WHATCOM COUNTY PROSECUTING ATTORNEY'S OFFICE

Memo

To: Seth Fleetwood
Sam Crawford
Whatcom County Council

From: Randy Watts
Chief Civil Deputy Prosecutor

Date: 6/12/2009

Re: Citizen Petition Ordinance Dealing with Limiting Total and Real Estate Property Tax Increases

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There are some questions concerning the memorandum that was sent out on May 27th and there is cause for clarification as well as the answering of some additional questions. The purpose of this memorandum is to give you guidance in answering the questions that were proposed.

Question No. 1: Can the Council, by adoption of this proposed ordinance, bind the Whatcom County Flood Control Zone District Board of Supervisors, a separate municipal entity, to the limitations imposed by the Ordinance?

Answer: No.

First, as was explained in the May 27th memorandum, this is not a legislative act. This is an administrative act. It is a decision the Council makes on an annual basis during the budget process as to how you intend to fund the budget. It is not general law. But secondly, and more importantly, the authority for the Council to act comes from the charter itself, Section 2.20, as well as State law RCW 36.32.120 and Constitution Article 11 §11. This is very broad power which authorizes you to adopt ordinances in furtherance of the police power. But that power to act is not unlimited. With regards to the Flood Control Zone District, it is not the same source that allows the supervisors to act.

The authority to act for the Flood Control Zone District does not come from the Charter or from RCW 36.32, or the Constitution Article 11 §11, but rather comes from RCW 86.15.080. This section of the law creates a separate entity from Whatcom County. It is given its own power to act. Thus, the Flood Control Zone District is granted its own police power to take action, and to fix their budget under RCW 36.32.120, which is the same statute whereby the County receives this ability. The District has the ability to assess levies under RCW 86.15.160.

Since the Board of Supervisors for the Flood Control Zone District has its own authority to act, and it does not derive its power from the Charter, it cannot be controlled by a County ordinance adopted by the Whatcom County Council. So, even though you hold the position of not only the County Council, but as the Board of Supervisors, the ordinance that you would adopt as the Council does not control the activities of the Flood Control Zone District. Since there is no severability clause, this infirmity would defeat the entire ordinance.

Question No. 2: The ordinance requires that a ballot measure be proposed by July 1st of the year preceding the year in which the levy would be raised more than 1%. The County Charter provides that the Executive brings the budget to Council in October, meaning that Council can never know by July 1st whether the budget will require an increase in County-levied property taxes. Does this provision of the proposed ordinance conflict with the budget process set forth in the Charter?

Answer: Yes, it is inconsistent, in that you could never comply with this ordinance by following the procedures already established for our budget.

Question No. 3: Does the first sentence of the second paragraph of Section 1.30 of the Charter:

> "References to adoption of ordinances by the County Council shall not be construed as impairing the right of the people to initiate and refer ordinances."

Does that portion affect your analysis provided by the memorandum of May 27th, 2009 relating to State statutory delegation of authority to the legislative authority?

Answer: I believe that the case from Clallam County which is identified in the memorandum of May 27th deals with this very issue. What it states is that you can't give power to the citizens of Whatcom County which they simply do not have. Meaning, that any referendum or initiative has got to be consistent with Article 11 §11 and State law. Thus, the broad language that we have in our Charter, by implication or by direct statement of Supreme Court, is limited to requiring it to be consistent with State law. You see this in the first sentence in Section 1.30 which sets out the limits. It must be consistent with the Constitution of the State. Thus, the Court-imposed limits mentioned in my May 27th memo cannot be circumvented even by broad language in our Charter. In addition, the ability to refer is no broader than the authority of the Council to adopt it initially. RCW 36.32.120 states that ordinances must be consistent with State law. This is also indicated in Constitution Article 11 §11.

Question No. 4: Is the "ballot measure" referred to in the proposed ordinance to be interpreted as a binding or advisory referendum?

Answer: There is nothing in this ballot measure which would show that it is advisory. I believe the proponents intended it to be binding. This is what makes it inconsistent with State law. It is in effect repealing the banking provisions of State law by placing the requirement of an election on its use. The Council can choose to seek an election prior to exercising the discretion allowed in State law. It would be in the form of an advisory ballot. An advisory ballot is just that, advisory and not binding. However, what you cannot do is amend State law and bind the hands of future councils in requiring them to seek an election for banked capacity.

Question No. 5: Does the Council have authority to place a ballot measure before the voters in the absence of State statutory authority, or Charter authority, to do so? Does this answer depend on whether the ballot measure is binding or advisory? Does it matter whether the subject matter of the ballot measure is one of Council's specifically enumerated powers in the Charter? *E.g.*, "to levy taxes, appropriate revenue and adopt budgets for the County" (§2.20(a)).

Answer: There is no inherent power of initiative or referendum. In fact, in non-charter counties this simply does not exist. It is our Charter which allows us to consider an initiative. There would be no restriction in seeking an advisory measure. But it is just that, advisory. You could seek it and then not follow it. However, even the Council has limits on ordinances. An ordinance simply cannot be inconsistent with State law. If it is, it is in violation of Article 11 §11 of the Washington State Constitution. It is beyond the ability of Whatcom County to adopt it. It doesn't matter how it is adopted, whether it is adopted by a vote of the people, or whether it is adopted by a vote of the Council. If the ordinance that is a result of that process is inconsistent with State law, it simply is not valid.

Question No. 6: Is this an area of the law that has been fully occupied by the State in which the County is pre-empted from adopting ordinances inconsistent with State law?

Answer: My opinion is that the State has fully occupied this area. Thus, it is not allowing for concurrent jurisdiction. While I recognize that the County does have the right to enact ordinances prohibiting the same acts State law prohibits, so long as the State enactment was not intended to be exclusive, and the ordinance does not conflict with the general law of the State. *See*, Bellingham v. Schampera, 57 Wn. 2d 106 (1960). Thus, the ordinance must yield to a statute on the same subject either if the statute preempts the field, leaving no room for concurrent jurisdiction (*citation omitted*), or if a conflict exists such that the two cannot be harmonized. (*Citation omitted.*) (*Emphasis mine.)* *See*, Brown v. City of Yakima, 116 Wn. 2d 556 at 559 (1991).

A determination that the legislature did not intend to preempt the entire field does not, however, end the analysis. The ordinance may also violate the Constitution Article 11 §11 if it directly and irreconcilably conflicts with the statute. Id. at 561.

In the Brown case, the court found the ordinance to be valid. In the present case, I do not believe the proposed ordinance is consistent with the State law in that the law allows the banking of capacity and its use without a vote. This proposal would basically repeal that section of State law. Thus, it prohibits what the statute permits. This point is conceded in the ordinance on page 2, lines 9-10, where it acknowledges as allowed by Washington State law. Thus, this proposal cannot be harmonized in that it is attempting to disdallow what State law permits. Even if it were to be argued that the State did not preempt the field, and thus there was ability to have some concurrent jurisdiction, you would still be in violation of Article 11 §11 in that it is not consistent with the State law.

Question No. 7: Are there any other legal issues raised by the proposed ordinance or its potential implementation of which the Council should be aware of before it takes a vote?

Answer: The options created in the State law are actually a savings to the taxpayer. Should this not exist, government would be tempted to increase the tax by 1% per year because, to do otherwise, would place the entity forever behind. Instead, the State legislature has allowed the County to defer the imposition and to bank its unused capacity, and not raise the limit immediately, so that a savings to the taxpayers may be had. But when necessary, they can then draw on that bank to place the County back, or at least closer, to where it would have been had they not consciously made the savings.

Question No. 8: Is the ordinance, as worded in the Bonner mini-initiative, proper and legal for Council adoption, should the majority of the Council wish to adopt it?

Answer: I believe that the proposed ordinance is not a proper ordinance for the Council to adopt. It would not be proper even had it been the Council's own idea for the reasons previously stated. This ordinance is not consistent with State law.

Question No. 9: Are we, in fact, able to self-impose an "over 1% annual tax increase," requirement of voter approval?

Answer: The Council could send all requests for 1% annual tax increase to the vote of the people for an advisory ballot. That could be done. It would be within the Council's discretion on an annual basis whether or not they are wishing to do that. What the Council cannot do is adopt an ordinance which binds the hands of a future council and force them to make that decision in that it is inconsistent with State law, and thus not a valid ordinance. However, it is a discretionary act on the part of the Council (1) whether they wish to bank it at the time of its banking, or (2) whether they wish to exercise the option of taking it out of the bank and placing it into the rate. They can also seek an advisory ballot on that.

Question No. 10: Could we self-impose it as an "advisory" requirement?

Answer: If I understand what you're asking, could you adopt an ordinance that would require the Council to seek the advice of its citizenry before exercising the discretion? That is a closer question, and in fact probably would not be inconsistent, in that the Council would not be bound by the decision

of the electorate. You would just be placing an additional hurdle upon the future councils' ability to exercise their discretion. They would still be able to exercise it in that the election and the role of the people would not be binding. My opinion is that it would not be inconsistent with State law. That would just be putting an extra person on the Council, *i.e.*, the public.

Question No. 11: If we did pass the ordinance, could we pass an ordinance in the future to remove the requirement?

Answer: Yes. This is another difference between a mini-initiative and an initiative. With an initiative you must wait two years before it can be repealed. Due to the fact that a mini-initiative places a petition in front of the Council and the Council is adopting an ordinance, you have the same ability to repeal a mini-initiative as you do any other ordinance.

Question No. 12: Have you read the language of the ordinance and found it to be legally acceptable?

Answer: I have read it and it seemed abundantly clear to me what is being proposed.

Question No. 13: Are there are minor terminology changes that could be proposed to make it more workable?

Answer: As I've expressed above, my position and my opinion is that as proposed, it is inconsistent with State law and it places an additional requirement upon the Council to exercise a discretion which has been given to it by State law. As presented, it cannot be harmonized with State law, and thus must yield to State law under Article 11 §11, as well as RCW 36.32.180, and our home rule Charter. Section 5.41 dealing with mini-initiatives indicates that the Council shall hold a public hearing on the proposed ordinance and enact or reject the ordinance within 60 days. It does not indicate that there is any ability to amend or suggest amendment to the ordinance. Thus, I believe the only option you would have is to either vote for or against the mini-initiative, and not attempt to amend or modify it at this time. Once it is disposed of, either through adoption or by non-adoption, you could at some later date, at the next meeting, propose an amendment or introduce a new ordinance which would then require an additional public hearing.

I hope this answers your questions. If not, please do not hesitate to contact me.