

EXPEDITE
 No hearing set
 Hearing is set
 Date: March 10, 2006
 Time: 9:00 a.m.
 Judge/Calendar: [not yet assigned]

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

In Re:
BALLOT TITLE for INITIATIVE NO. 933

Honorable _____
No. _____

(appeal filed by petitioners League of Women Voters of Washington, Whatcom County voter/forest manager Alan Soicher, and Kitsap County voter/wetlands owner William Stratton)

PETITIONERS' BRIEF IN SUPPORT OF REQUESTED BALLOT TITLE REVIEW

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I. SUMMARY OF THIS BRIEF

Initiative 933 would make four basic changes to Washington law. The Concise Description statement in that measure’s currently proposed ballot title, however, does not inform voters of those changes. The League of Women Voters of Washington, Whatcom County voter Alan Soicher, and Kitsap County voter William Stratton, therefore request that this Court amend that Concise Description to describe the essential content of this measure’s changes to Washington law as required by our State’s ballot title statute (chapter 29A.72 RCW).

Washington law currently requires compensation when a government regulation damages private property. Washington Constitution, Article I, §16 (“No private property shall be taken or damaged for public or private use without just compensation having been first made”).

Initiative 933 adds an additional requirement. It requires state and local governments to engage in a detailed SEPA-like study of alternatives and proportional impacts before adopting any rule, regulation, or ordinance that “may damage” any piece of private property. Initiative §2(1).

Initiative 933 then redefines “damage” to mean a broad array of zoning, environmental, health, forestry, shorelines, and water regulations – such as State and local land use rules adopted after 1995, State and local rules on tree removal, etc. Initiative §2(2)(b).¹

Initiative 933 then provides government agencies a waive-instead-of-pay option. Instead of paying an objecting propertyowner for a zoning, environmental, or other law’s claimed monetary impact on him or her, the government agencies could opt to exempt that objecting propertyowner from enforcement of that law. Initiative §3 & §4. As Oregon’s implementation of its similar Initiative Measure 37 has demonstrated, this exempt instead of pay option is

¹ *As explained in Part II.B.2 of this Brief, the exceptions allowed by Initiative 2(2)(c) are not applicable to most (if not all) zoning, forestry, etc. regulations because those regulations do not apply equally to all property subject to the governing agency’s jurisdiction.*

1 significant – for Oregon’s experience has been that instead of diverting limited taxpayer funds
2 to pay objecting propertyowners, government agencies uniformly select the option of exempting
3 the objecting propertyowner from the law’s enforcement.²

4 Finally, Initiative 933 also amends the Growth Management Act (chapter 36.70A RCW)
5 to prevent development regulations from prohibiting existing uses allowed before those
6 regulations were adopted. Initiative §5.

7 Maybe our State’s voters would vote “yes” if the November ballot described this
8 measure’s four basic changes to Washington law. Maybe they would vote “no”. But at the very
9 least, the Concise Description of this measure printed on the November ballot should tell voters
10 what those four changes are.

11 Indeed, Washington’s ballot title statute demands it. That statute unequivocally requires
12 the November ballot to provide a 30-word “concise description” of the initiative that is “a true
13 and impartial description of the measure’s essential contents”. RCW 29A.72.050(1).

14 The Concise Description in this measure’s currently proposed ballot title does not
15 comply with that requirement.

16 The *first* half of that Concise Description states “This measure would require
17 compensation when any government regulation damages the use or value of private property”.

18 But that is not a true description of what the initiative measure would do since our State
19 Constitution already imposes that requirement.

20 Repeating a popular constitutional requirement might (as a polling matter) be an
21 effective way to rally partiality in favor of a newly proposed statute or initiative. But as a legal
22 matter, the repetition of a pre-existing constitutional requirement cannot truthfully be said to be
23 part of that new measure’s “essential contents”.

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26 ² See the State of Oregon Department of Land Conservation & Development’s website
information discussed in Part II.B.3 of this Brief.

1 The *second* half of the proposed ballot title’s Concise Description then states that this
2 measure would “forbid regulations that prohibit existing legal uses of private property, and
3 provide for exceptions and conditions.”

4 But that statement on its face does not describe the essential content of this measure’s
5 basic changes to Washington law. It completely omits the new SEPA-like studies required
6 before restricting property use. It omits the exempt-or-pay option for responding to
7 propertyowners who object to the wide array of zoning, environmental, and other laws covered
8 by this measure’s new regime. And it misstates the Growth Management Act amendment
9 barring development regulations that prohibit previously-existing uses.

10 The petitioners accordingly request that this Court amend the Concise Description in this
11 measure’s currently proposed ballot title so Washington voters can be presented with a
12 November ballot that provides a “true and impartial statement of the measure’s essential
13 contents” as required by RCW 29A.72.050(1). As explained in more detail below, that can be
14 done by amending the Concise Description to state that this measure would “require
15 government studies before restricting property use, exempt or pay propertyowners who object to
16 certain zoning, environmental, and other laws, and prevent development regulations that
17 prohibit previously-existing uses.”

18 19 **II. BACKGROUND FACTS**

20 **A. Article I, §16 of our State Constitution.**

21 Washington law currently requires compensation when a government regulation
22 damages private property – for our State Constitution expressly mandates that “No private
23 property shall be taken or damaged for public or private use without just compensation having
24 been first made”. Washington Constitution, Article I, §16.

25 More fully, the People of our State have established the following as a basic
26 constitutional principle underlying our form of government:

1 Private property shall not be taken for private use, except for private ways
2 of necessity, and for drains, flumes, or ditches on or across the lands of
3 others for agricultural, domestic, or sanitary purposes. *No private property*
4 *shall be taken or damaged for public or private use without just*
5 *compensation having been first made*, or paid into court for the owner,
6 and no right-of-way shall be appropriated to the use of any corporation
7 other than municipal until full compensation therefor be first made in
8 money, or ascertained and paid into court for the owner, irrespective of
9 any benefit from any improvement proposed by such corporation, which
10 compensation shall be ascertained by a jury, unless a jury be waived, as in
11 other civil cases in courts of record, in the manner prescribed by law.
12 Whenever an attempt is made to take private property for a use alleged to
13 be public, the question whether the contemplated use be really public shall
14 be a judicial question, and determined as such, without regard to any
15 legislative assertion that the use is public: Provided, that the taking of
16 private property by the state for land reclamation and settlement purposes
17 is hereby declared to be for public use.

18 Washington Constitution, Article I, §16 (emphasis added).

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B. Initiative 933.

A complete copy of Initiative 933 is attached as Exhibit A to the Petition filed with this Brief.

The essential content of that Initiative measure is established in its Sections 2 through 5.³

³ Sections 6-10 appear under the caption "Miscellaneous", and provide construction, severance, and other miscellaneous provisions. Section 1 is the "Intent" provision which has no substantive or operative effect. E.g., *Pierce County v. State*, 150 Wn.2d 422, 434, 78 P.3d 640 (2003) (Initiative measure's intent section is "policy fluff" that "is without force in a legislative sense ... It is no part of the law").

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1. **Require SEPA-like pre-action studies.**

Section 2(1) of Initiative 933 requires state and local governments to engage in a detailed SEPA-like study of alternatives and proportional impacts before enacting or adopting any ordinance, regulation, or rule that “may damage” any piece of private property:

NEW SECTION. Sec. 2. A new section is added to chapter 64.40 RCW to read as follows:

(1) To avoid damaging the use or value of private property, prior to enacting or adopting any ordinance, regulation or rule which may damage the use or value of private property, an agency must consider and document:

(a) the private property that will be affected by the action;

(b) the existence and extent of any legitimate governmental purpose for the action;

(c) the existence and extent of any nexus or link between any legitimate government interest and the action;

(d) the extent to which the regulation’s restrictions are proportional to any impact of a particular property on any legitimate government interest, in light of the impact of other properties on the same governmental interests;

(e) the extent to which the action deprives property owners of economically viable use of property;

(f) the extent to which the action derogates or takes away a fundamental attribute of property ownership, including, but not limited to, the right to exclude others, to possess, to beneficial use, enjoyment, or to dispose of property;

(g) the extent to which the action enhances or creates a publicly owned right in property;

(h) estimated compensation that may need to be paid under this Act; and

(i) alternative means which are less restrictive on private property and which may accomplish the legitimate governmental purpose for the regulation, including, but not limited to, voluntary conservation or cooperative programs with willing property owners, or other non-regulatory actions.

1 2. **Redefine “damage” to mean a broad array of zoning, environmental, health, forestry,**
2 **shorelines, and water laws.**

3 Section 2(2) of Initiative 933 redefines “damage” to mean a broad array of zoning,
4 environmental, health, forestry, shorelines, and water laws – such as State and local land use
5 rules adopted after 1995, State and local rules on tree removal, etc.. Initiative §2(2)(b).

6 That Section also includes exceptions which are to be “construed narrowly” and are
7 expressly limited to “restrictions that apply equally to all property subject to the agency’s
8 jurisdiction.” Initiative §2(2)(c) (emphasis added). Those exceptions accordingly do not apply,
9 for example, to most zoning and forestry laws because such laws do not apply equally to all
10 property subject to the governing agency’s jurisdiction. E.g., a city’s residential neighborhood
11 zoning restrictions typically do not apply to property in the city’s downtown office building
12 core or property its outlying industrial areas.

13 Nor do those exceptions apply to any other restriction on a property’s use once an
14 agency grants a single exemption under Initiative Sections 3 & 4 – because once an exemption
15 to a restriction is granted, that restriction by definition no longer applies equally to all property
16 subject to that agency’s jurisdiction.

17 3. **Allow government agencies to exempt (instead of pay) a propertyowner who objects to**
18 **a law.**

19 Sections 3 & 4 of Initiative 933 provide that government agencies do not need to apply
20 and enforce existing laws equally to all propertyowners. Instead, government agencies can
21 exempt an objecting propertyowner from enforcement of an existing zoning, environmental,
22 health, forestry, shorelines, water, or other law in lieu of paying that propertyowner for the
23 law’s claimed monetary impact on him or her. Initiative §3 & §4.

24 Since government payments in fact come from taxpayer dollars, and since such taxpayer
25 funds are in fact limited, this measure’s exemption option is undeniably the one that will in fact
26 be frequently employed instead of this measure’s payment option.

1 Indeed, the implementation of the similar exempt-or-pay option established by Oregon's
2 Initiative Measure 37 confirms this reality. Instead of appropriating taxpayer dollars to pay the
3 claims of objecting propertyowners under that measure, government agencies have
4 overwhelmingly opted to exempt the objecting propertyowner from the law's enforcement.
5 <http://www.oregon.gov.LCD/measure37.shtml> (2/20/2006) (State of Oregon Department of
6 Land Conservation & Development's website confirming that none of the claims submitted to
7 the state by objecting propertyowners have resulted in the payment of any compensation –
8 instead, in 90% of the cases the objecting propertyowner was granted an exemption, and the
9 remaining 10% had their payment claim denied).

10 4. **Amend the Growth Management Act to prevent development regulations that prohibit**
11 **previously-existing uses.**

12 Finally, Section 5 of Initiative 933 amends the Growth Management Act
13 (chapter 36.70A RCW) to prevent development regulations that prohibit existing uses that were
14 allowed before those regulations were adopted. Initiative §5.

15 C. **The Currently Proposed Ballot Title.**

16 On February 16, 2006, the Attorney General's office filed with the Washington
17 Secretary of State the following proposed ballot title for the above Initiative measure:

18 Statement of the Subject: Initiative Measure No. 933 concerns government
19 regulation of private property.

20 Concise Description: This measure would require compensation when any
21 government regulation damages the use or value of private property, forbid
22 regulations that prohibit existing legal uses of private property, and provide
23 for exceptions and conditions.

24 Should this measure be enacted into law? Yes[] No[]

25 Due to time and resource constraints, and to focus on the above proposal's most significant
26 departure from Washington's ballot title statute, petitioners have limited their Petition to the
above Concise Description statement. See Petition at ¶11.

1 **III. LEGAL DISCUSSION**

2 **A. Standard of Review.**

3 The wording proposed by the Attorney General’s office is not entitled to statutory or
4 administrative deference. See, e.g., RCW 34.05.010(2) (the Washington Administrative
5 Procedures Act – which includes the “deference to administrative agencies” standard – does not
6 apply to the Attorney General).

7 Instead, Washington’s ballot title statute expressly grants this Court the authority (and
8 responsibility) to review proposed ballot titles and amend their wording to fully comply with
9 that statute’s requirements. RCW 29A.72.080.

10 **B. Washington Supreme Court’s Emphasis on the Importance of a Ballot Title’s**
11 **Wording.**

12 The ballot title as finalized by this Court will be printed in full on the ballot that voters
13 are given to vote on in November. RCW 29A.72.050.

14 The exact words used in that final ballot title are therefore significant. As our State
15 Supreme Court has reiterated:

16 We can safely assume that not all voters will read the text of the initiative
17 or the explanatory statement. Some voters may cast their votes based on
18 the ballot title as it appears on their ballots. Thus, the outcome of the vote
19 may be affected by the tenor of the ballot title.

20 *In Re Ballot Title for Initiative 333*, 88 Wn.2d 192, 198, 558 P.2d 248 (1977).

21 This Court’s ensuring that a final ballot title’s wording fully complies with the
22 requirements of our State’s ballot title statute is therefore crucial.

23 **C. The “Concise Description” Required by Washington’s Ballot Title Statute.**

24 Washington’s ballot title statute provides that an initiative measure’s ballot title must be
25 written to consist of (a) a statement of the subject of the measure; (b) a concise description of
26 the measure; and (c) a question. RCW 29A.72.050(1).

The statute requires that the “concise description” part of the ballot title “must contain
no more than thirty words, be a true and impartial description of the measure’s essential

1 contents, clearly identify the proposition to be voted on, and not, to the extent reasonably
2 possible, create prejudice either for or against the measure.” RCW 29A.72.050(1).

3 **D. The “Concise Description” in the Currently Proposed Ballot Title Does Not Fully**
4 **Comply with Washington’s Ballot Title Statute.**

5 The currently proposed Concise Description for Initiative 933 is not a true and impartial
6 description of that measure’s essential contents.

7 Instead of describing the essential content of that Initiative measure, the *first* half of the
8 currently proposed Concise Description reiterates the fundamental compensation principle that
9 our State’s citizens established when they adopted Article I, §16 of our State Constitution.

10 The *second* half of that Concise Description does not cure this defect, for it only
11 continues to omit a description of this measure’s essential contents – i.e., its four basic changes
12 to existing Washington law:

13 **One:** As currently proposed, the Concise Description does not inform the average voter
14 that this measure would require state and local governments to engage in a detailed SEPA-like
15 study of alternatives and proportional impacts before enacting or adopting any ordinance,
16 regulation, or rule that “may damage” any piece of private property. Initiative §2(1).

17 **Two:** As currently proposed, the Concise Description does not inform the average voter
18 that this measure redefines “damage” to mean a broad array of zoning, environmental, health,
19 forestry, shorelines, and water regulations – such as State and local land use rules adopted after
20 1995, State and local rules on tree removal, etc.. Initiative §2(2)(b) & (c).

21 **Three:** As currently proposed, the Concise Description does not inform the average
22 voter that this measure would allow government agencies the option of exempting an objecting
23 propertyowner from enforcement of a law instead of paying that propertyowner for the law’s
24 claimed monetary impact on him or her. Initiative §3 & §4.

25 **Four:** As currently proposed, the Concise Description does not inform the average
26 voter that this measure would amend the Growth Management Act (chapter 36.70A RCW) to

1 prevent development regulations that prohibit existing uses that were allowed before those
2 regulations were adopted. Initiative 5.

3 Whether this Initiative measure's changes to Washington law are a good or bad idea is a
4 choice for the voters voting on the November ballot to decide. But to make that choice, the
5 Concise Description of this measure printed on the November ballot must disclose those basic
6 changes. That disclosure can be provided, and compliance with Washington's ballot title statute
7 can be achieved, by amending the Concise Description in the currently proposed ballot title to
8 read as noted below:

9 Statement of the Subject: Initiative Measure No. 933 concerns government
10 regulation of private property.

11 Concise Description: This measure would require government studies
12 before restricting property use, exempt or pay propertyowners who object
13 to certain zoning, environmental, and other laws, and prevent development
14 regulations that prohibit previously-existing uses.

15 Should this measure be enacted into law? Yes[] No[]

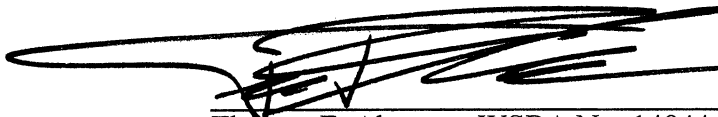
16 **IV. CONCLUSION**

17 Washington's ballot title statute requires the Concise Description to provide voters "a
18 true and impartial description of the measure's essential contents". RCW 29A.72.050.

19 The Concise Description in the currently proposed ballot title for Initiative 933 does not
20 do that. Petitioners therefore request that this Court enter an Order amending that Concise
21 Description as set forth above so it fully complies with our State's ballot title statute.

22 RESPECTFULLY SUBMITTED this 24th day of February, 2006.

23 FOSTER PEPPER PLLC

24 

25 Thomas F. Ahearne, WSBA No. 14844
26 Attorneys for Petitioners