claims in this action under the Uniform Declaratory

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Judgment Act (UDJA), Chapter 7.24 RCW, because the City's rights, status or other legal relations will be affected should I-27 be placed on the ballot. The City has an interest:

1) in ensuring that the integrity of the initiative process is not compromised by the placing of an invalid measure on the ballot;

2) in direct monetary benefits the City will derive from the budgeting appropriation made by the King County Council to support the King County Board of Health's decision to locate one of two pilot CHEL sites within the city limits, which decision was supported by the City's members on the Board; and

3) in ensuring that its sole authority to make development regulations within the city limits is not usurped by voters from a different jurisdiction.

RCW 7.24.020 confers standing upon the City because of these interests. That section states:

> A person[3] interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Id.

Clearly, the City's interests confer standing to bring its claims.

B. The integrity of the initiative process should not be compromised by the placing of an invalid measure on the ballot.

In considering the City's challenge, "it is important to distinguish between statewide and local initiatives." *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 103, 369 P.3d 140 (2016). While the former is rooted in our State's Constitution, local initiatives,

[3] RCW 7.24.130 states, "The word 'person' wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever."

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like the County's, derive from statutes or charters. *See id.* at 104; *see also City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 8, 239 P.3d 589 (2010); *City of Longview v. Wallin*, 174 Wn. App. 763, 790, 301 P.3d 45 (2013).[4] As a result, courts are not hesitant to keep local initiatives that exceed the scope of authority off the ballot. *See, e.g.*, *Spokane Entrepreneurial* at 104-105 (citing cases).

While the City respects the right of citizens to engage in popular lawmaking, a substantial public interest exists in ensuring the integrity of the initiative process by only allowing valid initiatives to be placed on the ballot. Placing an invalid initiative (*i.e.*, one that is outside the scope of the initiative authority) undermines the integrity of the local initiative process and presents voters with a false choice. As the California Supreme Court said:

> Although real party in interest recites the principles of popular sovereignty which led to the establishment of the initiative and referendum in California, those principles do not disclose any value in putting before the people a measure which they have no power to enact. The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

AFL-CIO v. Eu, 686 P.2d 609, 615 (Cal. 1984). As explained below, because I-27 is outside the scope of the local initiative power, it should be stricken from the ballot.

C. Section 1 of I-27 is beyond the scope of the initiative power because it invades the power exclusively granted to a county's legislative authority to enact budgeting provisions.

The City's "rights, status or other legal relations" will be affected should I-27 be placed on the ballot because the City stands to lose direct monetary benefits that it is statutorily and contractually entitled to receive from King County; to wit, one-third of the approximately $1 million cost estimated for the Seattle CHEL site that King County has tacitly agreed to provide.

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[4] Likewise, while there may be First Amendment rights involved in circulating petitions and gathering signatures, no one has a "First Amendment right to have any initiative, regardless of whether it is outside the scope of the initiative power, placed on the ballot." *Wallin*, 174 Wn. App. at 792.

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The funding prohibition in Section 1 of I-27, which provides that "[n]o public funds may be spent on the registration, licensing, construction, acquisition, transfer, authorization, use, or operation of a supervised drug consumption site," is beyond the scope of the initiative power. This is because the funding prohibition is a budget measure, the enactment of which is reserved to the counties' "legislative authority." Powers reserved to a municipality's "legislative authority" are not subject to initiative or referendum.

Chapter 36.40 RCW concerns county budgets. Under that chapter, each year, "the county auditor or chief financial officer designated in a charter county shall prepare the county budget which shall set forth the complete financial program of the county for the ensuing fiscal year, showing the expenditure program and the sources of revenue by which it is to be financed." RCW 36.40.040. "The budget shall be submitted by the auditor or chief financial officer designated in a charter county to the board of county commissioners. . ." RCW 36.40.050.

RCW 36.40.060 provides that "[t]he county *legislative authority* shall then publish a notice stating that it has completed and placed on file its preliminary budget for the county for the ensuing fiscal year, . . ., and that it will meet on the first Monday in October thereafter for the purpose of fixing the final budget and making tax levies. . . ." *Id.* (Emphasis added).

RCW 36.40.080 provides, "Upon the conclusion of the budget hearing *the county legislative authority* shall fix and determine each item of the budget separately and shall by resolution adopt the budget as so finally determined and enter the same in detail in the official minutes of the board, a copy of which budget shall be forwarded to the state auditor." *Id.* (Emphasis added).

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Finally, RCW 36.40.100 provides that the appropriations in the budget can only be changed by "the board of county commissioners." Here, the King County Council is the equivalent of a board of county commissioners.[5]

Washington courts have consistently held that where state law gives a power to a municipality's "legislative authority" or "governing body," local direct legislation through initiative or referendum can neither usurp that function, nor hamper it, nor place any conditions or limits on the legislative body's exercise of that power. *City of Sequim v. Malkasian*, 157 Wn. 2d 251, 138 P.3d 943 (2006); *King County v. Taxpayers of King County*, 133 Wn.2d 584, 949 P.2d 1260 (1997); *Whatcom County v. Brisbane*, 125 Wn.2d 345, 884 P.2d 1326 (1994); *Seattle Bldg. and Constr. Trades Council v. City of Seattle*, supra; *Leonard v. City of Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976); *State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 382, 384, 494 P.2d 990 (1972); *State ex rel. Bowen v. Kruegel*, 67 Wn.2d 673, 678-79, 409 P.2d 458 (1965); *Neils v. City of Seattle*, 185 Wash. 269, 53 P.2d 848 (1936).

"'[L]egislative authority' cannot be carried out by initiative or referendum." *Whatcom Cty. v. Brisbane*, 125 Wn. 2d at 350. "Referendum rights do not exist when power has been statutorily delegated to the 'legislative authority.'" *Id.* at 350, quoting *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 344–45, 662 P.2d 845 (1983). "When the Legislature or state constitution has granted a power to the legislative authority of a municipality, the municipality may not limit the scope of that power, or surrender any of it under Const. art. XI, § 11, our state supremacy clause." *King Cty. v. Taxpayers of King Cty.*, 133 Wn. 2d 584, 611, 949 P.2d 1260, 1274 (1997),

[5] RCW 36.32.005 states, "The term "county commissioners" when used in this title or any other provision of law shall include the governmental authority empowered to so act under the provisions of a charter adopted by any county of the state." King County through its charter has assigned the legislative powers of the county to a nine-member council. King County Charter Article II, §§ 210 & 220.

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citing, *Carrick v. Locke*, 125 Wn.2d 129, 133, 882 P.2d 173 (1994); *Clallam County Deputy Sheriff's Guild v. Board Of Clallam County Comm'rs*, 92 Wn.2d 844, 849, 601 P.2d 943 (1979).

D. Section 2 of I-27 is beyond the scope of the initiative power because it invades the power exclusively granted to city and county legislative authorities to enact development regulations under the Growth Management Act.

I-27's proponents seek to place controls on land use activities that constitute "development regulations" within the meaning of the Growth Management Act, Chap. 36.70A RCW (GMA), a power granted exclusively to the legislative authorities of cities and counties.

Washington courts have held that citizens cannot use the initiative process to enact GMA development regulations. *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 389, 93 P.3d 176, 179 (2004). Under the GMA, "development regulations" or "regulation" means controls placed on development or land use activities by a city or county, including zoning ordinances and official controls. RCW 36.70A.030(7). The initiative seeks to enact development regulations by prohibiting certain uses of land: no person may "operate or maintain any building, structure, site, facility or program with a function of providing a space or area for the use, consumption or injection" of certain controlled substances. Section 2(A) of I-27. Section 2(B) provides an enforcement mechanism for subsection 2(A). For this reason, all of Section 2 of I-27 is beyond the scope of the initiative power.

In *Yes for Seattle*, Division One of the Court of Appeals prevented an initiative from being placed on the ballot because it purported to control development and land use activities ("prohibiting future development over creeks or their buffers" and "requiring the City to ensure that creeks are restored concurrently with major creekside development" among other things). *Yes for Seattle*, 122 Wn. App. at 391. Here, like in *Yes for Seattle*, I-27 proposes to control development and land use activities by prohibiting the operation or maintenance of buildings, sites or areas where the use, consumption or injection of certain controlled substances occurs.

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Further, the legislature has delegated the power to adopt development regulations under the GMA exclusively to the legislative authority of the city, here the Seattle City Council. The initiative process is not available when the legislature delegates power to act exclusively to the legislative authority of a local government, as opposed to the local government as a corporate entity. *Yes for Seattle*, 122 Wn. App. at 387, citing *State ex. rel. Guthrie v. City of Richland,* 80 Wn.2d 382, 384, 494 P.2d 990 (1972); *Mukilteo Citizens for Simple Govt. v. City of Mukilteo*, 174 Wn.2d 41, 51 (2012). Development regulations including land use controls are beyond the local initiative power in Washington "because the power and responsibility to implement zoning was given to the legislative bodies of municipalities" not the electorate. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 174 (2007) (citing the GMA).

The GMA requires that the legislative authority take legislative action to review and, if needed, review its comprehensive land use plan and development regulations. RCW 36.70A.130(1)(a). Controlling precedent makes clear that local initiatives cannot impose development controls under the GMA: "the legislature specifically granted the power to enact development regulations to the legislative bodies of cities and counites, and therefore the enactment of development relations cannot be accomplished by initiative." *Yes for Seattle*, 122 Wn. App. at 392. Because Section 2 of I-27 attempts to enact land use control regulations that have been granted exclusively to the legislative authority, the initiative process is not available here.

Even if Section 2 of the I-27 were not a development regulation under the GMA, I-27 purports to limit where certain land use activities can occur; this provision would require a legislative authority to amend its zoning code to prohibit such activity. Washington courts have long recognized that Washington's general law grants and limits the zoning power to the legislative body of charter cities as well as counties and code cities, and grants county and city councils exclusive zoning power. These

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cases have invalidated initiatives that prevent certain types of development in some zones. *Lince v. City of Bremerton*, 25 Wn. App. 309, 312-313 (1980); *Save Our State Park v. Bd. Of Clallam Cnty Comm'rs*, 74 Wn. App. 637, 649-650 (1994). Here, I-27 invades not only the province of the King County Council but also that of the Seattle City Council. For these reasons, Section 2 of I-27 is beyond the scope of the initiative power.

E. Only the City and the King County Board of Health have the power to enact health regulations within the corporate limits of the City.

The City of Seattle has the power to enact police and sanitary regulations that are not in conflict with general laws. Const. art. 11, § 11. RCW 70.05 establishes a general law that gives boards of health coextensive powers with the City. *See Snohomish County Builders Association v. Snohomish Health District,* 8 Wn. App. 589, 595-96, 508 P.2d 617 (1973). "This concept of overlapping of phases of the police power has long been with us. Law enforcement, fire protection, and health protection, all of which are carried on at the city, county, and state levels, in many instances territorially overlap and readily demonstrate this." *Municipality of Metro. Seattle v. City of Seattle*, 57 Wash. 2d 446, 455–56, 357 P.2d 863, 870 (1960). Here, RCW 70.05, gives the King County Board of Health a specific grant of power to enact local health regulations that apply inside the City of Seattle. By contrast a county has the power to make and enforce police and sanitary regulation only within the unincorporated area of the county. [6]

To the extent that I-27 attempts to limit the operation of safe injection site programs in the City of Seattle, the initiative attempts to utilize the County's police powers to enact a police power

[6] *See* Steve Lundin, *The Closest Governments to the People: A Complete Reference Guide to Local Government in Washington State*, 27-28 (2007) available at http://mrsc.org/getmedia/1c25ae05-968c-4edd-8039-af0cf958baa7/closest-governments-to-the-people.pdf.aspx?ext=.pdf.

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regulation within the Seattle City limits. This is not a power that a county possesses. King County cannot do by initiative what it is not permitted to do by ordinary legislation. *See Seattle Bldg. & Constr. Trades Council v. City of Seattle,* 94 Wash.2d 740, 620 P.2d 82 (1980).

F. The entirety of I-27 must be enjoined from being placed on the ballot because separate provisions of initiatives are not severable.

While I-27 contains a severability clause, the presence of such a clause is not dispositive. *McGowan v. State*, 148 Wn.2d 278, 295, 60 P.3d 67 (2002). If this Court determines that any portion of I-27 is invalid, it should keep the entire initiative off the ballot. This is so because there is no way to know whether the Initiative Proponents would have been able to garner sufficient signatures to even place I-27 on the ballot if certain portions were not part of the petition when it was circulated for signatures. Likewise, there is simply no way to know whether someone who signed the initiative petition supported only portions of I-27. Perhaps a voter in Kent signed the petition because she did not believe the County should be expending taxpayer funds to support injection sites. That same voter may have no issue with the City of Seattle zoning an injection site within City limits. *Cf. Leonard v. City of Spokane*, 127 Wn.2d 194, 201, 897 P.2d 358 (1995) (noting severability cannot be accomplished when it is unknown whether legislation "would have passed" the constitutional provisions with the unconstitutional provisions). Because it is impossible to know whether any person signing the petition to the place I-27 on the ballot was against using tax funds, but in favor of such sites elsewhere, or vice versa, this Court should not engage in any severability analysis.[7]

[7] While the City is aware of numerous cases that have kept local initiatives off the ballot in their entirety, it is not aware of any reported cases where a court severed certain portions out of an initiative *after* all of the petition signatures were collected. This is likely so because changing the "substance" of an initiative "in court [would create] a significant possibility that the title would no longer accurately state the subject and/or provide a concise description." *Coppernoll v. Reed*, 155 Wn.2d 290, 299 n.6, 119 P.3d 318 (2005).

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VI. CONCLUSION

For the foregoing reasons, the City of Seattle respectfully requests that the Court enter an order declaring that King County Initiative 27 is beyond the scope of the initiative power, and enjoining Initiative 27 from being placed on the ballot.

VII. WORD LIMITS

CERTIFICATE OF COMPLIANCE

I certify that this document, City of Seattle's Motion for Declaratory Judgment And Injunctive Relief, contains 4,149 words in compliance with the Local Civil Rules of the King County Superior Court as amended September 1, 2016.

DATED this 5th day of October , 2017.

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CERTIFICATE OF SERVICE

I certify that on the 5th day of October, 2017, I caused a true and correct copy of this document, along with Declaration of Jeff Sakuma, Second Declaration of Carlton W.M. Seu and Proposed Order to be served on the following in the manner indicated below:

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