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April 26, 2018

Tanaja C. Gravina

[sent via email at tanajagravina@gmail.com](mailto:tanajagravina@gmail.com)

Re: Demand of the People for Enacting or Submission of Protect Our Parks Ordinance

Dear Ms. Gravina,

I am in receipt of your letter dated April 10, 2018 and emailed to me on April 10, 2018 at 5:13 p.m. After our phone conversation I have delivered your message and requests to the City Council members individually. I have been asked to make a simple and neutral legal response to the points of your letter, and address the legal position of Initiative and Referendum powers in the City of Kalama.

Does Kalama Municipal Code Already Adopt Initiative-Referendum Powers?

As you stated in your letter Chapter 1.02 of Kalama Municipal Code provides that the City of Kalama has adopted all the powers of noncharter code cities set forth in Revised Code of Washington (RCW) Title 35A. Specifically, the code Section 1.02.010 provides:

Notwithstanding anything contained in this code of ordinances to the contrary, the city of Kalama, Washington adopts the classification of a noncharter code city operating under the mayor-council plan of government as set forth in RCW Chapter 35A.12, endowed with all the applicable rights, powers, privileges, duties and obligations of noncharter code cities as set forth in RCW Title 35A as the same now exists, including, but not by way of limitation, those set forth in Chapter 35A.11 of said title, and further including any and all supplements, amendments or other modifications of said title hereafter at any time enacted.

While RCW 35A.11 does address the use of the Initiative and Referendum powers in noncharter code cities, there are three sections concerning Initiative and Referendum powers. First, section 35A.11.080 explaining how the powers are adopted by a noncharter code city. Second, section 35A.11.090 explaining that once initiative-referendum powers have been adopted, all ordinances initiated by the City Council are subject to referendum within 30 days except for exceptions listed in that section. Finally, section 35A.11.100 explaining how the initiative-referendum powers are to be exercised once they have been adopted.

So, section 35A.11.080 Election to Exercise-Restrictions or Abandonment, must be followed before the procedures of the next sections can be utilized. Section 35A.11.080 quite clearly states what needs to happen before the City can proceed to 35A.11.090 and 35A.11.100, by explaining that:

The qualified electors or legislative body of a noncharter code city **may provide** for the exercise in their city of the powers of initiative and referendum, **upon electing so to do** in the manner provided for changing the classification of a city or town in RCW 35A.02.020, 35A.02.025, 35A.02.030, and 35A.02.035, as now or hereafter amended (emphasis added).

Section 35A.11.100 only addresses how the Initiative and Referendum powers are exercised *after* they have been adopted, by election of the citizens of Kalama, or by election of the Kalama City Council, under Section 35A.11.080. So, we must now look to see if the initiative-referendum powers have been voted into existence by a previous Kalama City Council, or by a vote of the Kalama citizens.

If the City of Kalama had ever adopted the Initiative-Referendum Powers as required by RCW 35A.11.080, and as done by other noncharter code cities they would have a specific and separate Chapter in the Kalama Municipal Code for Initiative-Referendum Powers. The issue would have been brought up in previous city council meetings, either by the citizens or the City Councils, and a vote done. Neither of these two things exist anywhere in the records. I ask everyone researching this to look at the Municipal Codes for Battle Ground, Olympia, Bothell, Camas, Kelso, North Bend, Walla Walla, or any other of the noncharter code cities that have specifically adopted the initiative-referendum powers as an example of how a noncharter code city such as Kalama must specifically adopt those powers.

We can also refer to the Municipal Research and Services Center of Washington (MRSC) which states initiative and referendum powers are available to code cities, but they are not automatic powers either at the time of incorporation or reclassification as a code city. Code cities must formally adopt these powers. They have information pages on this subject as they track the cities that have elected to adopt these powers, and monitor those that are considering adopting those powers. In their researched opinion, the City of Kalama has not adopted the initiative-referendum powers. I must conclude that from looking at the clear language of the statute, and the public record on the matter, the City of Kalama has never had a City Council vote, or citizen vote to adopt the initiative-referendum powers. This leads to the next points made in your letter.

Is Kalama Municipal Code 3.06.040 Precedence for the Argument the Initiative-Referendum Powers are Already Adopted by Kalama Municipal Code?

Under Chapter 3.06 of the Kalama Municipal Code, entitled Additional Sales or Use Tax the Kalama City Council of 1982 chose to add Section 3.06.040 to allow special initiatives for proposing that taxes imposed under Chapter 3.06 could be changed or repealed. It reads:

3.06.040 - Special initiative.

This chapter shall be subject to a special initiative proposing that the tax imposed by this chapter be changed or repealed. The number of registered voters needed to sign a petition for special initiative shall be fifteen percent of the total number of names of persons listed as registered voters within the city on the day of the last preceding general election. If a special initiative petition is filed with the city council, the operation of this chapter shall not be suspended pending the city council or voter approval of the special initiative and the tax imposed herein shall be collected until such special initiative is approved by the city council or the

voters. Procedures for initiative upon petition contained in RCW 35A.11.100 shall apply to any such special initiative petition. (emphasis added)

The ordinance is very clear that special initiative powers are granted for “this chapter,” Chapter 3.06 for Additional Sales or Use Tax, it does not grant a general initiative-referendum power as mentioned in 35A.11.080. It does show that previous councils have been aware of the ability to grant the initiative-referendum power but limited it only to Chapter 3.06 of the code.

I understand the initial basis of your argument that this in some way sets a precedent for the initiative-referendum power being elected into law by a previous city council, as initiative power is directly mentioned. But looking at this from a neutral point of view, I am afraid I do not see how this sets a precedent for a general power of initiative-referendum. It would appear to show the exact opposite, because if previous city councils believed that Section 1.02.010 of the Kalama Municipal Code already granted the initiative-referendum powers, then the 1982 Kalama City Council would not have had to specifically add the provisions of Section 3.06.040 to allow for a special initiative power for that chapter only.

Is Previous Kalama City Councils Acting on Petitions by Citizens Precedent for the Argument the Initiative-Referendum Powers are Already Adopted by Kalama Municipal Code?

You make mention in your letter of a petition for a zoning change made to the City Council. This occurred over a number of years from 1979-1982. After the petition was rejected, a citizen made a petition and model ordinance, and submitted it to the City Council with some 400 signatures. There have also been several other incidents where citizens have made petitions to the City Council, or presented ordinances they hoped to have adopted. The question is, did previous City Councils follow the initiative-referendum powers, or simply choose to adopt the proposed ordinances on their own motions.

To better understand whether previous City Councils chose to follow initiative-referendum powers, or instead made the decision to move forward with the requested ordinances on their own motions we must be clear about what the required procedure a city must take when an initiative petition is filed for a city that has adopted the initiative-referendum powers. As you know, there is a certain number of signatures that are required to accompany an initiative petition with the language of a proposed ordinance to go before the City Council. If that number is met, and the petition is submitted to the City, then, like any petition it is sent to the county auditor to verify the signatures. If the county auditor determines that the number of signatures is sufficient, then the City Council has two options. The first is for the City Council to pass the proposed ordinance, without alteration, within 20 days after the county auditor’s certificate of sufficiency has been received by the council. The second is to submit the measure to a vote of the people. (These options are found in RCW 29A and RCW 35A.17 as required by RCW 35A.11.100)

In the example you provided, and all the other incidents I could find in my research of the previous City Council minutes, previous City Councils have never adopted any citizen submitted ordinance within the 20 days per the requirement. Nor have they ever submitted the citizen submitted ordinance as a measure to be voted on by the people. Rather the City Councils took the citizens petition or proposed ordinance, edited it, debated it, and then either rejected it or and made it into an ordinance by motion of the City Council after a longer process. The prime example is the petition and ordinance you explain, which takes nearly a year after the petition was filed before the City Council voted to adopt the ordinance. So as to proof, or precedent of initiative-referendum powers being

adopted and utilized by the City of Kalama, these examples further shows that the initiative-referendum power was never adopted, nor has any precedent been set.

That being said, while I cannot see any previous incidents of an initiative petition filed with the City of Kalama actually going through the initiative-referendum processes, there is very clearly a strong tradition of Kalama City Councils choosing to take the ordinances presented to the by the citizens, and after modifying and clarifying those ordinances, adopting them upon their own motion. This has not always been the case, but it is the most common outcome when citizens have petitioned the City Councils, or presented proposed ordinances to the City Councils.

Can the Current City Council, or Previous City Councils Waive the Need to Follow the Method of Adopting Initiative-Referendum Powers as Laid Out in RCW 35A.11.080?

In your letter you state that “By precedence, the City of Kalama has waived the right to prevent the people of Kalama from exercising this power.” For the sake of argument, should we assume that a precedent has been set by either Kalama Municipal Code 3.06.040 or by previous Kalama City Councils acting on petitions by citizens to answer this statement, we must still answer the larger question of whether a City Council can simply waive by precedent the formal requirements required in RCW 35A.11.080, whether by past action, or even by an expressed desire to do simply waive those requirements.

Here I will refer you to the MRSC explanation of adopting initiative-referendum powers. As previously indicated, not all code cities have the powers of initiative and referendum. These powers must be formally adopted to be available in a code city. Two methods exist by which a code city may adopt the powers of initiative and referendum:

1. Petition Method. The adoption of the powers of initiative and referendum may be initiated by registered voters of the city filing a petition with the city requesting their adoption.
2. Resolution Method. The second method for acquiring these powers is for a majority of the city council to initiate the process by enacting a resolution declaring the intention to provide for initiative and referendum powers.

The Washington State Legislature would not have put RCW 35A.11.080 into the code had they not intended for a formal adopting of the initiative-referendum powers, rather than a passive action to allow them to be adopted. The Legislature laid out two specific ways to formally adopt them, and no passive methods. They simply could have added RCW 35A.11.090 and 100, but they did include 35A.11.080 as a requirement.

The initiative-referendum powers cannot be passively adopted as no City Council has the authority to simply create, by past action or inaction, a power that by statute must be formally and purposefully adopted. Even if a City Council wished to passively adopt these powers, by the plain language of the Revised Code of Washington they cannot do so. The initiative-referendum powers are not a tool, or a right, for a City Council to choose to allow or not. They are a set of steps to be specifically followed once legally adopted. Again, as stated above, no where in the Kalama Municipal Code or in the public record has the City of Kalama ever adopted the initiative-referendum powers by the required methods for them to be now utilized.

Unasked Question

There is a question that you have not asked or addressed, but must be considered when looking at the ordinance you have proposed. To quote from the MRSC Initiative and Referendum Guide, "Even if the citizens of a city or county have the powers of initiative and referendum available to them, this does not mean that every type of legislation is subject to these powers. There are a number of statutory limitations on these powers, at least in code cities, and additional limitations have been imposed by the courts." I will not extend this letter longer by going into the argument of whether the ordinance you have presented passes the two legal tests the courts have put in place to determine whether or not an ordinance like the one you propose is the type subject to the initiative and referendum if those powers were adopted. I encourage everyone researching this to review pages 5-10 of the MRSC Initiative and Referendum Guide (this is a free PDF found online) for an overview of the issues here, and how the courts have ruled on some similar ordinances. There are many more court cases, legal briefs, and research that has been done on these questions, but it is something that must be determined before this ordinance could proceed particularly since it involves restrictions on property. But I will comment no further on this aspect unless requested to do so.

Conclusion

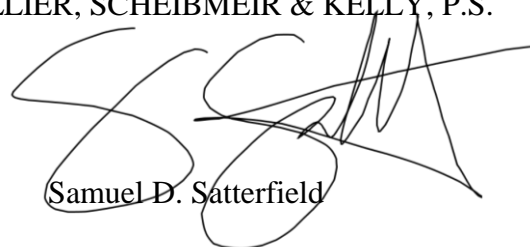
After reviewing the arguments made in your letter, researching the statutes and laws surrounding initiative-referendum powers in Washington State, and consulting with Municipal Research and Services Center of Washington and other city attorneys, I give you the analysis and observations above. I apologize for the length of the letter, but I wanted to give your letter a full review and proper response in all aspects, and to inform the citizens of Kalama and City Council as to the points of law surrounding this contested issue. I make no recommendations as to how the City Council should proceed, but I am happy to answer any questions they may have.

Your letter, and the demands made in it, have been put on the Agenda for the Kalama City Council Meeting set for May 3, 2018. The City Council can review your letter, this letter, and any further information they so choose. It is then up to the City Council to decide what, if any, action they choose to take on the demands in your letter, any proposed ordinances or changes, or to make further requests for information or discussion. I will not be able to attend the City Council meeting on May 3, 2018 as I will be at a Washington State Association of Municipal Attorneys conference from May 2nd through May 4th, but I am happy to answer any further questions that may arise.

Very truly yours,

HILLIER, SCHEIBMEIR & KELLY, P.S.

By



Samuel D. Satterfield

SDS:sds

Cc: Mayor Reuter

Cc: City Council Members