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Supreme Court of the State of Washington

Opinion Information Sheet

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JUSTICES

See the end of the opinion for the names of the signing Justices.

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1000 Friends of Washington, et al. v. McFarland
Dissent by J.M. Johnson, J.

No. 76581-2

J.M. JOHNSON, J. (dissenting) -- The King County Council (Council) adopted three controversial ordinances. The three were a "critical areas" ordinance, a clearing and grading ordinance, and a stormwater ordinance, which regulated the use of land only in unincorporated areas of King County. Those ordinances were adopted only by the votes of council members representing incorporated King County; council members representing the affected areas opposed each ordinance.

Appellant Rodney McFarland filed referenda to allow voters to determine the council ordinances at election. Advocacy groups opposed to the referenda filed to enjoin the referenda and were joined by King County, which has taken over the case. The King County Superior Court by order prohibited election on the proposed referenda. A majority of this court now approves this denial of the people's exercise of their right to check legislative

power.

The ordinances at issue are each properly subject to referenda, surely

two of the three are. The Growth Management Act (GMA), chapter 36.70A RCW, does not require such ordinances nor does that act prohibit these or any referenda. The majority misconstrues the GMA and upholds denial of the right of referendum. Even more disturbing is the majority's apparent disregard of this court's historical presumption in favor of the people's right of referendum. The voice of the people in their own self-government and an important check on legislative power are undermined by the majority's decision today. I therefore dissent.

Analysis

We begin with the first words of article I, section 1 of the Washington Constitution, "All political power is inherent in the people." The constitution was early amended to define two legislative powers retained by the people to enforce this concept: initiative and referenda. As amended in 1912, article II, section 1(b) declares, "The second power reserved by the people is the referendum."

Before this court limits powers constitutionally reserved to the people, we should also be mindful of the Washington Constitution's guiding provision that "[a] frequent recurrence to fundamental principles is essential to the

security of individual right and the perpetuity of free government." Const. art. I, Â§ 32.

The fundamental constitutional principle that political power is inherent in the people is illuminated by The Federalist No. 49 (James Madison):

> As the people are the only legitimate fountain of power,

> and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority . . . whenever any one of the departments may commit encroachments on the chartered authorities of the others.

Recognition of the people's inherent political authority requires courts to construe law in favor of the people's reserved legislative powers. Referenda allow the people to directly check legislative power. "The people, too, have directly charged us with a duty to be mindful of their sovereign rights." State ex rel. Mullen v. Howell, 107 Wash. 167, 171, 181 P. 920 (1919).

A. Local Ordinances Are Proper Subject of Referenda

1. King County Citizens' Right of Referendum

King County Charter (KCC) section 230.40 (Referendum) should receive the same construction favoring the right of referendum that the Washington Constitution demands for statewide referenda. For a state statute

to preempt, the general rule is that there must be a clear statement or expression of legislative intent. Weden v. San Juan County, 135 Wn.2d 678, 695, 958 P.2d 273 (1998); State ex rel. Schillberg v. Everett Dist. Justice Court, 92 Wn.2d 106, 108, 594 P.2d 448 (1979). Thus, prohibition of referenda is found only with a clear statement by the legislature precluding that right.

We apply a liberal construction to preserve the right of referendum. Brower v. State, 137 Wn.2d 44, 58, 969 P.2d 42 (1998). The burden is on the challenger of an initiative proposal to show that the people's power is restricted. Maleng v. King County Corr. Guild, 150 Wn.2d 325, 334, 76 P.3d 727 (2003). The same burden is on a court seeking to block its people's exercise of the right of referendum.

Under the Washington Constitution, no local charter provision may

conflict with a provision of the State's constitution or a validly enacted state

law. Const. art. XI, Â§ 4. It is within the state legislature's power to direct

"home rule" counties and cities to enact ordinances that are exempt from referenda. Local referenda are prohibited only where a state legislative mandates decision only by the "county legislative authority." But to the

extent the legislature demurs to local discretion, it also countenances local referendum.

King County has a home rule charter as authorized by article XI, section 4 of the Washington Constitution. The charter expressly reserves to the county's voters initiative and referendum under section 230.40. Those local initiative and referendum provisions reserve a "fundamental right of a governed people to exercise their inherent right and constitutional political power over governmental affairs." Paget v. Logan, 78 Wn.2d 349, 352, 474 P.2d 247 (1970). These local and statewide initiative rights have also been held to be a "fundamental constitutional right." See, e.g., Save Our State Park v. Hordyk, 71 Wn. App. 84, 90, 856 P.2d 734 (1993) (citing Schrempp v. Munro, 116 Wn.2d 929, 932, 809 P.2d 1381 (1991); Vangor v. Munro, 115 Wn.2d 536, 541, 798 P.2d 1151 (1990); Sudduth v. Chapman, 88 Wn.2d 247, 251, 558 P.2d 806, 559 P.2d 1351 (1977)). KCC section 230.40's right of referendum should therefore receive the same construction favoring the right of referendum found in the Washington Constitution.

2. GMA Does Not Preclude Referenda

a. GMA Mandates Local Control

The rule of construction favoring the right of local referenda is bolstered here by the GMA's insistence upon local decision-making and inclusion of no provision expressly barring referenda or initiative. The emphasis upon local control applies equally to ordinances concerning critical areas.

The GMA's emphasis upon local control is seen in its provisions for comprehensive plans. Each plan was required to include a "land use" element, a "housing element," and a "capital facilities element." RCW 36.70A.070. Zoning ordinances and development regulations were required to be made consistent with the comprehensive plan. RCW 36.70A.040(4). While establishing this general framework for land use planning, the legislature left wide policy making discretion to local jurisdictions. In 1997, the legislature amended RCW 36.70A.320(3) so that the growth management hearings boards must find local enactments in compliance with the GMA unless the action is "clearly erroneous."

Tellingly, state approval of a county's local comprehensive plan is not required. The comprehensive plan and all development regulations are presumed valid upon adoption. RCW 36.70A.320(1). Review occurs only if

a timely petition is filed to the board. Even then, a comprehensive plan is still subject to a "clearly erroneous" standard with continuing deference to local decision-making. See RCW 36.70A.320(3).

The GMA merely directs counties to adopt regulations that protect specific types of critical areas. RCW 36.70A.040(3)(b), .060(2). In complying with this general directive, cities and counties are required to "include the best available science in developing policies and development

regulations." RCW 36.70A.172(1). But this requirement did not dictate a particular result or policy. In Honesty in Environmental Analysis & Legislation v. Central Puget Sound Growth Management Hearings Board, 96 Wn. App. 522, 531, 979 P.2d 864 (1999), the Court of Appeals noted the board "rejected the idea that the statute required any particular substantial outcome or product. The Board is correct."

Here, the Council adopted a critical areas ordinance pursuant to the GMA that was properly within its local discretion. Referenda are an instrument in local governance. To the extent that the legislature has deferred to local discretion, it has also countenanced the use of the local referendum.

The majority undervalues the constitutional status of initiatives and

referenda. Majority at 10-11. These powers may be barred only if expressly precluded by state legislation. Such an exception does not exist here.

b. Referendum Veto Consistent with GMA Procedures

Operating akin to an executive veto, the people's exercise of the right of referendum on GMA-related local ordinances is entirely permissible. Referenda calling for a "yes" or "no" vote on nonmandatory, local ordinances passed pursuant to the GMA are consistent with GMA procedural requirements.

Whereas there are many similarities between initiatives and referenda, important differences are relevant. An initiative involves the drafting and adopting of legislation initiated by voters. It is the people's exercise of legislative power. Initiatives regulating critical areas would not involve the GMA's adoptive procedures.

By contrast, referenda most clearly fit into GMA's process for critical areas ordinances. A referendum, in this context, occurs after the county has presumably complied with its preliminary procedural requirements. Such a referendum is a people's veto. As amicus Washington State Attorney General rightly points out, "[a]s long as the process followed by the

legislative authority complies with the GMA, the addition of referenda to approve or reject ordinances does not create a conflict with the GMA." Amicus Br. of Att'y General at 10. If a referendum succeeds, the Council could adopt new regulations consistent with the comprehensive plan and the GMA.

The majority insists that an opportunity for public participation at hearings somehow precludes the right of referendum. Majority at 17. There is no basis for this unusual rationale which would bar any referenda. It violates fundamental principles above-stated to suggest that public involvement may operate as a sub silentio repeal of the people's right of referenda.

The dissent in Whatcom County v. Brisbane, 125 Wn.2d 345, 884 P.2d 1326 (1994) strongly rejected the assertion that "public participation" operates as the equivalent of referenda:

> A referendum is not simply an effort to participate in, or contribute to, discussion; rather, the enactment of a referendum measure "is an exercise of the same power of sovereignty as that exercised by the legislature in the passage of a statute". Philip A. Trautman, Initiative and Referendum in Washington: A Survey, 49 Wash. L. Rev. 55, 66 (1973). Initiative and referendum provisions reserve to voters "the fundamental right of a governed people to exercise their inherent and constitutional political power over governmental affairs". Paget, [78 Wn.2d] at 352.

Therefore, to say that public discussion of the proposed content

> of an ordinance is somehow equivalent to the right to challenge that ordinance by referendum, and that the public must be contented with such discussion, is a mischaracterization of the significance of the referendum power.

Id. at 359 (Madsen, J., dissenting). To treat public participation as the equivalent of referenda or to allow hearings to preclude the people's rights was as wrong when Brisbane was decided as it is today.

Furthermore, this court has even affirmed the authority of a non-GMA entity to veto GMA development regulations. In City of Bellevue v. East Bellevue Community Council, 138 Wn.2d 937, 983 P.2d 602 (1999), this court reviewed whether community councils, pursuant to RCW 35.14.040 (not part of the GMA), could continue to exercise a veto authority over development regulations adopted by cities. This court rejected claims that such a veto over GMA zoning regulations was impermissible. East Bellevue Community Council should control here, not Brisbane.

c. Delegation to the "Legislative Authority" Precludes Referenda

The trial court's decision is also erroneous because it disregarded our precedent recognizing the legislature may grant authority exclusively to the local legislative body simply by saying so. Here, for example, the statute

could have read: "a county council shall adopt . . . regulations." The majority repeats the trial court's error.

"This court has repeatedly recognized the distinction between a grant of authority by the legislature to a city as a corporate entity and to its legislative and other corporate authorities." State ex rel. Haas v. Pomeroy, 50 Wn.2d 23, 25, 308 P.2d 684 (1957). "[T]he general rule that where a statute vests a power in the city as a corporate entity, it may be exercised by the people through the initiative or referendum process." State ex rel.

Guthrie v. Richland, 80 Wn.2d 382, 384, 494 P.2d 990 (1972).

Thus, under our cases (and principles of construction), the specific wording of the statute is crucial to our determination. Here, the statute authorizing and mandating adoption of the critical areas ordinance is RCW 36.70A.060. Subsection (2) specifies that "[e]ach county and city shall adopt development regulations that protect critical areas." Id.

The statute does not refer to "the legislative authority" of each city and county. The language is similar for inclusion of best available science. RCW 36.70A.172(1) ("counties and cities shall include the best available science"). This language does not limit delegated authority to the King County Council.

If the legislature intended to preclude local referenda, it could have simply stated this intent. (For example: "referenda shall not be available for such actions.")

In contrast to Brisbane, 125 Wn.2d 345 (discussed below), prior court decisions have restricted initiative powers only where power was expressly or exclusively granted to a legislative body. See, e.g., Guthrie, 80 Wn.2d 382; Lince v. City of Bremerton, 25 Wn. App. 309, 607 P.2d 329 (1980). We should adhere to these prior decisions, not Brisbane.

The majority decries "laser focus" on the words "'legislative authority.'" Majority at 13. This is because focus on the actual words of the legislature would permit referenda. Statutory use of the term "legislative authority" in this context would suggest intent to preclude referenda. Those words were not chosen by the legislature. Nothing about the GMA's

framework or our constitutional system suggests referenda be precluded.

3. Brisbane Should Be Overruled

To the extent that the right of referendum is inconsistent with Brisbane, 125 Wn.2d 345, that case should be overruled. This court's unanimous decision in Snohomish County v. Anderson, 123 Wn.2d 151, 868 P.2d 116

(1994) constituted a more careful and reasonable application of Washington's law regarding statutory construction and the referendum power. In this respect, Brisbane is both harmful and incorrect. The majority now compounds error by following Brisbane instead of distinguishing or overruling it.

a. Brisbane Is Incorrect

The majority in Brisbane was clearly erroneous in concluding the legislature used the terms "county" and "legislative body" interchangeably (and implying the legislature does not know the difference). 125 Wn.2d at 349. The only support for the Brisbane majority's conclusion in this regard is a paltry footnote that fails to accurately describe the cited statutory provision. Id. at 350 n.18. The Brisbane majority's footnote "example" of interchangeable use of terms actually shows the legislature is aware of the distinction between the term "county" and the specific term "county legislative body." Our cases also require us to assume the legislature knows the difference, and chooses its language.

The Brisbane majority's footnote quotes only RCW 36.70A.040(3), concerning adoption of comprehensive land use plans. 125 Wn.2d at 350

n.18. In that quotation is a reference to subsection (2) and the "date the county legislative body takes action as required by subsection (2)." Id. The footnote fails to mention that subsection (2) deals only with counties that are not automatically required to plan under the GMA but that nevertheless choose to opt in and become GMA counties. Subsection (2) states:

> The county legislative authority of any county that does not meet . . . [the] criteria established under subsection (1) of this section may adopt a resolution indicating its intention to have subsection (1) of this section apply to the county.

RCW 36.70A.040 (emphasis added). The legislature was clear that only the "legislative authority," through adoption of "a resolution" may decide for a county to opt in to GMA requirements. In subsection (3), the legislature further stated the action undertaken in subsection (2) must be by the "legislative authority" and not by the county generally.

By assuming the legislature was merely careless in its use of the terms "county" and "legislative body," the Brisbane majority denigrates the legislature. Careful reading of the statute, as is this court's duty, undermines the Brisbane majority's opinion.

Moreover, instead of following Anderson and looking at the specific wording of the statute at issue to determine whether referendum rights

existed, the Brisbane majority looked at the wording of the other provisions in the GMA. See Brisbane, 125 Wn.2d at 350 n.18. There is no precedent supporting the Brisbane majority. Anderson was limited to reviewing the specific statutory provision delegating the authority to adopt the ordinance at issue in that case (RCW 36.70A.210). Anderson held RCW 36.70A.210(2) was "[a]t the heart" of determining whether referendum rights were available

and did not even discuss or review other sections of the GMA. Anderson, 123 Wn.2d at 155. Contrary to the Brisbane majority, the focus should not be on mere presence of both words in a statutory provision, but what term is specifically used when the legislature delegates power under the GMA.

Finally, the majority in Brisbane gave no recognition of the presumption favoring the right of referendum. This disregard of citizens' right to referenda is clearly erroneous. As discussed below, it is also harmful.

b. Brisbane Is Harmful

Brisbane is harmful because it wrongly denies citizens fundamental rights. Rights of initiative and referenda are the "first of all the sovereign rights of the citizen -- the right to speak ultimately and finally in matters of political concern." Howell, 107 Wash. at 171. Laws that limit this

fundamental right should be strictly construed. However, Brisbane runs contrary to our constitution's rule favoring initiative and referenda in the absence of a clear legislative repeal.

Brisbane is also harmful because of the problems it creates for the drafting of legislation. Until Brisbane, there was no question that the legislature might prohibit local referenda by delegating authority to the "legislative authority." What Anderson clearly reiterated, Brisbane unfortunately muddled. The majority's expansive reading of Brisbane puts the legislature in the position of having to include a provision in every bill affecting local government as to whether referenda should be allowed. The majority's assumption is that the people are not assumed to have such rights. But referenda exist as the people's check upon unconstitutional or abusive

legislation. See Howell, 107 Wash. at 172 ("the referendum was asserted . . . because the people . . . had become impressed with a profound conviction that the legislature had ceased to be responsive to the popular will."). The legislative branch has incentive to avoid referenda. The majority's adherence to Brisbane interferes with this important check-and-balance on abuse of government power.

Overruling Brisbane would also bring consistency with this court's decisions in Anderson and East Bellevue Community Council.

B. Noncritical Areas Ordinances Are Subject to Referenda, Even Under Brisbane

Even if Brisbane were correct, that case should not completely control here. Brisbane related to critical areas ordinances. Clearing and grading or stormwater ordinances are not critical areas ordinances under the GMA. A county's power to enact and amend the latter ordinances exists independent of the GMA. Such regulations derive from a county's police power, granted by article XI, section 11 of the Washington Constitution. See Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 14, 959 P.2d 1024 (1998) (grading ordinances enacted under the police power); Phillips v. King County, 87 Wn. App. 468, 488, 943 P.2d 306 (1997), aff'd in part, 136 Wn.2d 946, 968 P.2d 871 (1998) (stormwater ordinances enacted under police power). Chapter 36.70A RCW contains no reference to clearing and grading ordinances or to stormwater ordinances. They are not mandated by the GMA. Thus, the referenda challenging these ordinances were improperly blocked.

Not all land use regulations are the result of a GMA mandate. In

Skagit Surveyors & Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 566, 958 P.2d 962 (1998), this court held the growth management hearings boards had no authority to invalidate development regulations which were not adopted under dictates of the GMA.

There is nothing in the GMA indicating the counties' preexisting authority to enact clearing and grading ordinances or stormwater ordinances was superseded. Our courts have recognized that referenda apply to grading ordinances. See, e.g., Postema v. Snohomish County, 73 Wn. App. 465, 468, 869 P.2d 1107 (1994). Even the growth management hearings board has deemed the ordinances at issue in this case as "general regulation for rural lands, not a designation or regulation of critical areas." Keesling v. King County, No. 05-3-0001, Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Final Dec. and Order (Wash. July 5, 2005) at 31 (emphasis omitted).

As articulated by the attorney general amicus, a more reasonable interpretation of Brisbane is that the GMA requires an analysis of whether the authority to adopt each development regulation is exclusively vested in the county council. Amicus Br. of Att'y General at 11. Under RCW 36.70A.030(7)'s definition of "development regulation," both the grading and

clearing ordinance and the stormwater ordinance at issue here are development regulations.

Development regulations are unlike any in Brisbane because here there is not even a contention of interchangeable use of county authority and legislative authority. The statute specifies a county or city only as the corporate body. Absent a specific vesting of power in the legislative authority to adopt a grading and clearing or stormwater ordinances, referenda

on such ordinances do not conflict with a reasonable interpretation of Brisbane.

Even if the Council proclaimed the clearing and grading and stormwater ordinances to be GMA measures, that should not determine this court's decision. Our law has a presumption in favor of the constitutional right of referendum. Moreover, our system of checks and balances requires the judiciary to safeguard referenda from intrusion by legislative bodies. After all, the purpose of the referendum power is "to slay unwanted legislation." Wash. State Farm Bureau Fed'n v. Reed, 154 Wn.2d 668, 683, 115 P.3d 301 (2005) (Chambers, J., dissenting). The right of referendum would be too easily frustrated were a local legislative body given the ability

conclusively to determine whether a particular land use regulation was enacted pursuant to GMA mandate and thus exempt from the local referendum.

To permit a local legislative body of representatives to decide for itself whether its ordinances shall be subject to local referendum,

> would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78 (Alexander Hamilton). It is untenable to assume the legislature through GMA would sub silentio effect the radical change in local land use regulation as King County suggests. The GMA was promulgated in the context of preexisting state police powers entrusted to local government for purposes of purely local land use regulation. Our law's presumption favoring the right of referendum and the importance of checks and balances

makes the majority's conclusion all the more disconcerting.

Conclusion

The ordinances at issue are each subject to the people's exercise of their right of referendum. This power is also express in the King County

Charter and was not repealed by the legislature. In upholding the superior court's judgment preventing an election on these proposed referenda, the majority of this court has used a strained reading of the GMA and the King County Charter to deny these rights. The majority undermines our constitutional presumption favoring the people's right of referendum. I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Richard B. Sanders