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June 23, 2014

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Filed via email and US Mail

Subject: **Request for Investigation**
Complaint for Violation of Ethical Rules and Open Public Meetings Act

This letter requests an immediate investigation into the City of Seattle's improper use of public resources and public positions for political campaigning, violations of the Open Public Meetings Act, and other violations of ethical standards as described herein.

The political campaign in question involves Seattle Initiative 107, a citizen initiative to provide enhanced training and better pay for Seattle's 4,500 early-childhood educators. The sponsors of I-107 filed the proposed measure with the Clerk's office on March 11, 2014, after which the City was prohibited from using public resources and public positions to advocate for or against it. On June 4, 2014, the City Clerk found that the I-107 petition was sufficient to qualify the measure for the ballot.

From early on in this process, unidentified City of Seattle officials and/or City staff have utilized their positions and public resources to mount an unethical attack on I-107. This letter outlines some egregious aspects of this attack. We can provide more details to support this complaint, and we will be utilizing public records request to document these violations. Because almost all of this conduct occurred behind closed doors, for now we have only an outline of the unethical campaign being waged against I-107.

Use of City resources to mount political attack on I-107.

The City used taxpayer resources to procure a biased legal memo as part of the attack on I-107. Rather than procuring a neutral legal analysis of I-107, the City hired an attorney with a vested interest against I-107[1] to identify "issues" with I-107, knowing that the primary use of the document would be to foster opposition to the citizen initiative.

Then, the City used this taxpayer-funded memo for campaign purposes. The City[2] provided this biased study to *The Seattle Times* along with talking points against I-107, but refused to provide this study to the proponents of I-107 despite repeated requests. Thus, I-107 proponents were unable to respond to the attack; they only learned about the existence of the report and its contents from a *Seattle Times* editorial writer. He stated that the legal report, and the City official/staff providing it, argued that I-107 would allow any parent to sue the City to enforce I-107's policy that child care be affordable and not cost more than 10% of family income. This claim is frivolous since neither I-107 nor court precedent allow judicial enforcement of such policy statements. *See* Yes for Early Success Legal Analysis, attached.

The City effectively made an in-kind contribution to the opponents of I-107 when it prepared this biased analysis and then provided it to I-107 opponents, with negative talking points, while refusing to give it to I-107 sponsors despite repeated requests. The City's actions suggest that this document was not leaked, but rather was provided by a top official and/or staff member.

Use of taxpayer resources to make false claims about I-107.

Next, the City used public resources to prepare a "fiscal analysis" of I-107 based largely upon the biased legal analysis. Once again, the City provided this "analysis" and talking points only to *The Seattle Times* editorial writers known to be working on an editorial against I-107, but not to I-107 sponsors. Before the analysis was even publicly released, *The Seattle Times* had already published an editorial attacking I-107 based upon the preposterous claims in the "analysis."

The Seattle Times cited the City's "confidential legal analysis" and "fiscal analysis" to claim that parents could sue to obtain affordable child care, and that to provide it would cost the City over $107 million in the first year alone. It ignores the fact that I-107 gives the City the entire first year just to develop goals and timelines for achieving the initiative's affordability policies, and never requires the City to spend any money on childcare.

This preposterous claim — the "swift boating" of I-107— was illegally generated and publicized with City resources. The City's investment in these biased and false legal and fiscal reports seems driven, at least in part, by the effort to obtain a negative editorial from *The Seattle Times*, and it was successful. The City's efforts drove the *Seattle Times'* editorial, and allowed the editorial to peddle false claims as if they were legitimate by citing the City's studies.

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[1] The attorney sits on a levy task force that hopes to obtain an expanded role in oversight of the Seattle Preschool Program, whereas I-107 would create a different oversight board that includes early educators.

[2] We do not know specifically which City officials and/or staff took this action.

City Resources for "whisper campaign" against I-107.

Even before public resources were put towards these biased studies, public officials and staff were mounting a whisper campaign against I-107. We have received numerous reports of public officials calling opinion leaders with messages opposing I-107. We believe that this effort constitutes the use of public resources for campaign purposes and also the improper use of these officials' positions for campaign purposes, in violation of State and City code.

Violation of Open Public Meetings Act.

Finally, the Seattle City Council has held numerous "executive sessions" in which they have discussed their response to I-107 behind closed doors. Under the Seattle City Charter, the City Council is given a legislative role to approve I-107, reject it and put it on the ballot, or reject it and put it on the ballot with an alternative. The City Council's discussion and carrying out of its legislative duties should have been held in open session. There was no pending or potential litigation that would justify shutting the public out of these discussions. The Council's role under the Charter is lawmaking, not litigation. These improper closed meetings have allowed the City to be further drawn into an unethical and partisan campaign role – certainly innocently in the case of some council members – since no member of the public was present to question these activities.

It is with regret that we must officially raise these breaches, but it is essential that the City of Seattle act with the utmost integrity and in accordance with the law in carrying out is legislative role in responding to a citizen initiative. Elected officials and their staff must not be allowed to utilize public resources and their public positions to orchestrate political campaigns from City Hall.

We would like to set up an immediate meeting to discuss this matter and provide you further details about this complaint.

Very Truly Yours,

SMITH & LOWNEY, P.L.L.C

By _____
Knoll D. Lowney
Attorneys for Yes for Early Success

Exhibit A

SMITH & LOWNEY, P.L.L.C.
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June 18, 2014

To: Yes for Early Success

From: Knoll Lowney, Claire Tonry
Smith & Lowney PLLC

RE: Enforceability of Initiative 107's affordability policies

QUESTION PRESENTED

Can a parent or other citizen sue to enforce the policy statements in I-107, which states that early childhood education should be affordable and that no family should have to pay more than 10% of gross family income towards childcare?

SHORT ANSWER

No. The policy statements are important and well supported, but the mere adoption of such policies are not enforceable under any recognized legal theory.

INTRODUCTION

Initiative 107 states that it "shall be the policy of the City of Seattle that early childhood education should be affordable and that no family should have to pay more than ten percent (10%) of gross family income on early education and child care." I-107, § 301(A). Federal agencies and consultants hired by the State Department of Early Learning have recommended the 10% policy to guide government decisions concerning affordability of child care, such as the amount of co-pays required of families in subsidized child care.[1] This policy is important and well supported.

Yet, by its plain terms, section 301(A) is merely a statement of policy. The initiative requires the City to adopt goals, timelines, and milestones for implementing the policy, but the City is given unfettered discretion as to how the policy is implemented or whether it is

[1] *See* http://www.del.wa.gov/publications/subsidy/docs/WAChildCareSubsidyReport.pdf (page 25 *et seq.* discussing the basis and use of the 10% policy and page 30 where this policy is recommended to the State of Washington); *and see* http://www.researchconnections.org/childcare/resources/14784/pdf (page 89, discussing that federal "regulations consider 10% of family income as a benchmark of affordability.")

implemented at all. Thus, the policy that child care should be affordable and cost no more than 10% of a family's income is not an enforceable component of I-107.

DISCUSSION

It is well-established that "statutory policy statements as a general rule do not give rise to enforceable rights and duties." *Aripa v. Dept. of Social & Health Servs.*, 91 Wn. 2d 135, 139, 588 P.2d 185 (1978). In *Aripa*, the Washington Supreme Court held that a legislative policy statement that persons afflicted by the disease of alcoholism should be afforded treatment as opposed to criminal sanctions did not create an enforceable state duty. *Id.* The Supreme Court held that the policy statement could not be used to support the plaintiff's contention for individualized alcohol treatment. *Id.* More recent appellate decisions continue to rely on *Aripa's* statement as black-letter law. *See, e.g., Bailey v. State*, 147 Wn. App. 251, 191 P.3d 1285 (2008). Indeed, Washington courts have consistently recognized that stating a legislative goal does not create an enforceable right. *See, e.g., Bresolin v. Morris*, 88 Wn.2d 167, 171, 558 P.2d 1350 (1977).

Far from creating enforceable rights, policy statements are regarded as *not* being substantive law. "A law is a rule of action. An argument is not.... policy expressions in a bill or initiative are no part of the law." *Pierce County v. State*, 150 Wn.2d 422, 78 P. 3d 640 (2003) (holding that the substantive law did not include a stated desire for a revote without a legally binding obligation to conduct a revote). A "declaration of policy has no operative force in and of itself." *Food Servs. of Am. v. Royal Heights, Inc.*, 123 Wn. 2d 779, 784, 871 P.2d 590 (1994); *Oliver v. Harborview Medical Ctr.*, 94 Wn. 2d 559, 565, 618 P.2d 76 (1980).

The basic rule that policy statements do not create enforceable rights holds true even where the statute creates a regulatory scheme aimed to achieve the legislative goal. See, for example, *In re Young*, 95 Wn.2d 216, 219, 622 P.2d 373 (1980), where the court held that a statutory requirement that an agency create rehabilitative programs was for the benefit of the prison population and society generally, and did not vest any right in individual prisoners. *Id.*

I-107's only requirement as to implementation of the affordability goal is contained in Section 301(B), which mandates that the City "shall, within twelve months of the effective date of this Ordinance, adopt goals, timelines, and milestones for implementing this affordability standard. In adopting these standards, the City shall consult with stakeholders, who at a minimum must include parents, communities of color, child advocates, low income advocates, and the provider organization." Thus the implementing requirements of the I-107 are limited to the adoption of plan with milestones that is developed in consultation with stakeholders. I-107 does not require the City to adhere to the timeline or meet the milestones it sets for itself.

In terms of statutory construction and interpretation, the starkest contrast between the I-107's policy statements and its binding requirements is the use of the word "should" in section 301(A)'s policy statements and the use of "shall" in the section 301(B) requirements. Use of the word "should" is mere precatory language that does not create enforceable requirements. *See Pierce County v. State*, 150 Wn.2d 422 at n.4 (*citing* Websters as defining "precatory words" as

"words of recommendation, request, entreaty, wish, or expectation employed in legal instruments (as wills) and often resulting in no effective gift or rights being created"); Blacks Law Dictionary 1195 (7th ed.1999) (defining "precatory" as "requesting, recommending, or expressing a desire for action, but usu. in a nonbinding way"). On the other hand, use of the word "shall" creates a mandatory duty. *See Roberts v. King County*, 107 Wn. App. 806, 27 P. 3d 1267 (2001).

The initiative on its face does not allow for enforcement of the affordability policies. Section 702 of I-107 only allows enforcement of the initiative's "requirements," not its declarations of policy.

Moreover, the legal vehicle for compelling government action, the writ of mandamus, is not available because such writ requires, first and foremost, that the party subject to the writ is under a clear duty to act. RCW 7.16.160; *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003); *State ex rel. Burlington N. Inc. v. Wash. State Util. & Transp. Comm'n*, 93 Wn. 2d 398, 609 P.2d 1375 (1980). A "writ of mandamus cannot issue where the act to be performed is a discretionary act," *Washam v. Sonntag*, 74 Wn. App. 504, 507, 874 P.2d 188 (1994).

The fact that the City is given the discretion to adopt goals and timelines, with consultation from stakeholders, underscores the broad discretion afforded to the City to determine how it will implement I-107. Where the government is afforded discretion in how, exactly, to meet discrete statutory requirements, mandamus is not available. *State ex rel. Longview Fire Fighters Union v. City Longview*, 65 Wn. 2d 568, 399 P.2d 1 (1965); *Coughlin v. Seattle School Dist. No. 1*, 27 Wn. App. 888, 621 P.2d 183 (1980). Thus, the City's requirement to adopt goals, timelines, and milestones is the only enforceable requirement of the affordability section of I-107. There is no legal mechanism for attacking the manner in which the City exercises that discretion.

CONCLUSION

Section 301 of the I-107 sets forth two things that "should" be: (1) child care should be affordable, and (2) child care should cost no more than 10% of family income, and two things that "shall" be (1) the City shall establish a timeline and milestones within a year, and (2) the City shall consult with stakeholders. Only the latter two are mandatory, enforceable duties.

Very truly yours,

SMITH & LOWNEY, P.L.L.C.

By:_____
Knoll Lowney
Claire Tonry