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

MUKILTEO CITIZENS FOR SIMPLE GOVERNMENT, an unincorporated association of Mukilteo residents, Plaintiff, vs. CITY OF MUKILTEO, a Washington municipal corporation; CHRISTINE BOUGHMAN, in her official capacity as City Clerk for the city of Mukilteo; SNOHOMISH COUNTY, a political subdivision of the State of Washington, CAROLYN WEIKEL, in her official capacity as Snohomish County Auditor, Defendants, NICHOLAS SHERWOOD, ALEX RION AND TIM EYMAN, Intervenor-Defendants.	No. 10-2-06342-9 **INTERVENOR-DEFENDANTS' OPPOSITION TO MOTION FOR DECLARATORY JUDGMENT**

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

INTRODUCTION

Intervenor-Defendants, Nicholas Sherwood, Alex Rion and Tim Eyman file this opposition to Plaintiff's Motion for Declaratory and Injunctive Relief. Plaintiff's motion seeks to invalidate city-sponsored Resolution 2010-22, referred to the ballot by a unanimous vote of the Mukilteo City Council, spurred by a citizens initiative, Mukilteo Initiative No. 2, and to prohibit the matter from being placed on the November ballot. Intervenor-Defendants are the original sponsors of Initiative No. 2.

The Plaintiff's suit itself is not an uncommon political tactic.

> A lawsuit to strike an initiative or referendum from a ballot is one of the deadliest weapons in the arsenal of the measure's political opponents. With increasing frequency, opponents of ballot proposals are finding the weapon irresistible and are suing to stop elections… [I]t is generally improper for courts to adjudicate pre-election challenges to a measure's substantive validity.

James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 Notre Dame L. Rev. 298, 298 (1989).

At its most fundamental level, Plaintiff's suit is a political tactic to detract Intervenors from their campaign and to encourage Intervenors to expend funds for purposes other than informing the public of Initiative No. 2's virtues. Intervenors argue that (1) this suit is not justiciable because Plaintiff lacks standing, (2) injunctive relief is inappropriate, (3) the challenge is to the power of the duly elected representatives of the City to seek input from voters and not the power of voters to force the voters into a legislation-making role, and (4) the relief sought by Plaintiff frustrates free speech rights and right to petition government.

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

I.

THIS ACTION IS NOT JUSTICIABLE AND PLAINTIFF LACKS STANDING

Plaintiff's Complaint expressly alleged it is seeking declaratory relief under Chapter 7.24 RCW, the Uniform Declaratory Judgments Act ("UDJA"), and injunctive relief under Chapter 7.42 RCW. However, "[t]o proceed under the UDJA, a person must present a justiciable controversy and establish standing." *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 938, 121 P.3d 95 (2005). In the context of the UDJA, "the requirement of standing tends to overlap justiciability requirements." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 n.5, 27 P.3d 1149 (2001).

Under the UDJA, a justiciable controversy is one that is:

> (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement.
> (2) between parties having genuine and opposing interests,
> (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
> (4) a judicial determination of which will be final and conclusive

Id. at 411. An analysis of the justiciability and standing doctrines reveals that Plaintiff has not, and simply cannot, meet these legal requirements. Such an analysis also reveals why Courts have historically declined to engage in pre-election review of initiatives.

The present case does not present a justiciable controversy because Initiative No. 2 may never be approved by the voters and, even if approved by the voters, the City Council may choose to ignore the results of the election. It is evident that this suit is the epitome of a "possible, dormant, hypothetical, speculative, or moot disagreement," and that any "harm"

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11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

suffered by Plaintiff is merely "potential, theoretical, abstract or academic" at best. *To-Ro*, 144 Wn.2d at 411. Clearly, this case does not present a justiciable controversy.

However, in addition to a lack of justiciability, Plaintiff lacks standing. Similar to justiciability, standing requires a distinct and personal interest in an issue which is not contingent or a mere expectancy, and more than an abstract interest in having others, such as the City and County official named as defendants herein, comply with Plaintiffs' view of the law. *See Vovos v. Grant*, 87 Wn.2d 697, 699, 555 P.2d 1343 (1976); *Primark, Inc. v. Burien Gardens*, 63 Wn. App. 900, 823 P.2d 1116 (1992). Plaintiff here has failed to allege concrete harm to it, much less concrete harm caused by Resolution 2010-22 which merely places Initiative No. 2 on the ballot. Plaintiff cannot demonstrate standing.

In deciding whether a plaintiff has standing, courts have looked at whether the plaintiff has a special or peculiar interest which has been aggrieved any differently in kind or degree than what is experienced by the general public. *See Ocean Spray Cranberries, Inc. v. Doyle*, 81 Wn.2d 146, 154, 500 P.2d 79 (1972); *State ex rel. Gebhardt v. Superior Court*, 15 Wn.2d 673, 680, 131 P.2d 943 (1942).

At most, Plaintiff establishes that it and/or its members have certain **beliefs** and **positions** about how the City Council should go about making legislative decisions regarding traffic control cameras. For instance, the Declaration of Christine Preston states:

> [t]he association's **members believe** that it is in the public interest to support the authority of Mukilteo elected officials to act as the duly-elected representatives of Mukilteo citizens.
>
> .. it is **[Plaintiff's] position** that the Mukilteo City Council has exclusive authority to decide whether or not Mukilteo should use automated traffic safety cameras. …
>
> It is inefficient and a **waste of resources** to put measures on the ballot that the state legislature has already decided the City Council should handle.

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11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

Declaration of Christine Preston, at 2, ¶¶ 3, 4, 5 (emphasis added).

The organization's beliefs and positions are simply not a special or peculiar interest which is different in kind or degree than that shared by the general public. Rather, it is merely an abstract interest in having the City comply with its view of the law in regard to citizen input on proposed legislation.

In regard to the "waste of resources" assertions, it is not clear that the Plaintiff is talking about County or City resources or its own. Neither is sufficient to confer standing. In order to have standing to assert injuries to the County's or City's finances, Plaintiff must qualify as under the "taxpayer standing" rubric. All of the "taxpayer standing" requirements are simply not met in this case.

> The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum for citizens to contest the legality of official acts of their government. Under this circumstance **a taxpayer must first request action by the Attorney General** and **that request must be refused** before action is begun by the taxpayer
>
> "The mere fact that a taxpayer disagrees with a discretionary decision of the city provides no basis for a suit challenging that decision.... In order to maintain an action, the taxpayer must show ... **a unique right or interest** that is being violated, in a manner **special and different from the rights of other taxpayers**." The taxpayer must show that the action complained of interferes with the taxpayer's legal rights or privileges. If not, the taxpayer has no standing to challenge the action

Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 281-82 (1997) (emphasis added) (footnotes omitted). "The interest must be more, however, than simply the abstract interest of the general public in having others comply with the law." *In re Marriage of T.*, 68 Wn.App. 329, 335, 842 P.2d 1010 (1993), *quoted in Biermann v. City of Spokane*, 90 Wn.App. 816, 960 P.2d 434 (1998). Plaintiff has submitted nothing to indicate it has requested action by the

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11100 NE 8th Street, Suite 750
Bellevue, WA 98004
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Attorney General or that the request has been denied. Hence, the first two criteria for establishing taxpayer standing are simply not met.

Additionally, a person asserting taxpayer standing must prove that the plaintiff pays the particular taxes which are subject to being used wrongfully. *Dick Enterprises, Inc. v. Metropolitan King County*, 83 Wn. App. 566, 572, 922 P.2d 184 (1996). Plaintiff has not proven that it or its members pay the taxes which it contends would be "wasted" if Resolution 2010-22 were allowed to place the matter on the November election.

Nor has Plaintiff shown that the City Council's decision in Resolution 2010-22 to place Initiative No. 2 on the ballot has violated some "unique right or interest" that it (or its members) possess which is "special and different" from the public at large.[1] Plaintiff simply does not like the City Council's decision to allow a public vote and such preferences do not constitute a unique right or interest. Even if its complaints about the City's Resolution No. 2010-22 were valid, its issue with the resolution involve no unique rights.

Plaintiff's interest in invalidating Resolution 2010-22 and prohibiting a public vote on Initiative No. 2 is completely abstract. Although many people may wish that particular matters were not on the ballot, the "injury" in having an opportunity to vote on Initiative No.

[1] Plaintiff is essentially seeking a judgment on its declaratory relief and injunction claims without complying with the timing rules for summary judgment in CR 56. Nevertheless, because of the urgency in deciding whether pre-election review is appropriate in this case, Intervenors have not objected to the August 6, 2010 hearing date. In these circumstances, it is even more important that Plaintiff produce everything it needs to obtain a judgment when it files its motion, rather than fix its deficiencies in a last minute reply. Such sand-bagging is not tolerated in the summary judgment context. *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168-69 (1991) (CR 56 contemplates that the moving party will include its evidence with its original motion). Plaintiff should not be allowed to offer evidence with its reply to fix the deficiencies of its original motion.

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11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

2 is imperceptible and one that is not "special or peculiar" to Plaintiff or its members. Rather, disagreements regarding public policy are the natural product of our free society.

Although not clear from its briefing, Plaintiff may be claiming an interest in avoiding the expenditure of funds to influence voters regarding the measure. Yet, nothing requires it to do so. While such an interest may be unique to Plaintiff, it is not an interest which the Court should recognize as legally sufficient to confer standing. If the mere choice to oppose a proposed measure was sufficient to confer standing, the standing requirement itself would be rendered a nullity. Lobbyists would become litigators and legislative processes would likely come to a halt if anyone opposed to a potential law could simply sue on the basis that they do not want to go to the trouble to oppose it. The Court should deny Plaintiff the relief it seeks because it lacks standing and the dispute at this stage is not justiciable.

II

INJUNCTIVE RELIEF IS NOT WARRANTED

Additionally, to obtain an injunction—extraordinary relief—Plaintiff must prove that if the election were to go forward, it "would create great injury to the plaintiff." RCW 7.49.020. Plaintiff provides no evidence that it or its members are harmed in having a public vote so the representatives serving on the City Council can learn what their constituents believe about a particular topic. The absence of harm is a further reason to deny relief.

Finally, to obtain injunctive relief, RCW 7.40.080 requires the posting of a bond.

> No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court … to the adverse party affected thereby to pay all damages and costs which may accrue by reason of the injunction.

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(425) 453-6206

RCW 7.40.080. While bonds are mandatory, although the amount is discretionary with the Court, Plaintiff has proposed no bond in its motion to obtain an injunction. The Plaintiff's extraordinary request should be denied.

II.

THIS CASE IS NOT ABOUT THE POWER OF THE INITIATIVE, BUT THE POWER OF THE CITY COUNCIL TO SOLICIT INPUT FROM ITS CITIZENS

Pre-election review of matters slated for the ballot is highly disfavored. This disfavor is for obvious and well-established reasons:

> The fundamental reason is that "the right of initiative is nearly as old as our constitution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government." [*Coppernoll v. Reed*, 155 Wash.2d 290, 297, 119 P.3d 318 (2005).] Given the preeminence of the initiative right, preelection challenges to the substantive validity of initiatives are particularly disallowed. *Id*. at 297, 119 P.3d 318. Such review, if engaged in, would involve the court in rendering advisory opinions, would violate ripeness requirements, would undermine the policy of avoiding unnecessary constitutional questions, and would constitute unwarranted judicial meddling with the legislative process. *Id*. at 298, 119 P.3d 318. Thus, preelection substantive challenges are not justiciable. *Id*. at 300-01, 119 P.3d 318. Further, substantive preelection review could unduly infringe on the citizens' right to freely express their views to their elected representatives. *Id*. at 298, 119 P.3d 318.

Futurewise v. Reed, 161 Wn.2d 407, 410-11, 166 P.3d 708 (2007).

> [T]he right of initiative is nearly as old as our constitution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government. Accordingly, this potent vestige of our progressive era past must be vigilantly protected by our courts.

Coppernoll, 155 Wn.2d at 296-97, 119 P.3d 318 (2005) (*citing In re Estate of Thompson*, 103 Wn.2d 292, 294-95, 692 P.2d 807 (1984)).

Hence, the general rule is that courts do not rule on the validity of an initiative before its adoption. *Maleng v. King County Corrections Guild*, 150 Wn.2d 325, 300, 76 P.3d 727

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(2003). "This reluctance stems from our desire not to interfere in the electoral process or give advisory opinions." *Id*. at 330. The presumption is that the power of initiative is allowed and the burden is on the challenger to the initiative to show otherwise. *Id.* at 334.

This case has even more potential ripeness problems than cases where the voters are seeking to force a vote on an initiative. Not only might the voters reject the measure at the polls, here there is no certainty as to how the City Council would respond to the results of the November vote.

Plaintiff notes that the exception to pre-election challenges are when an initiative is challenged as being beyond the scope of the initiative power. *See* Motion for Declaratory Judgment and Injunctive Relief, at 6. However, in all of those cases voters were seeking to force an election on a subject which was beyond the scope of the initiative power.

This case is unique in that Plaintiff's challenge is not to the power of the **voters** to force an initiative on city government, but rather a challenge to the power of the **City** to seek the input of its citizens by placing a matter before them on the ballot All of the cases which Plaintiff cites for authority for a court to review an initiative prior to the election are ones in which the governmental entity chose not to place a matter on the ballot or sued for court authority to enable it to refrain from placing a matter on the ballot.

In contrast, the City Council chose to seek a public vote. Resolution 2010-22 states that the City received an initiative petition.

> The City Council desires to hear from the qualified electorate on the issues addressed in the Initiative Petition, **regardless of whether the subject of the Initiative is subject to the initiative process.**

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11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

Decl. of. V. Power, Ex. 5, at 1 (emphasis added). The vote which Plaintiff seeks to enjoin is not about the initiative power, but the ability of the City to hear from the electorate.

Here, a unanimous vote of the Mukilteo City Council essentially declared that it did not matter whether the subject matter was properly the subject of an initiative; it chose to seek a public vote regardless. Initiative No. 2 is on the ballot, not because sufficient signatures were submitted on a petition, but because the City Council chose to pass Resolution 2010-22. Plaintiff's challenge is not to the exercise of the voters' initiative power, but to the City's power to seek input from its citizenry. Plaintiff has cited no authority that prohibits a city or any government entity from seeking the advice of its citizens through the election process.

The use of advisory votes to solicit voter input is nothing new. *See State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328, 12 P.3d 134 (2000) (legislature authorized an advisory vote); *see also* RCW 43.135.041 (requiring advisory votes for tax increases); RCW 47.46.030(3) (advisory votes for traffic proposals).

Even if the City were not using Initiative No. 2 in an advisory function and the City Council were to treat Initiative No. 2 as enacting an ordinance if the measure is approved, it would simply be an example of conditional legislation. Legislative bodies have the authority both to refer a measure to the people and to condition the effectiveness of an enactment upon the happening of a future event, in this case a positive vote of the people. *Brower v. State*, 137 Wn.2d 44, 969 P.2d 42 (1998). When the City Council did so in this case, it was exercising its own legislative power. *Diversified Inv. Partnership v. Department of Social and Health Services*, 113 Wn.2d 19, 775 P.2d 947 (1989).

> When a law is made to take effect upon the happening of such an event, the legislature in effect declare the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to no other [persons]

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11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

> to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the Constitution imposes upon them."

T. Cooley, Constitutional Limitations 169 (7th ed. 1903) (quoting *Barto v. Himrod*, 8 N.Y. 483, 490 (1853)).

While the legislature gave the City of Mukilteo the legislative authority to decide whether to include automatic ticketing machines (red light and speed cameras), it did not dictate how that legislative decision must be made. It did not dictate the number or manner of public hearings or debate on the issue. To the point here, the legislature did not instruct cities to refrain from soliciting the input of their citizens on the question generally, and not to prohibit an election specifically.

IV.

PLAINTIFF'S COMPLAINT SEEKS TO STIFLE DEBATE AND ASKS FOR A REMEDY PROHIBITED BY THE FIRST AMENDMENT

Plaintiff seeks the extraordinary remedy of prohibiting a city-wide election on an issue the City has decided should be put to the voters. Such a remedy has significant free speech and right to petition government implications, founded in the First Amendment to the United States Constitution and Article I, Sections 4, 5, and 19 of the Washington Constitution.

The United States Supreme Court has made clear that the process involved in proposing legislation by means of initiative involves core political speech. *See Meyer v. Grant*, 486 U.S. 414 (1988) (overturning state's prohibition on using paid petition circulators); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (overturning various registration requirements for petition circulation). Also, the U.S. Supreme Court has noted that the core value of the Free Speech Clause of the First

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11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

Amendment is the public interest in having free and unhindered debate on matters of public importance. *See Pickering v. Board of Education,* 391 U.S. 563 (1968).

The Washington State Supreme Court echoed these same concerns in *Coppernoll v. Reed,* 155 Wn.2d.290 (preelection review of an initiative can infringe upon the constitutional rights of the people). In *Coppernoll,* opponents of a proposed initiative on tort reform petitioned the Washington State Supreme Court to reverse a trial court order dismissing their action to enjoin the Secretary of State from placing three sections of the initiative on the ballot arguing that those sections were unconstitutional. *Id*. at 3. The Supreme Court held that the proposed initiative did not exceed the scope of the legislative power and ordered the Secretary of State to place the initiative on the general election ballot. *Id*. at 9. In reaching this conclusion, the Court recognized its historical practice of refraining from inquiring into the validity of a proposed initiative before it is enacted. *Id*. at 4. The Court also recognized that First Amendment rights were implicated in preelection review.

> Because ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the measure), substantive preelection review may also unduly infringe on free speech values.

Id. at 5 (emphasis added). In making this argument, the Court noted that after the trial court invalidated Initiative 695 (requiring $30 vehicle license tabs) at issue in *Amalgamated Transit Union,* 142 Wn.2d 183, 11 P.3d 762 (2000), the Legislature quickly responded by passing an almost identical measure that was subsequently signed by the Governor. *Id*. at 4. The point of the example is that by exercising the right to initiative, the people exercised their First Amendment right to petition the government. The people were permitted to since courts do not review the legality of an initiative before the election because of First Amendment rights.

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11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

Plaintiff's claims fail to recognize that the campaign and vote itself for this measure is a valid expression of political speech, and that such expression is still fulfilled even if it is rejected by the voters, accepted by the voters but ignored by the City Council, or enacted and subsequently invalidated by judicial decree. Clearly, the relief Plaintiff seeks is foreclosed by the historical protection of the right of people to vote in the initiative process.

Plaintiff seeks to block the voters from discussing or considering the policies, provisions, and principles embodied in this measure, even if the measure, or some part of it, is subsequently found invalid. Initiative campaigns are not just about passing laws, they are about informing and involving the people in a discussion over public policy. This is especially true because the City's Resolution 2010-22 seeks the input of its constituents through an election regardless of whether the ordinance can be adopted by initiative.

Public votes on issues, even when a majority of voters reject them, serve the people and our system of government in many positive ways. Just as the Legislature considers bills that may or may not be signed into law by the Governor, so too, the people must be free to discuss and debate initiatives and their policies even if they never become law.

CONCLUSION

Intervenor-Defendants urge the Court to deny Plaintiff's request for declaratory and injunctive relief.

DATED this 2nd day ofAugust, 2010.

GROEN STEPHENS & KLINGE LLP

By: _____
Richard M. Stephens, WSBA #21776
On behalf of Intervenor-Defendants
Nicholas Sherwood, Alex Rion, and
Tim Eyman

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

DECLARATION OF SERVICE

I, Richard M. Stephens, declare:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On August 2, 2010, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

Vanessa Soriano Power Gloria S. Hong Stoel Rives LLP 600 University St., Ste. 3600 Seattle, WA 98101 vspower@stoel.com	☐ Hand Delivery via Legal Messenger ☒ First Class U.S. Mail ☐ Federal Express Overnight x Electronic Mail ☐ Other _____
Angela S. Belbeck, OGDEN MURPHY WALLACE 1601 5th Ave Ste 2100 Seattle, WA 98101-1686 abelbeck@omwlaw.com	☐ Hand Delivery via Legal Messenger ☒ First Class U.S. Mail ☐ Federal Express Overnight x Electronic Mail ☐ Other _____
Gordon W. Sivley Senior Civil Deputy Prosecuting Attorney Snohomish County Prosecutor's Office Robert J. Drewel Bldg., 7th Floor, M/S 504 3000 Rockefeller Ave. Everett, WA 98201-4046 gsivley@snoco.org	☐ Hand Delivery via Legal Messenger ☒ First Class U.S. Mail ☐ Federal Express Overnight x Electronic Mail ☐ Other _____

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 2nd day ofAugust, 2010 at Bellevue, Washington.

_____
Richard M. Stephens

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206