

# **Legal Memo on County Governance Parameters**

Appendix B of the County Financial Health  
and Governance Alternatives 2007  
Legislative Study

July 27, 2007

## Memorandum

To: Anne Pflug, Local Government Project Manager,  
Department of Community, Trade and Economic Development

From: Hugh D. Spitzer, Foster Pepper PLLC

Date: July 27, 2007

Subject: Questions for County Legislative Study

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This memorandum discusses the questions that you posed in your July 16, 2007, email regarding the Legislature's ability to shape county government and to authorize county commissioners and other officers to exercise various powers. This memo answers each of the questions in turn. Not surprisingly, our conclusions are in most respects similar to the initial responses you received from legal staff at the Municipal Research and Services Center. But the most important observation we make is that, within certain constitutional constraints, the Legislature has substantial power to shape county government by statute, to identify certain county offices, and to control the powers exercised by each county officer. Please note that this memo focuses solely on non-home-rule counties.

Question 1. *Article XI, section 5 allows the legislature to, by general laws, classify the counties by population and provide in certain classes county officers that shall exercise the powers and perform the duties of two or more officers. To what extent may the authority to "combine" offices be exercised without requiring a constitutional amendment? For example, could all of the offices except for the county commissioners be consolidated into a few positions? If there is consolidation, must the remaining office/offices be filled by election or could it/they be filled by appointment?*

Article XI, section 5, provides, in part:

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office: Provided, That the legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population....

The “general and uniform laws” language in both section 4 and section 5 of Article XI reflects the strong opposition, in the late 19<sup>th</sup> century American west, to the practice of legislatures chartering individual local governments. W. Lair Hill, who authored an annotated model constitution that was provided to every delegate at Washington’s 1889 constitutional convention, wrote that such charters “are the footballs of...lobbyists, who are sure to besiege the legislature when there is opportunity for plunder. The plan of regulating these municipal governments by general laws only...has proved an efficacious remedy for the evils above mentioned....”<sup>1</sup> Because of the drafters’ antipathy to “special laws” for individual local governments, several sections of Article XI require that counties, cities and other municipal corporations be created and governed by “general laws.”<sup>2</sup>

A typical (and early) case involving the application of the “general laws” provision was *State ex rel. Hunt v. Tausick*, 64 Wash. 69 (1911), in which a new statute on the organization of cities was challenged on the grounds that it was meant to apply solely to Walla Walla. But the State Supreme Court held that that statute was “general in its terms and applicable to all cities...having a population of 2,5000 and less than 20,000.” 64 Wash. at 75. The court took judicial notice of the fact that many cities existed within that range of population and that if “they so elect, all of them under the act may avail themselves of the privileges it grants. The court also noted that the act did not “select any particular city or special territory to which it shall exclusively apply.” *Id.*

The “general laws” requirement applies to counties under Art. XI, §5, so that the legislature may not enact special legislation applicable to a specific county or group of counties. But it is important to emphasize that the *general laws* requirement is different from the *uniform laws* requirement, and each is applied separately. Legislation relating to Washington *cities* is constrained only by the “general laws” prohibition on special legislation. Statutes may not be made applicable to a specific city. Under Art. XI, §10, the Legislature may freely create various classes of cities and prescribe their powers and how they are governed, based on the class of city—so long as that is all set forth in general legislation. City government does not have to be uniform within a class. In fact, cities are provided many structural options within classes, such as code cities’ choice of organizing according to the mayor-council, council-manager, or commission form of government.<sup>3</sup>

Under Article XI, §§ 4 and 5, counties are different from cities because their organization and powers are subject not only to the *general laws* requirement (*i.e.*, no special laws applicable to just one named county) but are also subject to a *uniform laws* requirement (*i.e.*, the system of county government must be the same from county to county except to the extent that the constitution expressly allows deviation). The classic case on this issue is *State ex rel. Maulsby v.*

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<sup>1</sup> W. Lair Hill, *Proposed Constitution for the State of Washington* (Portland Oregonian, July 4, 1889).

<sup>2</sup> *See, e.g.*, Art. XI, §10, which provides in part: “Corporations for municipal purposes shall not be creted by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification in proportion to population, of cities and towns....” *See also*, the ban, in Art. XII, §1, on creating private corporations by special laws, and the broader prohibition on special legislation in Art. II, §28.

<sup>3</sup> RCW 35A.01.070(5) and RCW 35A.02.130.

*Fleming*, 88 Wash. 583 (1915). In that instance, the Legislature had abolished the office of county coroner in all counties other than first class counties. In small and medium sized counties the coroner's duties were to be transferred to the prosecutor. The State Supreme Court held that although Art. XI, §5, as then written, allowed the classification of counties for the purpose of the compensation level of officers, in other respects the system of county government must be the same statewide. The opinion stated: "It seems too plain to admit of serious dispute that a system of county government which permits certain officers in one county which are not permitted in another county is not a uniform system." 88 Wash. at 584. The court also held: "In order that the system may be the same, the officers must be the same; and their duties must be the same; otherwise the system is different." 88 Wash. at 585.

The *Maulsby* case resulted in the 1924 adoption of Amendment 12. That amendment adjusted Art. XI, §5 by adding the following proviso: "The legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers." After enactment of Amendment 12, the Legislature was free to merge coroners into prosecutors in certain classes of counties, or to combine treasurers and auditors, or treasurers and assessors—so long as the system was according to general law and was uniform within each class of county.

Another case worthy of note is *State ex rel. Scofield v. Easterday*, 182 Wash. 209 (1935). The issue in *Scofield* was whether the Legislature could remove the management and control of county highways from the board of county commissioners and transfer that responsibility to the county engineer. The State Supreme Court held that Article XI, §5 permitted the transfer of powers because it granted the Legislature with the power "to prescribe the duties of the county officers."

Although *Scofield* confirmed the Legislature's strong authority to prescribe county officers and the powers to be exercised by those officers, in other respects *Maulsby's* language regarding uniformity government for the several counties still carries weight. For example, in AGO 1987 No. 11, the Attorney General concluded that there was a reasonable possibility that the courts would reject legislation allowing larger counties to opt for five-member county commissions. The Attorney General concluded that the legislation might result in an unconstitutional "crazy quilt" system of county government."<sup>4</sup>

In response to your specific questions on this matter, Article XI, §§ 4 and 5 enable the legislature to provide for various county officers in addition to commissioners, sheriffs, county clerks, treasurers and prosecuting attorneys. Those specified offices must exist, but all other county offices are optional. Next, the Legislature may allocate duties to the various offices, and may classify counties by population for the purpose of specifying the merger of certain duties into a single office, and for setting compensation scales.<sup>5</sup> As a hypothetical example, the

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<sup>4</sup> See also Wash. AGLO 1979 No. 8, an earlier opinion that dealt with a similar proposal for different sizes of county commissions.

<sup>5</sup> Amendment 57 in 1972 allowed the Legislature to delegate, to the county commissioners or county councils, the authority to set the salaries of the other county officers as well as their

Legislature could by statute establish the following uniform county offices for non-charter counties:

- Five Commissioners
- County Administrator
- Sheriff
- County Clerk
- Treasurer
- Prosecuting Attorney
- Medical Examiner
- Elections Director
- Registrar
- Assessor

Also by way of example, the Legislature could classify non-charter counties into three population classes: above 100,000 (Class I), 15,000 to 100,000 (Class II), and below 15,000 (Class III). The Legislature could then provide, by statute, as follows: Class I counties would have all 14 offices performed by separate individuals (*i.e.*, 14 officers); in Class II counties the responsibilities of the Assessor and Treasurer would be combined and the Elections Director and Registrar would be combined (resulting in 12 officers); in Class III counties the responsibilities of the Assessor and Treasurer would be combined, the Elections Director and Registrar would be combined, the Prosecuting Attorney and Medical Examiner would be combined, only three commissioners would exercise the powers and duties of five Commissioner positions, and the County Administrator's duties would be transferred to the three Commissioners (resulting in 8 officers). This would provide for "uniform" county government, with the classification of counties and the merger of duties consistent with Article XI, §5. Of course, county offices could be reassigned in many other ways, so long as the classification of counties and the permissible merger of duties were both prescribed by statute.

Several constraints would remain: First, as suggested above, it is probable (although not certain) that the five offices named in Article XI, §5 cannot be abolished by statute; unless Article XI, §5 is amended, every non-charter county will need to have commissioners, a sheriff, a county clerk, a treasurer and a prosecuting attorney. Second, all officers must be elected, because Article XI, §5 expressly states that the Legislature "shall provide for the *election* in the several counties" of the specified officers and any others the Legislature deems appropriate; Article XI, §5 further states that the Legislature may provide for the "*election* in certain classes of counties" of officers who may exercise the powers and duties of two or more officers. Third, powers must follow the specific office; although Article XI, §5 provides that offices may be merged so that certain officers would "exercise *the* powers and perform *the* duties of two or more officers," the courts might hold that the statutorily-assigned powers and duties of an officer may not be *split* between two other officers. The courts would probably not allow, for example, one officer's duties to be split between two identified officers in Class II counties and split between

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own. That power would be subject to Article XI, §8, which together with XXXI, §1 prohibits an elected officials from increasing his or her own salary before reelection. But county legislative authorities may adjust the salaries of *other* county official, and that power can strengthen the hand of the county legislative authority in the budget purposes.

two different officers in Class III counties. Finally, the specified offices and allocation of responsibilities should be uniform among counties of the same class, and classes must be based only on population. If a statute provides that the commissioners' responsibilities are undertaken by five individuals in Class I and Class II counties, and shared by three individuals in Class III counties, there cannot an "option" system under which, for example, voters in Class II counties are permitted to choose whether to have three or five commissioners.<sup>6</sup>

Question 1A. *Could the legislature authorize consolidation of offices between counties having the same classification? For example, could the auditor of county X have his or her duties consolidated with the duties of the auditor in county Y, allowing the same officer to perform the duties for both counties?*

Under Washington's constitution, counties are difficult to create and difficult to merge or eliminate. Article XI, §1 recognized all of the "several counties of the Territory...existing at the time of the adopting of this Constitution" and just five new counties were added by legislative action through 1911, when Pend Oreille County was created.<sup>7</sup> Article XI, §3 made it relatively difficult to create new counties without legislative support. *See, e.g., Freedom County v. Snohomish County*, 95 Wash. App. 839 (1999) rev. den. 139 Wn.2d 1022 (2000).

"The several counties" and their officers seem to be firmly entrenched in the current constitution. There appears to be no firm basis for the Legislature to consolidate responsibilities of county officers between counties. The Washington Supreme Court in 1896 upheld the Legislature's consolidation of superior courts across county lines, but the constitutional provision involved was worded quite differently than Art. XI, §5.<sup>8</sup> While the language of the relevant Article IV judiciary provision was less than clear, that section of the constitution *did* contemplate multi-county courts.

If the Legislature desired to encourage the consolidation of services across county lines without amending the State Constitution, this might be accomplished in several ways. First, the State could provide grants and staff support to encourage county officers voluntarily to combine staff resources with their counterparts in adjoining counties. For example, grants could be made available to assessors to encourage them to pool their personnel and records. Each county would continue to have its own assessor and assessor's budget, but most operating costs would be shared with other jurisdictions.

Another approach would be for the Legislature to *require* that certain county officers pool their staff and operations. For example, in counties that share a superior court (*e.g.* Benton-Franklin Superior Court) the Legislature could require that there be a single staff of assistant

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<sup>6</sup> AGO 1987 No. 11 correctly concluded: [Two legislative proposals] contain the flaw of leaving the determination of how many commissioners the county will have up to the voters within the county....While Engrossed Substitute Senate Bill 5020 purports to classify counties by population for the purpose of setting the number of commissioners, the involvement of voters can lead to nonuniformity among counties of the same class."

<sup>7</sup> Steve Lundin, *The Closest Governments to the People: A Complete Reference Guide to Local Government in Washington State* 32 (2007).

<sup>8</sup> *State v. Rusk*, 15 Wash. 403 (1896).

prosecuting attorneys. In the Benton-Franklin example, there would continue to be two separately elected prosecutors, but they would have to work together in supervising a common staff. Prosecutorial decisions would ultimately be made by each prosecutor for his/her county.

A third approach would be for the Legislature to strip certain responsibilities from the elected officers and vest them in new multi-county agencies. For offices that are not specified in Article XI, §5, the Legislature could assign them to new regional entities without limitation. For example, the Legislature could provide that Class II and Class III counties would have no assessors, coroners or auditors, and that assessment, medical examiner and election operations be vested in new multi-county agencies. (In that example, the auditor's document registration functions might be transferred to the county treasurer.) There is an historical basis for this type of rearrangement of powers traditionally held by a county officer. From territorial days until 1969, state law provided for an elected county superintendent of schools in each county. The role of counties in overseeing school district activities was gradually decreased, and in 1969 the county superintendents were replaced with regional entities called intermediate school districts, now "educational service districts."<sup>9</sup> (Washington currently has nine multi-county educational service districts that provide their component districts with educational, fiscal, information technology, human resources and social services.) For offices that are listed in Article XI, §5, the Legislature could provide the continued county-by-county election of those posts, but strip many functions and reassign them to multi-county regional entities, or require pooled operations as described in the previous paragraph. Under Article XI, §5, the Legislature has full authority to "prescribe [the] duties" of county officers.

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<sup>9</sup> Lundin, *Closest Governments* 377. Educational service districts are created under Chap. 28A.310 RCW.

Question 2. *Article XI, section 4 of the constitution provides for the establishment of county government "which shall be uniform throughout the state." If certain offices could be consolidated, either within a single county or with the offices of neighboring counties, would there be a violation of the constitutional uniformity requirement?*

There would be no violation of the uniformity requirement so long as the list of county officers, the responsibilities of each officer, and the transfer of responsibilities among offices or the transfer of powers to regional entities, was consistent statewide among all counties within the same population class.

Question 3. *Would the Inter-local Cooperation Act, chapter 39.34 RCW, which allows local governments to contract with one another, permit one county to contract with another to have the duties of one office (elected or appointed) be performed by the equivalent officer of the other county; for example, could the treasurer of county A provide treasurer-related services with county B, if there was an inter-local agreement entered into by the two counties? Who may enter into the contract: the Commissioners, the separately elected officials or both to make it valid?*

RCW 39.34 provides that any public agency, including a county, may exercise any of its powers jointly with any other public agency. Consequently, Counties A, B and C could agree that County A's treasurer would be responsible for handling the daily investments of the funds of all three counties.<sup>10</sup> However, each county's treasurer would still be legally responsible for that county's investments, and it would be prudent (perhaps legally necessary) to involve all three treasurers in a joint board or other body overseeing County A's treasurer as she carries out her tasks for the three entities. Furthermore, in light of the discussion in the answer to Question 4, below, it would be prudent (perhaps legally necessary) to have each county treasurer to agree to and countersign the three-county interlocal agreement. RCW 36.29.020 makes the county treasurer the custodian of county funds and expressly charges the treasurer with investment responsibilities. County commissioners probably lack authority to *order* their county treasurer to use the investment services of another county's treasurer. However, as noted in the discussion under Question 3, above, the Legislature might be able to strip all county treasurers, within a class of counties, of investment responsibilities, and require pooled investment practices among counties. This short discussion has focused on county treasurers and investments, but the principles would be applicable to other officers and duties.

One other issue that should be considered is whether a county officer, such as a treasurer, has the authority to contract for services from a corresponding officer in another county, without the approval of the county commissioners. Under RCW 36.32.120, the "legislative authority of the several counties" have certain specified powers, including "the care of the county property and the management of the county funds and business..." County legislative authorities must approve the budgets of each county office under Chap. 36.40 RCW, and commissioners normally

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<sup>10</sup> Such interlocal contracts for joint services are fairly common. For example, under a single interlocal agreement, remittance processing (*i.e.*, tax and other payments) are collectively handled at one location in Vancouver for Clark County, Clark Public Utilities, Clark Regional Wastewater District, the City of Vancouver, the City of Camas, the City of Longview, the Tualatin Valley Water District and the Eugene Water and Electric Board.

approve contracts their counties enter into. Because of the budget and finance implications of an arrangement among treasurers to pool services, it would be prudent (perhaps legally required) for such an interlocal agreement to be approved by the legislative authority as well as the treasurers themselves.

Question 4. *Are the separately-elected officials of a non-charter county required to comply with or follow the county-wide policies adopted by the county commissioners? For example, would a policy adopted by the county commissioners that county offices use the county fleet or purchase supplies through the county purchasing agent apply to the other independently-elected county officials?*

It is a longstanding principle in Washington “that a board of county commissioners can exercise no powers which are not in express terms or by fair implication conferred upon it by law.” *Martin v. Whitman County*, 1 Wash. 533 (1889). Although county legislative authorities are granted a number of powers and duties in RCW 36.32.120, that list is not very long. Other statutes expressly grant additional powers to county commissioners, such as the control of all county agency budgets in Chap. 36.40, the authority to issue bonds under Chap. 36.67 RCW, and the control of road and bridge construction under Chaps. 36.75 RCW and 36.7 RCW. County legislative authorities also have a key role in the development of growth management policies under Chap. 36.70A RCW. But before county commissioners may enact and enforce “county-wide policies” and require that those policies be followed by other independently-elected county officials, it is necessary to identify specific statutory authority that vests the commissioners with the power to develop those specific policies relating to the specific subject matter concerned.

The classic case on this subject is *State ex rel. Taylor v. King County*, 2 Wn.2d 575 (1940), which involved an attempt by the King County Board of Commissioners to create a division of purchases and to require all county departments—including those headed by independently elected officials—to make purchases through that central division. The State Supreme Court held that absent clear legislative intent to the contrary, each independently-elected officer had the right to purchase their own supplies. 2 Wn.2d at 588. The opinion stated:

Counties are but arms or agencies of the state organized to carry out or perform some functions of state government. They, as instrumentalities of the state, have no powers except those expressly conferred by the constitution and state laws, or those which are reasonably or necessarily implied from the granted powers.

2 Wn.2d at 579. The court noted: “Our statutes do not in express terms designate any officer whose duty it is to purchase supplies for the offices of clerk, auditor or treasurer.” *Id.* The opinion then proceeded to carefully analyze the specific powers that the Legislature *had* granted county commissioners, but found no authority for commissioners to supervise all purchases under the law then in effect. The court ruled:

Those cases lay down the rule that the county commissioners have a supervisory power over the affairs of the county, that they are the business agents of the county, have the care and management of the county funds and business, and have the power to properly exercise those rights and duties. In none of those cases, however, do we find a holding that the county commissioners have the power to

purchase or to supervise the purchases of supplies for other county offices.

2 Wn.2d at 582. *Taylor* is still good law. It suggests that whenever county commissioners desire to establish a program or outline policies that will control how other independently-elected county officials must act, the commissioners must first identify specific statutory authority granting them that power with respect to the specific type of program or policy.

Question 4(a). *If the answer to this question is "yes," would the requirement to follow county policy also apply to the county judicial offices?*

Because of the State Supreme Court's historic protection of the judiciary as an independent branch, it is even more difficult for county commissioners to impose policies or practices on the superior courts and district courts. *See, generally, In re Juvenile Director*, 87 Wn.2d 232 (1976), which upheld a county commission's budget authority over the county courts, but suggested that the commissioners' authority could not be exercised in such a way that would harm the courts' ability to operate.

We hope that this discussion is useful. Please feel free to call if we can provide you with additional analysis of these or related questions.

cc: Pat Mason  
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