

November 2019 WPPA CLE Significant Updates to Washington's Fair Campaign Practices Act

Carolyn Lake,

Port Legal Counsel

clake@goodsteinlaw.com

253.229.6727



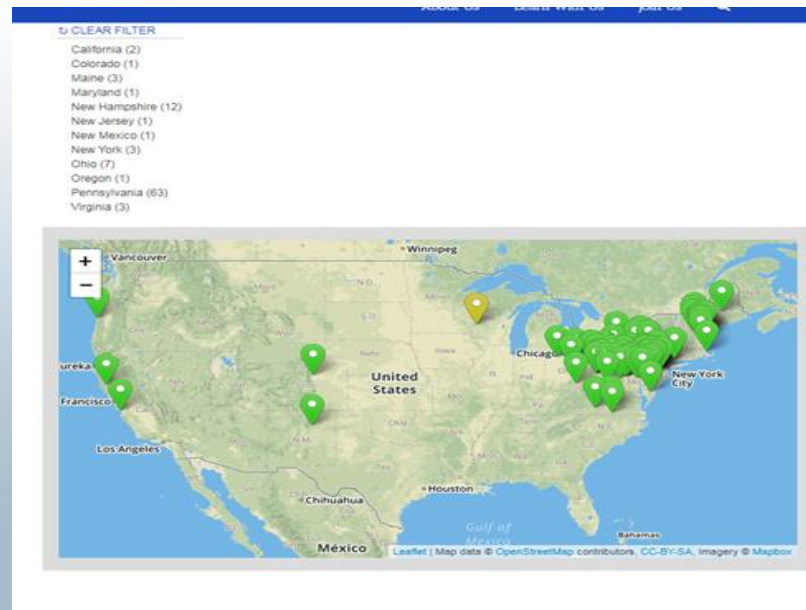
Agenda!

- Wave of Local Initiatives
- Washington State Examples
- Washington Local Initiative Law
- Port of Tacoma Experience
- Fair Campaign Practice Act (FCPA) Chapter 42.17A RCW
 - Citizen Action Suits
 - Public Disclosure Processes
 - Attorney General Enforcement Actions
- Changes to FCPA-
 - Supreme Court
 - Legislature



Wave of Local Initiatives

- Why Ports have an interest
- Trend of Local Initiatives Affecting Land Use
- Often Targeted at Industrial, Manufacturing Tech
- Uses <http://communityrights.us/community-rights-ordinance-campaigns-across-the-us/ordinance-map>
- Community Environmental Legal Defense Fund (CELDF)



Wave of Local Initiatives

- In 1999, CELDF moved from more conventional single-issue one-corporate-harm-at-a-time legal defense work through the regulatory arena of law,
- Instead began to help rural communities to write paradigm-shifting laws that banned (rather than regulated) harmful corporate activities, and challenged for the first time the legitimacy of corporations exercising constitutional so-called “rights”. It was at this point that the movement took on the name Community Rights, a name that has since stuck
- <http://communityrights.us/>



Wave of Local Initiatives

Implemented So Far

- California (2)
- Colorado (1)
- Maine (3)
- Maryland (1)
- New Hampshire (12)
- New Jersey (1)
- New Mexico (1)
- New York (3)
- Ohio (7)
- Oregon (1)
- Pennsylvania (63)
- Virginia (3)

Topics

- Community Self Government
- Toxic Materials
- Water
- Agriculture
- Fossil Fuels
- Rights of Nature
- Renewable Energy
- Mining
- Home Rule Charters
- Eminent Domain
- Land
- Infrastructure
- Climate
- Sanctuary
- Forests

Wave of Local Initiatives

- **Mendocino County Community Bill of Rights, Fracking & Water Use Initiative..**
- Mendocino County, CA - 11/4/2014 PASSED
- Topics: Community Self-Government, Fossil Fuels, Toxic Materials, Water
- **City of Lafayette Climate Bill of Rights..**
- Lafayette, Boulder County, CO - 3/21/2017 PASSED
- Topics: Climate, Community Self-Government
- **City of Santa Cruz Local Control, Pesticide & Chemical Trespass Ordinance.**
- Santa Cruz County, CA - 2/2009 PASSED
- Topics: Community Self-Government,
- Rights of Nature, Toxic Materials

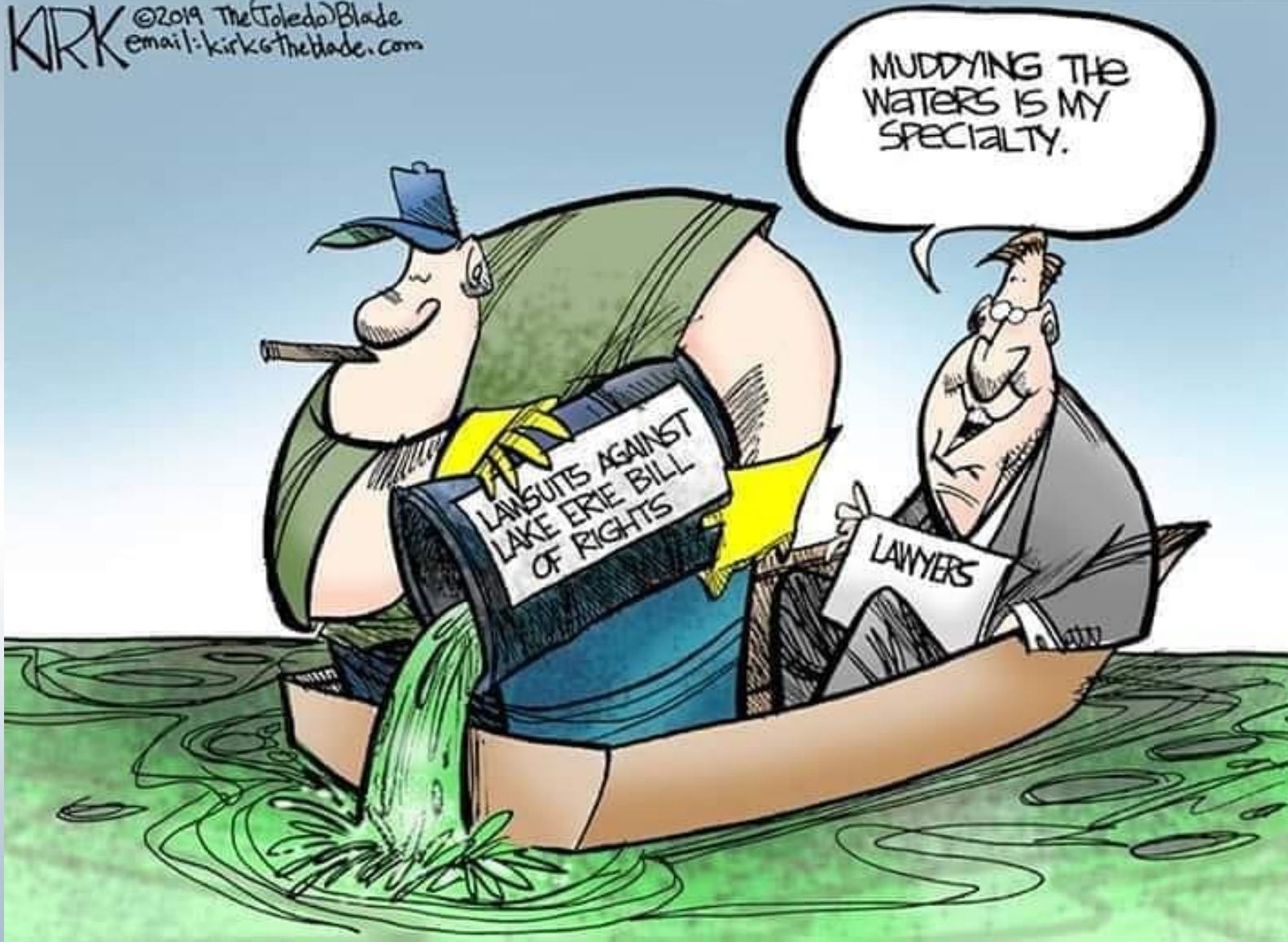


Wave of Local Initiatives

- Rights of Nature:
- On 26 February 2019, a lake became human.
- In December 2018 Toledo city councilors drew up an extraordinary document: an emergency “bill of rights” for Lake Erie.
- At the bill’s heart was a radical proposition: that the “Lake Erie ecosystem” should be granted legal personhood, and accorded the consequent rights in law – including the right “to exist, flourish, and naturally evolve”.



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email: kirks@theblade.com



Washington State Examples

- **Port Angeles Initiatives.** *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 227, 151 P.3d 1079 (2007).
- 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.



Washington State Examples

- **Spokane Initiative.** *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016).
- Any proposed zoning changes involving large developments to be approved by voters in the neighborhood.
- To give the Spokane River the legal right to “exist and flourish,”
- To give Spokane residents the right to access and use water & individually the right to enforce the Spokane River's new rights.
- To give employees Bill of Rights protections against their employers
- To strip the legal rights of any corporation that violated the rights secured in the charter.



Washington State Local Initiative Law

- With Amendment 7 to the Washington Constitution, the people secured for themselves the right of the people to file a statewide initiative. WASH. CONST. art. II, § 1; *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973).
- Washington courts interpret the rules regarding statewide initiatives under constitutional principles to facilitate this right.
- 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)



Washington State Local Initiative Law

- There are multiple limits on the local initiative power under Wash. Rev. Code § 35.22.200.
- Excludes:
 - Administrative matters, particularly local administrative matters
 - Powers granted by the legislature to a governing body of a city, rather than the city itself.
- Cannot exceed the scope of the authority of the city itself.
 - While the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law or constitution.



Washington State Local Initiative Law

- RCW 42.17A is replete with areas where it treats campaign finance activity differently at state versus local, municipal level –
- No state regulation whatsoever of municipal lobbying, either grassroots or direct (RCW 42.17A.600 et seq) and
- Law completely exempts from all of its provisions cities smaller than 5,000 people (RCW 42.17A.200).



Washington State Local Initiative Law

- **Port Angeles.** Supreme Court held the initiatives beyond the scope of the local initiative power
- Neither *Wash. Const. art. II, § 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.
- The Washington Legislature has explicitly vested the power to decide whether or not to fluoridate in the board of commissioners of a water district. *Wash. Rev. Code § 57.08.012*.
- Nothing in Wash. Rev. Code ch. 57.08 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.

Washington State Local Initiative Law

Spokane (Feb. 4, 2016).

- Supreme Court found local initiative exceeded this scope of authority, including administrative matters, water law, and constitutional rights.
- Affirmed the trial court's finding local initiative exceeded scope of local initiative power and should not be put on the ballot. **9-0**
- Expanding the Bill of Rights to apply to private persons and entities is federal constitutional issue outside the scope of local authority.
- Amendment of the Washington Constitution is not the local initiative power reserved to the voters under Wash. Rev. Code § 35.22.200 or Wash. Const. art. II, § 1(a).
- Corporations have rights under the federal constitution. Municipalities cannot strip constitutional rights from entities and cannot undo decisions of the United States Supreme Court.

Port of Tacoma Experience

- In March 2016, a month after *Spokane* Supreme court ruling, the Port became aware of two potential City of Tacoma Initiatives,
- Led by Save Tacoma Water (STW) two local initiative to be slated for the November 2016 ballot, Tacoma Charter Amendment 5 and 6.
- The Port was aware that STW's Initiatives were near identical to Spokane Initiatives



Port of Tacoma Experience

- Both proposed initiatives would require that
- any application to the City of Tacoma for water usage of 1,000,000 or more gallons per day to be decided by a majority of voters
- Initiatives were superior to any state statute or regulation that conflicted with them,
- (b) "no government actor, including the courts," could "recognize as valid" any authorization that would contradict the requirements of the Initiatives, and
- (c) that no corporation could possess any other "legal rights, powers, privileges immunities or duties that would interfere with them," including "the power to assert international, federal, or state laws in an attempt to overturn" the initiatives.

Port of Tacoma Experience

Yes!

Prop. 1
ON

Stop the world's largest methanol refinery from being built in the Port of Tacoma

Residents of Tacoma, University Place, Ruston, Fife, Milton, Kent, Covington, Bonney Lake, Lakewood, Steilacoom, Federal Way, the Muckleshoot and Puyallup Reservations and portions of Des Moines and Auburn are dependent on fresh water from Tacoma Public Utility, as well as the proposed methanol refinery. The proposed methanol refinery is estimated to use 14 to 22 million gallons of water every day = to what 185,000 to 291,000 residents use daily (Tacoma 2015 Population: 198,397).

BALLOT TITLE

This Initiative amends Title 12 of the Tacoma Municipal Code and adds a new section requiring a vote of the people to approve any water permits issued to users of 1 million gallons or more of water per day.

Should this initiative be approved?

Yes No

STATEMENT OF SUBJECT

This initiative adds a new section to Title 12 of the Tacoma Municipal code for new industries seeking to locate in Tacoma that are large fresh water users.

**TURN THIS SHEET IN BY
MARCH 31, 2016**
**IMPORTANT DATES
TO REMEMBER**
Petition Signature
Final Deadline
June 15, 2016
General
Election Day
November 8, 2016

PAID FOR BY
SAVE OUR WATER
PEOPLE BEFORE INDUSTRY
P.O. Box 8841
Tacoma, WA 98419
(253) 209-7988
www.SaveTacomaWater.org

INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE

To The City Council of Tacoma and
Doris Sorum, City Clerk:

We, the undersigned registered and legal voters of Tacoma, Washington, respectfully propose and ask for the enactment of an ordinance of the measure known as Tacoma Initiative 1 entitled:

This Initiative shall be known as

"The Large Fresh Water User Ordinance"

a full, true and correct copy of which is printed on the reverse side of this petition, for submission of Initiative No. 1 to the legal voters of the City of Tacoma for their Advisory Vote at the General Election to be held on the 8th day of November, 2016, and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the City of Tacoma as written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

WARNING

Every person who signs this petition with any other than his or her true name, or who knowingly signs more than one of these petitions, or signs a petition seeking an election when he or she is not a legal voter, or signs a petition when he or she is otherwise not qualified to sign, or who makes herein any false statement, shall be guilty of a misdemeanor.

Initiative to the people text:

Be it ordained by the voters in the City of Tacoma that:

A new ordinance is adopted and new sections of Tacoma Municipal Code Title 12 are hereby adopted:

Section 1. Findings and Intent - The voters of the City of Tacoma find that there is a compelling need to carefully consider the consequences of issuing permits to a water permit applicant that intends to use large amounts of fresh water daily.

Section 2. Subject - this Act deals with issuing water permits to any industry needing 1 (one) million gallons or more of water daily from the City of Tacoma, this Act is to be known as

"The Large Water User Ordinance"

Section 3. Text - The City of Tacoma shall place before the voters any applicant's request for a water permit for one million gallons or more of water use per day and it shall be placed on the next General Election Ballot. Any water users currently using 1 (one) million gallons or more of water daily are grandfathered in and their rights to water are not transferrable.

Section 4. Interpretation - The resulting vote by the citizens of Tacoma shall be binding.

Section 5. Severability - This Act shall be liberally construed to achieve the defined intent of the voters. The provisions of this initiative are declared to be separate and severable. The voters of Tacoma declare that they support each of the provisions of this Act independently, and their support for this Act would not be diminished if one or more of its provisions were to be held invalid, or if any of them were adopted by the City Council and the others sent to the voters for approval.

- END -

PLEASE DO NOT CUT—INVALIDATES SIGNATURES

PLEASE DO NOT CUT—INVALIDATES SIGNATURES

PLEASE DO NOT CUT—INVALIDATES SIGNATURES

TACOMA VOTERS PLEASE SIGN BELOW TO PLACE INITIATIVE 1 ON THE 2016 NOVEMBER BALLOT

PLEASE SIGN YOUR NAME AS YOU ARE REGISTERED TO VOTE SIGNATURE	FOR IDENTIFICATION PURPOSES PRINT NAME HERE	STREET NUMBER OR RURAL ROUTE AND BOX NUMBER ADDRESS	CITY	ZIP	VOLUNTEERS NEEDED! PLEASE FILL OUT THIS FIELD TELEPHONE / EMAIL	I WANT TO HELP <input checked="" type="checkbox"/>
1						
2						
3						
4						
5						
6						
7						

Port of Tacoma Experience

- Other concerned entities:
 - Tacoma Pierce County Chamber of Commerce
 - Economic Development Board – Tacoma Pierce County



Port of Tacoma Experience

- Question – Mechanics of Action
- The Washington Supreme Court strictly limits a type of pre-election challenges courts will review under Wash. Rev. Code § 7.24.020.
- Difference between state and local
- Courts do not consider a challenge to the substantive validity of a statewide initiative under Wash. Const. art. II, § 1(a) prior to an election.



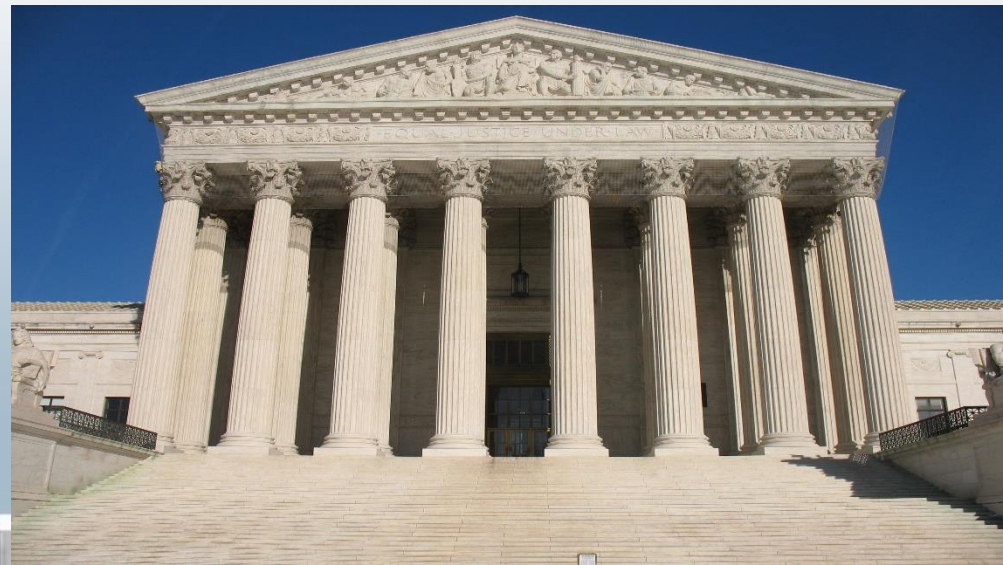
Port of Tacoma Experience

- Generally review only two types of challenges:
 - Procedural challenges (such as sufficiency of signatures and ballot titles) and
 - Whether a subject matter is proper for direct legislation.
- While generally, judicial pre-election review of initiatives and referendums is disfavored, courts will review local initiatives and referendums to determine, notably, whether a proposed law is *beyond the scope of the initiative power*.



Port of Tacoma Experience

- Cause of action framed: The Uniform Declaratory Judgments Act
- Allows a person whose rights are affected by a statute or municipal ordinance to have determined any question of construction or validity of that statute or ordinance, and
- to obtain a declaration of rights, status, or other legal relations thereunder. Wash. Rev. Code § 7.24.020



Port of Tacoma Experience

- Washington courts routinely exercise this power in pre-election initiative challenges
 - **Recent:** *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn. 2d 97 (Feb. 4, 2016), *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (Div. 2 2013), cert denied, 178 Wn.2d 1020 (2013); *Eyman v. McGehee*, 173 Wn. App. 684, 294 P.3d 847 (Div. 1 2013);
 - **Historically:** *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746 (1980) (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Ford v. Logan*, 79 Wn.2d 147, 151 (1971) (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App.427, 432-33 (2011) (upholding pre-election challenge to scope of initiative as exceeding initiative power and therefore invalid); *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386 (2004) (affirming declaratory judgment "striking [initiative] from the ballot").

Port of Tacoma Experience

- The Port, along with co-Plaintiffs EDB and Chamber filed a legal action on June 6, 2016
- Sought judicial determination under Washington's Uniform Declaratory Judgment Act, RCW Ch. 7.24, that Initiative beyond the proper scope of the local initiative power, and for injunctive relief.
- The City of Tacoma filed its Answer and Cross Claims on June 8, 2016
 - Agreed the Initiatives were legally defective and
 - Filed a cross claim against the Initiative sponsors within the existing suit



Port of Tacoma Experience

- (1) usurp a proprietary administrative function of the City of Tacoma,
- (2) usurp a legislative function (i.e. classification of utility customers for different treatment) of the Tacoma City Council,
- (3) contradict other provisions of the Tacoma Charter,
- (4) contradict state law regarding management of water rights,
- (5) constitute impermissible zoning and development regulation,
- (6) regulate beyond the territorial jurisdiction of the City of Tacoma,
- (7) impermissibly transfer property rights to water to "the people,"
- (8) interfere with the Tacoma City Council's budgeting authority, and
- (9) impermissibly disavow superior law including state, federal, and constitutional provisions.

Port of Tacoma Experience

- Less than a month later on July 1, 2016, the Pierce County Superior Court granted Plaintiffs' Motion for Declaratory Judgement,
- Found the two Initiatives invalid and
- Granting injunctive relief to prevent the Pierce County Auditor from placing the measures on the ballot.
- STW appealed to COA (denied)
- Supreme Court declined to accept review
- *Still pending:*
- STW Writ of Certiorari to US Supreme



Port of Tacoma Experience

Swift Justice? *But wait* –

- On June 16, 2016, Arthur West submitted a "Citizen's Action Letter re Unlawful Campaign Activity" to the Washington State Attorney General, the Pierce County Prosecutor, and the Washington State Public Disclosure Commission (PDC)
- Alleged that (1) the Port had violated RCW 42.17A.555 (use of public funds for campaign purposes), and (2) the Respondents together had formed a "political committee" that failed to comply with any of the requirements of RCW 42.17A.255

Fair Campaign Practice Act (FCPA)

Citizen Action Suit *former RCW 42.17A.755*

A person believing a violation of the FCPA may bring a citizen action suit – only if:

- Notifies the prosecuting attorney and AG of violation, and
- AG or PA fails to enforce within 45 days
- After which the person gives a 10 day notice of intent to sue and AG & PA do not act within those 10 days
- Must be brought within 2 years
- Citizen can collect attorney fees and costs/ pay if loses

Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

- State **may** be awarded investigation costs and attorney fees
- If intentional violation – treble as punitive damages
- If no violation, court **shall** award attorney fees and costs



Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

- At AG's request, the PDC staff reviewed matter
 - Port – use of public facilities campaign purposes
 - EDB and Chamber – Failure to report campaign expenditures
- PDC process:
 - Contacted by PDC Staff,
 - submit information in response to investigation,
 - Staff prepares a post investigation Report
 - Presented to PDC Board at public
 - Board makes recommendation to AG

Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense:

- The Port did not use public facilities for campaign purposes.
- Seeking judicial review is not use of public facilities for campaign purposes.
- The Port took no electioneering or campaign action to influence the vote on the ballot measures.
- The purpose of Washington's campaign laws is to ensure that the financing of political campaigns and lobbying are fully disclosed to the public. RCW 42.17A.001.
- The laws are designed to let the voters know who is attempting to influence their vote.
- Filing a lawsuit to determine the legality of a local initiative is not advertising, communicating with voters, campaigning, lobbying or electioneering

Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense:

- The Port's legal action is consistent with the long list of legal cases in which public agencies have properly sought judicial review of the legal sufficiency of a proposed Initiative;
- In no case were these action found to violate RCW 42.17A.555.
- No Washington cases which hold that judicial review of a local initiative is improper use of public facilities



Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense:

- *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 101-105 369 P.3d 140 (2016) (“The petitioners include Spokane County....Applying those existing standing requirements, we hold that petitioners in this case have standing to bring their challenge”.)
- *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259-60, 138 P.3d 943, (2006) (Supreme Court of Washington described “it is well settled that it is proper for cities to bring challenges that the subject matter is beyond the scope of the initiative power & “In this case, like many other cases, the local officials had a valid concern that the proposed initiative was outside the scope of the initiative power” 157 Wn.2d at 269)
- *Whatcom Cty. v. Brisbane*, 125 Wn.2d 345, 346, 884 P.2d 1326 (1994) (Whatcom County Superior Court sustains “a challenge by Whatcom County to a referendum petition to amend portions of a critical areas ordinance”)

Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense:

- *Snohomish Cty. v. Anderson*, 124 Wn.2d 834, 836, 881 P.2d 240 (1994) (“The Snohomish County Council (County or Council) commenced an action against the citizens seeking and successfully securing a declaratory judgment the ordinance was not subject to a referendum”)
- *City of Longview v. Wallin*, 174 Wn. App. 763, 783, 301 P.3d 45 (Div. 2, 2013) (Cities have standing to bring court challenges to local initiatives that exceed the scope of initiative powers)
- *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 387, 93 P.3d 176 (Div. 1, 2004) (City challenge to local initiative, “limited to whether the initiative was beyond the initiative power, was appropriate”.)

Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense:

- *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 6-7, 239 P.3d 589 (2010) (“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.”)
- *City of Monroe v. Wash. Campaign for Liberty*, No. 68473-6-I, 2013 Wash. App. LEXIS 378, 5 (Unpublished Div. 1, 2013) (“In July 2011, the City filed a complaint for declaratory relief against Seeds of Liberty and the other sponsors of Monroe Initiative No. 1. The City sought a declaration that the initiative, ‘in its entirety, is invalid because it is beyond the scope of the local initiative power, and therefore null and void.’”)
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Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense:

- *Metro. Seattle v. Seattle*, 57 Wn.2d 446, 448, 357 P.2d 863, 866 (1960). (The City of Seattle moved challenged a ballot title under RCW 29A.36.200 which allows “persons” to challenge a local initiative ballot title “if any persons are dissatisfied with the ballot title for a local ballot measure that was formulated by the city attorney or prosecuting attorney preparing the same, they may at any time within ten days from the time of the filing of the ballot title, not including Saturdays, Sundays, and legal holidays, appeal to the superior court of the county...”)
- *Clallam Cty. v. Forde*, No. 28487-1-II, 2003 Wash. App. LEXIS 47, 3 (Unpublished Div. 1, 2003) (“Clallam County commissioners voted against holding public hearings on the petition, concluding that the proposed repeal was not within the initiative power of the people. The county subsequently moved for and was granted relief on summary judgment”.)

Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense: Two Exemptions:

RCW 42.17.130 contains an exemption for “Activities which are part of the normal and regular conduct of the office or agency”

- The Port has long been a public policy advocate on issues affecting industrial and manufacturing preservation and the sector’s role in economic vitality.
- Port communications regarding the need to preserve and protect industrial lands and jobs is part of the Port’s normal and regular conduct of the Port.
- Preventing anti-development and unconstitutional legislation is a necessarily implied power.



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Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense: Two Exemptions:

RCW 42.17.130 “Activities which are part of the normal and regular conduct of the office or agency”

- The Port has been involved in a number of lawsuits over the past decades.
- Litigation is a “normal and regular” means employed by the Port.
- The Port pursued the Declaratory Judgement action on the Initiatives as part of its normal and regular activity, because the Initiatives had the potential to impact the Port’s economic development mission.



Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense: Two Exemptions:

RCW 42.17A.555 (1) allows an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, port districts to express a collective position and even vote to support or oppose a ballot proposition so long as

(a) any required notice of the meeting includes the title and number of the ballot proposition and

(b) public comments pro and against are allowed and taken.



Fair Campaign Practice Act (FCPA)

Public Disclosure / Attorney General Enforcement

Port Defense: Two Exemptions:

RCW 42.17A.555 (1)

- On June 18, 2016, the POT Commission held a public meeting,
- Publicly noticed in advance the Commission's intention to vote to "ratify the Port's Declaratory Judgment and Injunctive action on the two proposed local initiatives.
- Staff provided a Port Commission Memo which was publicly available.
- Port Commission took public comment from over 20 persons, for and primarily against the action.
- Port Commission voted unanimously to ratify

Fair Campaign Practice Act (FCPA)

Public Disclosure Commission Action

- PDC staff concluded that the Port did **not** violate RCW 42.17A.555.
- The PD Commission returned the matter to the attorney general with “no recommendation for legal action.”
- The Commission made noting of the vagueness of the FCPA
- Opined "the need for rule making to provide clearer guidance to the regulated community and the public regarding what actions constitute activity reportable under RCW 42.17 A for ballot propositions."
- PDC expressly asked that the Chamber, EDB, and the Port participate in the rule making process and offer input.

Fair Campaign Practice Act (FCPA)

Attorney General Enforcement

- Despite the PDC recommending no action, the Attorney General filed enforcement action.
- Alleged EDB and Chamber failed to properly report independent expenditures made in opposition to the STW ballot propositions
- Alleged that the Port, through its chief executive officer and its commissioners, impermissibly used public facilities to oppose the STW ballot propositions in violation of RCW 42.17A.555.

Fair Campaign Practice Act (FCPA)

Attorney General Enforcement

Port EDB and Chamber filed summary judgment motions to dismiss.

- All the same defenses, and
- RCW 42.17A 555 is a punitive statute since it imposes penalties, so should be construed favorably to accused.
- Port did NOT dispute the public's right to know of the financing of political campaigns and lobbying.
- The question: whether expenditures to file a judicial declaratory judgment and injunction action to determine the legal validity of local initiative petitions is “campaign activity” constitutes activity regulated by the FCPA

Fair Campaign Practice Act (FCPA)

Attorney General Enforcement

- The Trial court granted the motions, dismissed the action, and awarded attorney fees and costs to the Port, EDB & Chamber
- The trial court correctly concluded that those actions did not fall within the scope of the FCPA because they were not in the realm of campaigning or electioneering,
- Court noted that to rule otherwise would improperly expand the Act and invade the province of the legislative branches.
- The AG appealed.



Fair Campaign Practice Act (FCPA)

Attorney General Enforcement

Port EDB and Chamber legal support:

- *Voters Education Committee v. Washington State Public Disclosure Commission*, 161 Wn.2d 470, 166P.3d 1174 (2007), the Supreme Court discussed the FCPA extensively and consistently phrased the disclosure requirements in terms of expenditures made in election campaigns, political campaigning and advertising. "supporting or opposing" means engaging in activities analogous to sponsoring political and not judicial activity.
- *Stole ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586, 598, 49 P.3d 894 (2002) unambiguous recognition by this Court that the phrase "support or oppose" must be interpreted to mean "support or oppose" through activities in the political sphere, not the legal sphere
- Filing a declaratory judgment action does not "influence the voter's opinion"; it is not directed to voters at all.

Fair Campaign Practice Act (FCPA)

Attorney General Enforcement

Port EDB and Chamber support:

The outcome of a lawsuit, unlike a political campaign, is determined by a court upon review of the facts and existing law.

	Litigation re Constitutionality	Electioneering
Purpose of Activity:	To determine validity	To persuade or sway votes
Communication is with:	Impartial judges	Voters or Influencers of Voters
Merits Determined by:	Existing law	Preferences about public policy/what law should be
Procedures:	Court rules	n/a, except required transparency

Fair Campaign Practice Act (FCPA)

Attorney General Enforcement

Beware the Parallel Cases:

- *State v. Evergreen Freedom Foundation*, Thurston County case
State alleged that the Freedom Foundation's legal services provided to several local ballot measure proponents was reportable campaign activity. (2016 dismissed/direct review Supreme Court)
- *Institute for Justice v. State of Washington*, No. 13-2-10152-7.
February 2015, the Pierce County Superior Court found “Defendants' treatment of free legal assistance to a political committee in a federal civil rights lawsuit as a "contribution," as that term is defined in RCW 42.17A.005(13), is unconstitutional under the U.S. Constitution”.

Fair Campaign Practice Act (FCPA)

Changes to FCPA- Supreme Court

After COA briefing complete: Supreme Court decided *State v. Evergreen Freedom Foundation*, 192 Wn.2d 782, 432 P.3d 805 (2019).

- EFF created sample municipal ordinances and ballot propositions for individuals in local municipalities.
- Citizens in multiple cities used the samples to request that local government either pass the measures, or place them on the ballot for a vote.
- When the municipalities neither passed the proposals nor placed them on the ballot, EFF brought three lawsuits in three municipalities seeking “a judicial directive to the respective city to put each measure on the local ballot.”

Fair Campaign Practice Act (FCPA)

Changes to FCPA- Supreme Court

State v. Evergreen Freedom Foundation, 192 Wn.2d 782, 432 P.3d 805 (2019).

- State brought a civil regulatory enforcement action against EFF because EFF did not file campaign disclosure reports for the value of the legal services.
- Supreme Court held that the value of legal services in **support of** a ballot proposition are independent expenditures under RCW 42.17A.255 and
- Reporting requirements of RCW 42.17A.255 do not violate the First Amendment.



Fair Campaign Practice Act (FCPA)

Changes to FCPA- Supreme Court

COA rules: Evergreen Freedom Foundation disposes of or weighs against many of the defendants' arguments in this case

- Evergreen clarifies that pre-election litigation expenditures for legal services used to support a ballot proposition are expenditures within the definition of RCW 42.17A.255 because the language of the statute is not restricted to electioneering.
- The Court, through a plain meaning analysis, held that “any expenditure” was unambiguous and included litigation expenditures for legal services incurred before the election.
- COA also found the phrase “in opposition to” is also unambiguous.

Fair Campaign Practice Act (FCPA)

Changes to FCPA- State Legislature

- ENGROSSED SUBSTITUTE HOUSE BILL 2938 Chapter 304, Laws of 2018
- SUBSTITUTE HOUSE BILL 1195 Chapter 428, Laws of 2019
- The legislature finds that passage of [2018 changes] was an important step ...Much has been accomplished in the short time the public disclosure commission has implemented these new laws. However, some additional improvements were identified..... Additional refinements to the law will help to ensure the public disclosure commission may continue to provide transparency of election campaign funding activities, meaningful guidance to participants in the political process, and enforcement that is timely, fair, and focused on improving compliance.

Fair Campaign Practice Act (FCPA)

Changes to FCPA- State Legislature

Changed process & timelines for citizen enforcement actions –

- Formerly enforcement by PA or AG within 45 days plus additional 10 day citizen action notice –
- 2018 changed to 90 days, followed by 45 day time period;
- 2019 kept 90 days, followed by 45 day time periods, but now only requires AG to publish intent to enforce, not actually enforce.

Changed AG enforcement –

2018 change significantly limited AG enforcement, such that AG could not bring FCPA actions unless the PDC first agrees a violation occurred and refers to case to the AG.

2019 changes reinstate AG enforcement either upon citizen complaint or upon referral by PDC or PDC failure to act

Fair Campaign Practice Act (FCPA)

Changes to FCPA- State Legislature

2018 changes enhance the range of PDC/Court enforcement tools:

Added remedial violation recognition- minor

Added mitigating circumstances

- (i) The respondent's compliance history, including whether the noncompliance was isolated or limited in nature, indicative of systematic or ongoing problems, or part of a pattern of violations by the respondent, resulted from a knowing or intentional effort to conceal, deceive or mislead, or from collusive behavior, or in the case of a political committee or other entity, part of a pattern of violations by the respondent's officers, staff, principal decision makers, consultants, or sponsoring organization;

Fair Campaign Practice Act (FCPA)

Changes to FCPA- State Legislature

Added mitigating circumstances

- (ii) The impact on the public, including whether the noncompliance deprived the public of timely or accurate information during a time-sensitive period or otherwise had a significant or material impact on the public;
- (iii) Experience with campaign finance law and procedures or the financing, staffing, or size of the respondent's campaign or organization;
- (iv) The amount of financial activity by the respondent during the statement period or election cycle;
- (v) Whether the late or unreported activity was within three times the contribution limit per election, including in proportion to the total amount of expenditures by the respondent in the campaign or statement period;
- (vi) Whether the respondent or any person benefited politically or economically from the noncompliance;
- (vii) Whether there was a personal emergency or illness of the respondent or member of the respondent's immediate family

Fair Campaign Practice Act (FCPA)

Changes to FCPA- State Legislature

Added mitigating circumstances

- (viii) Whether other emergencies such as fire, flood, or utility failure prevented filing;
- (ix) Whether there was commission staff or equipment error, including technical problems at the commission that prevented or delayed electronic filing;
- (x) The respondent's demonstrated good-faith uncertainty concerning commission staff guidance or instructions;
- (xi) Whether the respondent is a first-time filer;
- (xii) Good faith efforts to comply, including consultation with commission staff prior to initiation of enforcement action and cooperation with commission staff during enforcement action and a demonstrated wish to acknowledge and take responsibility for the violation;
- (xiii) Penalties imposed in factually similar cases; and
- (xiv) Other factors relevant to the particular case.

Fair Campaign Practice Act (FCPA)

Changes to FCPA- State Legislature:

Added flexibility in penalties RCW 42.17A. 755

- Impose penalties up to \$10,000
- Waive first time offender penalty, must impose enhanced penalty for repeat offender
- May suspend penalty based on future compliance
- Allow penalty stipulation in lieu of hearing per an adopted schedule

Set hearing deadline of 90 days

Created Public Transparency Account

2019 changes addressed electronic filing

Requires periodic modification to contribution limits

Adds confidentiality for some filing requirements due to safety for judges, sheriff and prosecutors

Fair Campaign Practice Act (FCPA)

Changes to FCPA- Take Aways

Supreme Court's Definition of Regulated Campaign Activity Most Impactful

- Public Entities Should be Extra Cautious
- Increase Awareness to Employees
- Increase Awareness to Commission & Commission Candidates
 - Use of photos, insignia, equipment, cranes



Fair Campaign Practice Act (FCPA)

Changes to FCPA- Take Aways

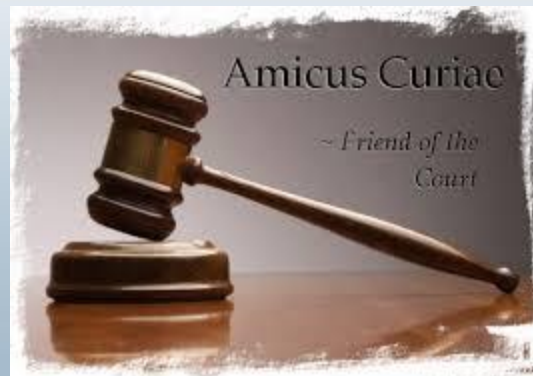
Supreme Court's Definition of Regulated Campaign Activity Most Impactful

Actions by Community entities, Associations –

- Closely Follow Committee report & filing requirements

Most impacted – 501(c)(3)'s

- Status prohibits from “political activity”
- Judicial action now equals prohibited campaign/political action
- Loss of amicus support



Questions?

