IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF OLYMPIA, a Washington municipal corporation, Respondent, v. OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK, Petitioners, THURSTON COUNTY; and MARY HALL, Thurston County Auditor, Respondents.	No. 49333-1-II RULING GRANTING STAY PENDING APPEAL

Petitioners, Opportunity for Olympia, Ray Guerra, and Danielle Westbrook (collectively, OFO), move for a stay of the superior court's decision to enjoin the

placement of their initiative (the OFO initiative) on the November ballot.[1] RAP 8.3. Respondent, the City of Olympia (the City), opposes the motion.[2] The motion is granted.

BACKGROUND

The OFO initiative would establish a fund to pay for one year of community college (or the equivalent, for other in-state public colleges or universities) for public high school graduates and general equivalency diploma (GED) recipients in the City of Olympia. Mot. for Stay and Injunctive Relief, App. B, Ex. 1. According to OFO:

> The measure would be funded by gifts, grants, and bequests, and by establishing an excise tax on household adjusted gross income ("AGI") exceeding $200,000.00 in the City of Olympia.[3] The initiative contains a severability clause and provides a mechanism for scaling back the grants if the income is insufficient.

Mot. for Stay and Injunctive Relief at 5 (citations omitted).

OFO worked to obtain enough signatures to place the OFO initiative on the November 8, 2016 ballot[4] and, on July 13, 2016, the Thurston County Auditor issued a certificate of sufficiency for the OFO initiative. RCW 35A.11.100; Mot. for Stay and Injunctive Relief, App. D, Ex. 1. The City Council then met and failed to either pass the

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[1] OFO's motion to file an overlength stay motion is granted.

[2] Thurston County and Thurston County Auditor Mary Hall filed an answer to the stay motion. They request accelerated review of this matter because the "Thurston County Auditor needs to receive the final decision in this appeal by **September 12, 2016**." Thurston County Response to Stay Motion at 1.

[3] Referred to herein as the "taxation provision."

[4] The Motion for Stay and Injunctive Relief, App. D (Declaration of Mary Hall), sets out the relevant dates.

proposed measure or call a special election. Mot. for Stay and Injunctive Relief, App. B, Ex. 2.

On July 22, 2016, the City filed a complaint seeking a declaration that the OFO initiative is invalid and to enjoin placement of the OFO initiative on the November ballot. Mot. for Stay and Injunctive Relief at 6. The Thurston County Auditor is required to have a final ballot title for the OFO initiative by September 14, 2016, to meet ballot printing deadlines. RCW 29A.36.071; RCW 29A.36.090; Mot. for Stay and Injunctive Relief at 7.

On August 24, 2016, the superior court held a hearing. It concluded the taxation provision extended beyond the scope of local initiative power. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 4 (Report of Proceedings (RP) Aug. 24, 2016 at 4). Specifically, it ruled, "[the initiative] involves powers that are granted to the City's governing body and not to the City as a whole" and "it does conflict with the state law prohibiting income tax." City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 5 (RP Aug. 24, 2016 at 5). It enjoined the initiative from appearing on the November 2016 ballot. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 4-6 (RP Aug. 24, 2016 at 4-6). OFO moved for the trial court to "order the City to issue the ballot title that it has already prepared" due to the September 14 deadline. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 12 (RP Aug. 24, 2016 at 12). The trial court denied the motion.

ANALYSIS

RAP 8.3 provides:

> Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review or in an original action under Title 16 of these rules, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security. A

> party seeking the relief provided by this rule should use the motion procedure provided in Title 17.

RAP 8.3 permits this court to "stay an injunction if the movant can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986) (citing *Purser v. Rahm*, 104 Wn.2d 159, 702 P.2d 1196 (1985), *cert. dismissed sub nom. Department of Soc. and Health Servs. v. Purser*, 478 U.S. 1029 (1986)). As a practical matter,

> courts apply a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the appeal. Indeed if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit.

Boeing, 43 Wn. App. at 291.

Debatable Issues on Appeal

Severability

Before addressing whether it is debatable that the OFO initiative's taxation provision is valid, OFO argues that the additional funding sources are clearly valid. Mot. for Stay and Injunctive Relief at 9. It notes that the City challenged only the taxation provision and never argued that this provision is not severable from the remainder of the initiative. Mot. for Stay and Injunctive Relief at 10. It adds that the superior court did not engage in a severability analysis despite that OFO raised it. Mot. for Stay and Injunctive Relief at 10.

The City responds that the taxation provision is not severable because it is central to the OFO initiative. City's Resp. to Mot. for Stay and Injunctive Relief at 7 (citing

Leonard v. City of Spokane, 127 Wn.2d 194, 202, 897 P.2d 358 (1995), for the proposition that a provision that is the "heart and soul" of a law is not severable). It adds that *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (2013), supports that the City would be harmed if forced to place invalid portions of a potentially severable initiative on a ballot.[5]

> A law's provisions are not severable if
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> > the constitutional and unconstitutional provisions are so connected . . . that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.

Leonard, 127 Wn.2d at 201 (quoting *Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982) (quoting *State ex rel. King Cy. v. State Tax Comm'n,* 174 Wash. 336, 339-40, 24 P.2d 1094 (1933))). Severability clauses in (passed) initiatives, however, are generally "'conclusive as to the circumstances asserted.'" *League of Educ. Voters v. State*, 176 Wn.2d 808, 827, 295 P.3d 743 (2013) (quoting *McGowan v. State*, 148 Wn.2d 278, 296, 60 P.3d 67 (2002) (quoting *State v. Anderson*, 81 Wn.2d 234, 239, 501 P.2d 184 (1972))).

In *Leonard*, our Supreme Court concluded that the funding source for law intended to encourage cities to constrict public improvements unlawfully diverted tax dollars from common schools to public improvements. 127 Wn.2d at 199. It does not appear, however, that the act contained additional lawful funding sources. Thus, the *Leonard* court concluded, "As the Act's funding mechanism, it represents the heart and soul of the

[5] In *Wallin*, the proposed initiative was eventually invalided in its entirety. 174 Wn. App. 782-83.

Act. This being so, the Act would be virtually worthless without it." 127 Wn.2d at 201-02; *see also League of Women Voters v. State*, 184 Wn.2d 393, 411-12, 355 P.3d 1131 (2015) ("Without a valid funding source the charter schools envisioned in I–1240 are not viable.").

Here, although the City argues that serving the taxation provision "leaves nothing remaining," the OFO initiative includes additional funding sources and permits college grants to be scaled back if income is insufficient. City's Resp. to Mot. for Stay and Injunctive Relief at 17. Thus, the severability issue is debatable.

Legislative Body

With respect to the other potential issues presented on appeal, OFO next argues that the legislature has not precluded local tax initiatives despite that RCW 35A.11.020 and .030[6] grant taxation powers to the "legislative body" of each code city.[7] Mot. for Stay

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[6] RCW 35A.11.030 provides, in relevant part:

> Powers of eminent domain, borrowing, taxation, and the granting of franchises may be exercised by the legislative bodies of code cities in the manner provided in this title or by the general law of the state where not inconsistent with this title; and the duties to be performed and the procedure to be followed by such cities in regard to the keeping of accounts and records, official bonds, health and safety and other matters not specifically provided for in this title, shall be governed by the general law.

[7] At oral argument, the City added that even a severed initiative (removing the taxation provision) infringes on the City's appropriations power, which is also vested in a legislative body. RCW 35A.11.090. RCW 35A.11.090 provides, in relevant part:

> Ordinances of noncharter code cities the qualified electors of which have elected to exercise the powers of initiative and referendum shall not go into effect before thirty days from the time of final passage and are subject to referendum during the interim except:
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> . . . .
>
> (4) Ordinances appropriating money;
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> . . . .

and Injunctive Relief at 19. It primarily argues that these laws do not demonstrate a clear legislative intent to preempt the initiative rights of the people. Mot. for Stay and Injunctive Relief at 20. *See also* RCW 35A.11.080 (granting code cities the right of initiative); *1000 Friends v. McFarland*, 159 Wn.2d 165, 177, 149 P.3d 616 (2006). The City responds by relying on the language of RCW 35A.11.020 and .030. City's Resp. to Mot. for Stay and Injunctive Relief at 4.

Decisions support that "initiative or referendum rights do not exist where the legislature has delegated power to a city or county legislative authority." *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 575, 103 P.3d 203 (2004) (citing cases). In *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976), for example, the court found that RCW 35A.11.020 vested the city council the power to adopt and modify a zoning code. It concluded, "[t]his grant of power precludes a referendum election" pursuant to RCW 35A.11.080. 87 Wn.2d at 853. *See also* City's Resp. to Mot. for Stay and Injunctive Relief at 4 n.5 (citing *Wallin*, 174 Wn. App. at 784; *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227 (2012); and *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006)).

As identified by OFO, these cases relied upon by the City address initiatives that sought to limit a city's exercise of authority granted to it by the legislature. Mot. for Stay and Injunctive Relief at 20 n.6. In *Mulkiteo Citizens*, for example, the initiative sought to

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> (7) Ordinances authorizing or repealing the levy of taxes; which excepted ordinances shall go into effect as provided by the general law or by applicable sections of Title 35A RCW as now or hereafter amended.

Although the City cites RCW 35A.11.090 in its response to the stay motion, it presented no argument that a severed initiative violates this law. City's Resp. to Mot. for Stay and Injunctive Relief at 4. This argument will not be addressed further herein.

limit the legislative body's power to enact red light cameras by requiring a two-thirds vote of the electorate. 174 Wn.2d at 51-52. *See also Malkasian*, 157 Wn.2d at 255 ("The proposed initiative would impose additional requirements on revenue bonds" by "requir[ing] the city council of Sequim to obtain ratification by the voters before issuing citywide revenue bonds."); *Wallin*, 174 Wn. App. at 785-86 (prohibiting traffic safety cameras unless two-thirds of the council and voters approved and placing other limits on camera use). OFO attempts to distinguish these cases by arguing that "[t]he OFO [i]nitiative seeks to enact substantive legislation by *exercising* the power that the citizens and the City Council both hold in common." Mot. for Stay and Injunctive Relief at 20 n.6 (emphasis theirs).

Although the City is correct that "[a]n 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," *Wallin*, 174 Wn.2d at 51, this court also recognizes that *1000 Friends* sets out that simply because a statute purports to give powers to a legislative authority or body, it does not automatically mean that the legislature intended to exclude "the people acting in a legislative capacity" from exercising the same powers. *1000 Friends*, 159 Wn.2d at 177-78. Accordingly, although the City prevailed on this issue in the superior court—and may be successful here on the merits of this issue—it qualifies as debatable. *Shamley v. City of Olympia*, 47 Wn.2d 124, 127, 286 P.2d 702 (1955).

Income/Excise Tax

The superior court also concluded that the OFO initiative conflicts with state law prohibiting the establishment of a net income tax by a city. City's Resp. to Mot. for Stay

and Injunctive Relief, App. 1 at 4 (RP Aug. 24, 2016 at 5). RCW 36.65.030 provides, "A county, city, or city-county shall not levy a tax on net income."

OFO contends, however, that the taxation provision is a permitted excise tax and not a prohibited net income tax. Mot. for Stay and Injunctive Relief at 23-25. According to OFO:

> The OFO Initiative taxes the privileges of disproportionate use and benefit from city services enjoyed by wealthy residents, such as proximity to city parks which enhance private property enjoyment and values, and higher value police and fire protection services, by assessing a tax on the portion of AGI [adjusted gross income] in excess of $200,000. Tonry Decl., Ex. Ex. 1.8.

Mot. for Stay and Injunctive Relief at 24-25.

Chapter 35A.82 RCW addresses excise taxes. It, however, does not define them. According to *Estate of Hambleton*, 181 Wn.2d 802, 811, 335 P.3d 398 (2014), which involved a challenge to an amendment of the Estate and Transfer Act:

> A tax is an "excise" or "transfer" tax if the government is taxing "a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property." *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945).

In addition, *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004), which addressed an assessment to fund ambulance services, states:

> Our cases establish that an assessment is a valid excise tax if (1) the obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise tax, and (2) the element of absolute and unavoidable demand is lacking. *Covell*, 127 Wn.2d [874,] 889, 905 P.2d 324 [(1995)]; *High Tide Seafoods v. State*, 106 Wn.2d 695, 699, 725 P.2d 411 (1986); *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965).

These cases support that the taxation provision does not resemble a conventional excise tax. The payment of an excise tax "must be based on a voluntary act."[8] *Covell*, 127 Wn.2d at 889 (discussing *Emerson College v. Boston*, 391 Mass. 415, 462 N.E.2d 1098 (1984)); *see also Arborwood*, 151 Wn.2d at 367. Here, the taxation provision is not premised upon any voluntary action of the person taxed. All citizens of Olympia use fire services, police services, other city services, and city parks.

However, because of the unique structure of the OFO initiative's taxation provision, which echoes the *Estate of Hambleton* language and imposes a "tax[on] the privileges of disproportionate use and benefit from city services enjoyed by wealthy residents," this court cannot say that OFO's argument is devoid of merit.[9] Mot. for Stay and Injunctive Relief at 24-25; *Boeing*, 43 Wn. App. at 291.

Equities

Timing of Action

The parties argue as to whether our courts should decide this matter before the election, or after. Although in some circumstances, courts will decline to reach the merits of an initiative until after an election, issues relating to the scope of local initiatives will be

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[8] In addition, *Covell*, in its analysis of whether a residential street utility charge was an excise tax, relied on *Emerson College*. *Emerson College* addressed whether a fire protection service charge was an excise tax. *Covell* noted that *Emerson College* rejected an argument that "the charge qualified as an excise on the 'privilege' of receiving an extra level of fire protection." *Covell*, 127 Wn.2d at 890 (citing *Emerson College*, 391 Mass. 415, 427-28, 462 N.E. 2d 1098 (1984)). The taxation provision here appears also to tax the "privilege" of receiving more or better city services.

[9] Because the issue whether the tax is an excise tax, as opposed to an income or a net income tax, is debatable, this court will not reach this issue whether the taxation provision qualifies as a net income tax that is prohibited by RCW 36.65.030 in this ruling.

heard before an election.[10] *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005).

Nevertheless, as pointed out by OFO, the merits of this appeal will not be reached by this court until after the election has passed. This situation resembles the circumstances in *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 52-53, 65 P.3d 1203 (2003). In *Reed*, the petitioners sought a declaration that a referendum was unconstitutional and they sought to bar the secretary of state from certifying a ballot containing the referendum. 149 Wn.2d at 53. The *Reed* court declined to bar the secretary of state from adding the measure to the ballot because there was "'insufficient time to engage in the deliberations that a case of this magnitude demands' and because an immediate decision was not required by the dates of implementation of those sections of EHB 2901 included in Referendum 53."[11] 149 Wn.2d at 53. The election was held. The matter returned to the courts and the secretary of state was prevented from certifying the election results until the *Reed* court ruled on the merits of the appeal. 149 Wn.2d at 53.

Thus, although it does not appear that the superior court's decision was premature, that does not control the outcome of the present RAP 8.3 motion for a stay pending

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[10] *Yes For Seattle*, relied upon by the City, addressed whether pre-election review was the scope of an initiative was premature and decided it was not. In that case, however, although an appeal was filed from the superior court's August decision to strike an initiative from a September ballot, it does not appear that any RAP 8.3 stay was requested or issued. The Court of Appeals decided the merits of the appeal the following June. 122 Wn. App. at 386-87.

[11] OFO also emphasizes that the taxation provision allows for "18 months for post-election review before any tax payments are due." Mot. for Stay and Injunctive Relief at 18-19.

appeal, when, like *Reed*, this court will not have the opportunity to address the merits of the appeal before November 8, 2016.

Balancing Harms

Given that OFO presents at least one debatable issue, this court must analyze whether a "stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." *Boeing*, 43 Wn. App. at 291.

Here, the concrete cost to the City will be the printing of a supplemental voters' pamphlet.[12] The deadline for adding the initiative to the original pamphlet was August 2. Mot. for Stay and Injunctive Relief, App. D (Declaration of Mary Hall) (OFO, however, notes that the City knew of the ballot measure's language and possible legal challenges before this deadline and should have performed its ministerial duty to advance the ballot measure while any legal challenge was pending, which would have gotten the OFO initiative into the original pamphlet. Mot. for Stay and Injunctive Relief at 12). The asserted harms to OFO are (1) missing a high voter turnout presidential election and (2) impairment of the First Amendment rights of the signatories to the OFO petition, who expressed their views that the OFO initiative should be put to a vote this November. Mot. for Stay and Injunctive Relief at 13-15.

The City and OFO disagree as to the harm caused to OFO by not having the initiative included on the November 2016 ballot. The City stipulates OFO will not have to re-collect signatures if they succeed on appeal and, therefore, can present the initiative

[12] At oral argument, the City also referenced a charge it is billed a percentage of the costs of holding an election and that this charge is calculated based on the number of issues on the ballot.

in a future special election. OFO responds that it planned for this initiative to appeal on the November ballot and obtained signatures for this purpose because of the high voter turnout in this specific election. This court agrees with OFO that it has an interest in having the initiative appear on the ballot that it sought and gained approval for and is now working to get passed, and that it would be harmed by deferring any election on its initiative. *See* Mot. for Stay and Injunctive Relief at 13 n.2. *See generally Small v. Avanti Health Sys. LLC*, 661 F.3d 1180, 1195 (9th Cir. 2011) (remedy of holding a new union election was insufficient to prevent harm).

Because this court has concluded that at least the severability issue is debatable and that a balancing of the equities favors OFO, this court determines to stay at least the portion of the superior court's decision that enjoined the *entire* initiative from appearing on the November 8, 2016 ballot.

The remaining issue is the harms to the parties if the taxation provision is included on the ballot. Although the court views the severability issue as more debatable than the remaining issues, it cannot conclude that the others are devoid of merit. Moreover, given that the City now will incur its additional costs regardless whether the taxation provision is included, this court concludes that a balancing of the equities favors having the full measure appear on the ballot regardless whether the additional issues meet the RAP 8.3 debatability requirement.

Supersedeas Bond or Other Security

RAP 8.3 provides, "The appellate court will ordinarily condition the order on furnishing a bond or other security." Neither OFO nor the City discussed the issuance of a bond. The primary financial harm to the City is the need to print a supplemental voters'

pamphlet. Mot. for Stay and Injunctive Relief, App. D, at 4 (Declaration of Mary Hall). This court sets the supersedeas amount at 50 percent of the reasonable cost to the City to print this pamphlet. The City has until 5:00 p.m. on September 6, 2016, to provide the printing cost information to OFO. Supersedeas must be posted with the Thurston County Superior Court Clerk no later than 5:00 p.m. on September 9, 2016. RAP 8.1(d).

Accordingly, it is hereby

ORDERED that OFO's motion for a RAP 8.3 stay of the superior court's decision, which enjoined the OFO initiative from appearing on the November 8, 2016 ballot, is granted. It is further

ORDERED that OFO must comply with the supersedeas portion of this ruling by 5:00 p.m. on September 9, 2016. It is further

ORDERED that any motion to modify this ruling is due by 5:00 p.m. on Tuesday, September 6, any answer is due by 5:00 p.m. on Wednesday, September 7, and any reply is due by noon on Thursday, September 8, 2016.

DATED this 2nd day of September, 2016.

Aurora R. Bearse
Court Commissioner

cc: Eric Lowney
Claire E. Tonry
P. Stephen DiJulio
Mark E. Barber
Annaliese Harksen
Elizabeth Petrich
Hon. Jack Nevin