

This discussion on adopting the powers Initiative and Referendum was excerpted from:
Council Retreat II: 05/29/2015
Agenda: Council Policies and Procedures Item #: 9



CITY OF KIRKLAND
City Manager's Office
123 Fifth Avenue, Kirkland, WA 98033 425.587.3001
www.kirklandwa.gov

Initiative and Referendum

At a previous retreat, a request was made for the City Council to consider adding a provision for initiatives and referendums to the Kirkland Municipal Code. The following background is provided as a point of departure for Council discussion.

The initiative power refers to the ability of citizens to directly enact legislation. By contrast, the referendum power refers to the ability of citizens to approve or disapprove legislation that has already been passed by legislative bodies.

At the local level, the initiative power is available only to the extent that the Legislature has authorized that power. State statutes classify cities based on population.¹ As an alternative cities may operate as code cities under title 35A, the optional municipal code, which grants broad powers to cities. Kirkland is a noncharter code city. The Legislature has authorized first class cities and code cities to adopt local initiative and referendum powers. To adopt those powers, code cities must follow certain procedures discussed below.

Limits on the Local Initiative Power

The exercise of the initiative power at both the state and local levels is limited to actions which are legislative in nature. Two tests have been suggested for determining whether an issue is legislative or administrative. First, actions relating to subjects of a permanent and general character are usually regarded as "legislative" and subject to the powers of initiative and referendum. Those actions taken on subjects of a temporary and special character are usually regarded as "administrative" and are not susceptible to the powers. *Citizens v. Spokane*, 99 Wn.2d 339 (1983). A second test suggests that a matter is legislative if it prescribes a new policy or plan and administrative if it merely pursues a plan that has already been adopted.

Initiatives must also be within the authority of the jurisdiction passing the measure. For example, the State Supreme Court ruled that a local initiative that would have blocked the construction of Interstate 90 was outside the scope of the initiative process, because the initiative conflicted with state law. *Philadelphia II v. Gregoire*, 128 Wn.2d 707 (1996).

¹ A first-class city is a city with a population of 10,000 or more at the time of organization or reorganization that has adopted a charter. RCW 35.01.010. A second-class city is a city with a population over 1,500 at the time of organization or reorganization that does not have a charter and does not operate as a code city under the optional municipal code. RCW 35.01.020. A town has a population of less than 1,500 at the time of its organization and does not operate under the optional municipal code. RCW 35.01.040.

Another limitation on the initiative power is that it may not be used if the Legislature statutorily delegates a particular power to the "legislative body" or "legislative authority" of the city government (as opposed to the corporate entity itself). For example, in *Priorities First v. City of Spokane*, 93 Wn. App. 406 (1998), the Court of Appeals kept an initiative off the ballot that would have required voter approval before the Spokane City Council could use city funds to construct off-street parking facilities. The Court ruled that the proposed initiative would have interfered with the power the Legislature granted to the city council to construct parking facilities and was outside the scope of the initiative power.

In sum, citizens may exercise local initiative powers if the subject matter of the initiative is:

- Legislative in nature;
- The power is within the scope of the city's authority; and
- The power over the subject matter has not been specifically granted to the city council.

However, citizens who file initiatives may not know of the limitations or may not believe those limitations apply to their initiative. This can lead to initiatives being filed that are outside the scope of the initiative authority and create the potential for litigation. If a city has concerns about whether a proposed initiative is legal, it can seek an opinion about the legality of the measure – before it passes. Although courts generally will not rule on the validity of initiatives until they are passed, attorneys for the city may issue opinions as to whether a particular measure would be upheld if enacted. Issuing a legal opinion on a pending ballot measure may be controversial because it is likely to be viewed as attempting to drive a particular outcome.

Adopting the Initiative Power in Code Cities

There are two methods by which code cities may adopt initiative powers. See RCW 35A.11.080; 35A.02.020 - .035.

Petition Method

- Registered voters of the city file a petition with the city clerk requesting the adoption of the powers of initiative and referendum.
- Petition must contain valid signatures equal in number to 50 percent of the votes cast at the last general municipal election.
- If the petition is sufficient, then the city council *must* adopt a resolution declaring the intention of the city to adopt the powers of initiative and referendum.
- City publishes notice of the resolution.
- If no referendum petition is filed within 90 days, then the city council must enact an ordinance formally adopting the powers of initiative and referendum
- If a valid referendum petition is filed, the issue goes on the ballot.

Resolution Method

- The city itself may initiate the process by passing a resolution of intention and following the subsequent steps listed above.

Initiative Procedures

The initiative process in code cities is provided by statute. *See* RCW 35A.11.100.

- The proposer of the initiative must obtain valid signatures on a petition equal in number to 15 percent of the total number of registered voters within the city as of the date of the last preceding city general election.
- Petitions in the form required by RCW 35A.01.040 are filed with the city clerk.
- The petitions with the signatures must then be transmitted to King County Elections (elsewhere the county auditor) to determine the validity of the signatures on the petition. King County Elections must attach a certificate to the petition indicating whether or not it has been signed by a sufficient number of registered voters.
- If the number of signatures is insufficient, then the petitioners have ten additional days to amend the petition. The amended petition is then resubmitted to the clerk.
- If King County Elections finds the number of signatures insufficient a second time, then the petition is returned. Any taxpayer then has the option of filing an action in superior court to determine if the petition is sufficient.
- If King County Elections determines that the number of signatures is sufficient, the city council has two options. The first option is for the city council to pass the proposed ordinance *without alteration* within 20 days. The second option is to submit the measure to a vote of the people.
- The city attorney prepares the ballot title.
- Once the ballot title is filed, King County Elections notifies persons proposing the initiative of the exact language of the ballot title. A person who is dissatisfied with the ballot title may file an appeal within ten days in the superior court of the county where the issue is to appear on the ballot. The court will hold a hearing and render a decision certifying the correct ballot title. The decision of the superior court is final.
- The election on the initiative will be at a general election if one is to be held within 90 days. Otherwise the vote will be at a special election.
- The city clerk must publish notice of the initiative.
- If a majority of the number of votes cast favor the proposed measure, it will become effective upon certification of the election results.

Initiative Costs

Election Costs

Council requested information about the potential costs of adopting initiative and referendum powers. The election costs associated with placing initiative and referendum measures on the ballot would vary depending on whether the City is participating in an odd numbered or even numbered year. During odd years, cities and other local jurisdictions (fire districts, utility districts, etc.) are already scheduled to participate in the primary and general elections.

Here is the election cost forecast provided by King County Elections for the City of Kirkland:

Spring Special Election (February or April)

- Election cost: \$103,000 – \$129,000
- Voters' Pamphlet cost: \$5,000 - \$6,200

Primary Election

- Election cost: \$72,000 - \$85,000
- Voters' Pamphlet cost: \$3000 - \$6,200 (likely to be at the higher end of range)

General Election

- Election cost: \$61,000 - \$72,000
- Voters' Pamphlet cost: \$3,000 - \$6,200 (likely to be at the lower end of range)

Note that if a new ballot measure is added to the ballot during an odd year, there is no additional cost because the City is already participating in the election due to the schedule of City Council races. King County does not add incremental costs for additional ballot items. There is an exception with respect to the Voters' Pamphlet as this cost does increase with additional printed materials. However, the cost of the Voters' Pamphlet is only approximately two to five percent of the election costs.

If a new ballot measure is added during an even year election, the costs above will apply. For the 2016 elections, the 2015 estimates would be increased by a 2.25 percent inflation factor. The City usually does not have anything scheduled on the ballot during even years, so an initiative or referendum measure could be the only item on the ballot.

Additional Costs

In addition to the County election costs, additional time will be required of the City Clerk and City Attorney to carry out their duties in connection with initiatives. Ballot titles written by city attorneys are frequently the subject of superior court challenges. If an initiative passes and is challenged, the city generally must defend the initiative.

Experience of Other Cities

In considering whether to adopt the initiative and referendum powers, Council also requested information about the experience of other cities. Two recent examples are below. More examples could be evaluated if the Council seeks further analysis.

Tacoma Minimum Wage Initiative

Errors in initiatives are difficult to correct. Once an initiative is certified, it goes on the ballot as drafted. There is no opportunity to correct mistakes prior to the election – except by submitting a new initiative petition. In addition, once an initiative is enacted in a code city, it cannot be amended – except by a vote of the people. This means that the city council cannot merely amend or repeal such an ordinance by council action as is usually the case – even to correct an obvious error. Any change must be approved by the voters, although the city council can initiate that process. *See RCW 35.17.340.*

Tacoma is currently dealing with a challenging initiative proposal. An initiative petition has been filed which, if passed, would immediately impose a \$15 per hour minimum wage on all businesses that have annual gross revenues of \$300,000 or more. The minimum wage would be adjusted annually by the rate of inflation. The measure would create a citizen commission to monitor the City's administration and enforcement of the minimum wage requirements, and make violations a crime. A copy of the petition is included as Attachment C.

Apart from the policy questions posed by having a higher minimum wage becoming broadly effective immediately versus one phased in over several years, elements of the proposed measure are viewed by the Tacoma City Attorney's Office as unenforceable or otherwise infirm. There is no fiscal analysis provided nor required. The Tacoma Mayor recently announced the formation of a Minimum Wage Task Force to counter the proposed ballot measure. The Tacoma City Council approved a \$30,000 contract with a facilitator to guide the task force's work. The work of the task force must be completed by June 30 in order to give the Tacoma City Council time to put an issue on the November 3, 2015, ballot. If the proponents of the current minimum wage initiative do not agree to withdraw their measure, the Tacoma voters may have two competing minimum wage measures on the ballot.

Issaquah Plastic Bag Ban Initiative

Closer to home, the City of Issaquah received an initiative petition to overturn the City's ban on plastic bags. Once the King County Elections Division certified that the initiative petition had sufficient signatures in October 2013, the Issaquah City Council passed a resolution sending the measure to the February 11, 2014, ballot. As required by statute, the Issaquah City Attorney drafted a ballot title. The City was not able to agree with the initiative proponent on the language of the ballot title and the proponent challenged the ballot title in King County Superior Court. It was then necessary for the City to defend the ballot title in court. While this matter was not tracked from a cost accounting perspective, the Issaquah City Clerk's Office estimates that the expenditure for legal fees was approximately \$10,000 (Issaquah uses outside legal counsel). The City Clerk indicated that this amount could have been higher as the City dealt with the initiative issue from June 2012 through March 2014. The City Clerk further estimated that her time alone spent on the initiative may have exceeded 200 hours.

As discussed above, because this matter was sent to the ballot in an even numbered year and when Issaquah did not have another contest on the ballot there were additional election expenses. The election cost Issaquah \$38,702. At the special election on February 11, 2014, 52.32 percent of the voters voted against repealing the plastic bag ban.

Arguments for and Against

The Municipal Research Services Center publication entitled, "Initiative and Referendum Guide for Washington Cities and Charter Counties," is an excellent resource and may be viewed at <http://mrsc.org/getmedia/18593ba0-fa89-4776-84dc-3dcab86b3449/initiativereferendumguide.pdf.aspx?ext=.pdf>. "Arguments for and against" from the publication are appended as Attachment D.

Summary of Direction Requested

Staff is requesting Council direction regarding the following questions:

1. Should the Council Committees policy be amended as proposed to allow for public attendance at Standing Council Committee meetings?
2. Should the proposed criteria for adding new agenda topics for Council Committees be included?
3. Should staff prepare an amendment to Chapter 8 Boards and Commissions allowing the City Council to appoint an incumbent for a second term without conducting a recruitment?
4. Should the new proposed section on petitions be added to Chapter 3 City Council Meetings?
5. Does the City Council want to further discuss or receive additional information about the initiative and referendum process?