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Reply to: Seattle Office

May 8, 2017

VIA U.S. MAIL

Mayor Ed Murray
P.O. Box 94749
Seattle, WA 98124-4749

Jesus Aguirre, Superintendent
Seattle Parks and Recreation
100 Dexter Avenue North
Seattle, WA 98109

Re: Proposed Expansion of the Seattle Asian Art Museum at Volunteer Park — Application of Initiative 42

Dear Mayor Murray and Superintendent Aguirre:

I represent Protect Volunteer Park, a Seattle-based citizen's group committed to the preservation and protection of Volunteer Park for current and future park users. As you know, Volunteer Park is recognized in the National Register of Historic Places and is also a Seattle landmark. Like New York's Central Park, Brooklyn's Prospect Park, and the Boston Park System, Volunteer Park was designed by the renowned Olmsted landscape architecture firm in 1903 as the centerpiece of their comprehensive plan for the Seattle park system. Volunteer Park typifies the Olmsted Brothers' naturalistic design philosophy and is a respite from the hurried pace of life in an already dense city, in one of Seattle's most vibrant neighborhoods. It continues to be a gem of the Seattle park system to this day.

Since 1933, Volunteer Park has also been the site of a large building that currently houses the Seattle Asian Art Museum, and which has long been controversial due to the building's significant impacts on the park's natural landscape design. In 2016, the art museum proposed an expansion, now pending before the Parks Department and other city agencies, that would intensify those impacts and eliminate additional outdoor park space. Standing 50-feet tall and 78-feet long (excluding the cantilevered Park Lobby), and projecting 42 feet into the park landscape, the expansion would become the tallest and most visually imposing face of the building, towering above Volunteer Park's downward-sloping east side. The proposed expansion would eliminate a significant and often used area for picnics, sledding and strolling/walking, eliminate the continuous sequence of landscape views on the east side of Volunteer Park, eliminate natural light and bring constant shade and shadow during daylight hours into this part of the park, cause significant night-

time lighting impacts, disrupt and disturb urban wildlife (including migratory and resident birds), and that construction will threaten several of the park's most outstanding and irreplaceable trees. Little wonder almost one thousand Seattle residents and other park visitors — including members of Protect Volunteer Park — have expressed their concerns about the project's significant deleterious impacts.

Today, I am writing to you in response to the Parks Department's apparent decision to not hold a public hearing on the museum expansion under Seattle Ordinance 118477 (Feb. 4, 1997), commonly known as Initiative 42. As you know, the intended purpose of Initiative 42 was to prevent the unnecessary conversion of Seattle park properties to non-park uses. When such conversions are proposed, the ordinance requires the city to hold a public hearing to determine whether the conversion is necessary and whether there is a reasonable and practical alternative. The relevant text of Initiative 42 reads as follows:

> All lands and facilities held now or in the future by The City of Seattle for park and recreation purposes, whether designated as park, park boulevard, or open space, shall be preserved for such use; and no such land or facility shall be sold, transferred, or changed from park use to another usage, unless the City shall first hold a public hearing regarding the necessity of such a transaction and then enact an ordinance finding that the transaction is necessary because there is no reasonable practical alternative . . . .

Seattle Or. 118477, Section 1. In the quote above, it is clear that Section 1 of Initiative 42 has two main clauses. The first (before the semi-colon) describes the class of lands to which the ordinance applies (*i.e.,* lands and facilities held for "park and recreation purposes"), and specifies that those lands must be preserved for such use. We refer to this as the "Preservation Clause" because it denotes the types of land covered by Initiative 42 and requires them to be preserved for future park and recreation use. The second clause (after the semi-colon) describes the three instances in which a public hearing is required (*i.e.,* when such lands are sold, transferred, or changed from park use to another usage). We refer to this second clause as the "Hearings Clause."

It is our understanding that the Parks Department determined this language from Initiative 42 does not prohibit the proposed museum expansion or require a public hearing, and that this decision was based largely on a legal memorandum authored by Bob Tobin, an attorney with the civil division of the city's law department. For your convenience, a copy of Mr. Tobin's legal memorandum is attached to this letter (herein, "Tobin Mem."). For the reasons below, Mr. Tobin's analysis is dubious with respect to both the Preservation Clause and the Hearings Clause.

A. Mr. Tobin Misconstrues Intiative 42's Preservation Clause.

With respect to the Preservation Clause, Mr. Tobin opines generally that the museum is a "recreational use," based on his assessment that, like other recreational facilities, the museum's purpose is to "stimulate the human spirit." *See* Tobin Mem. at 2. From that premise, Mr. Tobin concludes that the museum expansion would not alter the use of the museum or park, and thus, that the expansion is not prohibited by Initiative 42. In essence, he reasons that because the park

and museum are both used for recreation, expanding the museum and converting outdoor recreation space for indoor use does not violate Initiative 42's directive to preserve such land for park and recreation use. Because both uses are recreational, Mr. Tobin reasons that the museum expansion would not violate the Preservation Clause.

We do not think it necessary to invoke such lofty language about the human spirit to determine that the museum is a "recreational use." Clearly, it is a forum for recreational activities in the broad, common-sense meaning of the term. *See* Merriam-Webster's Online Dictionary (defining "recreation" as "something people do to relax or have fun : activities done for enjoyment"), *available at* <https://www.merriam-webster.com/dictionary/recreation> (herein, "Webster's"). But Mr. Tobin's premise, while obvious, also ignores the language and structure of Initiative 42's Preservation Clause.

While a museum may be considered a place of recreation, just like an indoor bowling alley or video arcade, it is far less clear that the drafters of Initiative 42 intended to exempt the conversion of open park land for indoor museum purposes. Indeed, the language of Initiative 42 suggests just the opposite. The word "recreation" in the quote above does not refer broadly to any and all recreation facilities (including indoor spaces), but only to open, outdoor recreation spaces like the open fields, paths, gardens, and other outdoor spaces of Volunteer Park. In this way, is evident that the intent of the Preservation Clause is to preserve open, outdoor recreation spaces, not indoor spaces like a museum. That intent would be violated by converting open space in Volunteer Park for the museum's expanded footprint.

Under the established and common-sense doctrine of *noscitur a sociis*, words are known by the company they keep. *See, e.g., State v. Rogenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (under the canon of *noscitur a sociis*, "a single word in a statute should not be read in isolation"; instead "'the meaning of words may be indicated or controlled by those with which they are associated'") (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)). Here, it is notable that while Initiative 42 does refer generally to land held for "park *and recreation* purposes" (emphasis added), the specific examples of lands covered by the ordinance, as denoted in the quote above, are "parks," "park boulevards," and "open spaces." In this way, the plain language of the ordinance does not cover every conceivable type of recreation space, but only those spaces appropriately falling under these other, more specific descriptors.

In turn, each of these words and phrases (*i.e.,* "park," "park boulevard," and "open space") clearly refers to open, outdoor recreation spaces, not indoor spaces like a museum. For example, Mr. Tobin observes in his memorandum that the word "park" is commonly defined as "'*a tract of land* maintained by a city or town as a place of beauty or of public recreation.'" Tobin Mem. at 2 (quoting Webster's Third New International Dictionary; emphasis added). Notably, however, he does not conclude that this definition supports the view that the museum is a park use. Nor could he. The phrase "tract of land" denotes an open recreation space, not an enclosed space like a museum. An alternative but similar definition of "park" — also in Webster's — is "a *piece of ground* in or near a city or town kept for ornament or recreation." Webster's at <https://www.merriam-webster.com/dictionary/park> (emphasis added). Under this definition, the open spaces of Volunteer Park qualify as park land, but the museum does not.

Further, we note that this common-sense definition of the word "park" has a long pedigree in the law of Washington. For example, in granting condemnation powers to cities and towns in Washington, the Legislature has distinguished between the power to condemn land for public parks (RCW 8.12.030) and the power to condemn land for art museums (RCW 35.21.020). This long-standing distinction reinforces the common-sense view that the term "park" refers to an outdoor space, not indoor spaces like museums. *See also Blane v. Feldstein*, 129 Wn. App. 73, 117 P.3d 1169 (2005) (noting that an outdoor boardwalk is "like a park, as it allows the public to access scenic views"). It is likely for all of the above reasons that when the art museum building was originally approved, the City Council described it as an "adjunct" to the park[1] — *i.e.*, as something added to the park, but not, essentially, part of it.[2]

Similarly, the term "boulevard," in the regulatory phrase "park boulevard," is commonly understood to mean "a broad often landscaped thoroughfare." Webster's at <https://www .merriam-webster.com/dictionary/boulevard>. Obviously, just as the museum is not an open tract of land, it is not a boulevard.

Finally, while the phrase "open space" does not have a common, dictionary definition, it does have a regulatory definition in the Seattle Municipal Code, as Mr. Tobin acknowledges. In particular, the phrase "parks and open space" is defined to mean "'a use in which an area is permanently dedicated to recreational, aesthetic, educational or cultural use and *generally is characterized by its natural and landscape features*.'" Tobin Mem. at 2 (quoting SMC 23.84.030; emphasis added). Mr. Tobin cites this definition but fails to apply it to the proposed museum expansion, and for good reason. Just as the museum is not a "park" or "boulevard" within the common meaning of those terms, it is not "open space." The museum, unlike the rest of Volunteer Park, is generally characterized by its indoor space and art collection, not by its "natural and landscape features." Relatedly, Seattle's definition of "parks and open space" is closely aligned with the common legal understanding of the phrase "open space," which is defined in Black's Law Dictionary to mean "Undeveloped (or mostly undeveloped) urban or suburban land that is set aside and permanently restricted to agricultural, recreational, or conservational uses." *See* Black's Law Dictionary (10th ed. 2014). Like the city's regulatory definition, this common legal definition again refers to outdoor recreation spaces, not indoor spaces like a museum.

For the reasons above, we believe Mr. Tobin's analysis of the Preservation Clause focuses on the wrong issue. The question is not whether the art museum expansion is a "recreational use" in the broad sense of the term, but whether it a recreational use within the meaning of Initiative 42. It is not — only outdoor spaces are covered. In turn, focusing on the text and structure of the Preservation Clause, we believe the City Council likely did not intend to allow conversion of open, outdoor park space to indoor recreation spaces. This is evident from the other, limiting words of the Preservation Clause, which require outdoor recreation spaces to be preserved for such use. By

[1] *See* Asian Art Museum Renovation and Proposed Expansion, Frequently Asked Questions, *available at* <http://www.seattleartmuseum.org/Documents/AAM_FAQ_Final_February_2017.pdf>.

[2] *See* Webster's at < https://www.merriam-webster.com/dictionary/adjunct> (defining "adjunct" to mean "something joined or added to another thing but not essentially a part of it").

converting open park space to indoor use, the museum expansion violates Initiative 42's Preservation Clause.

B. The Museum Expansion Triggers the Procedural Requirements of the Hearings Clause.

Mr. Tobin also misconstrues the instances in which a hearing is required under Initiative 42's Hearings Clause. In the quote above from Section 1 of the ordinance, the City Council determined that a hearing is necessary in three instances: (1) when lands or facilities covered by the ordinance are "sold"; (2) when those lands or facilities are "transferred"; and (3) when they are "changed from park use to another usage." Here, even if the park land that will be converted for museum use is not sold, it will be transferred and changed from park use to another usage. For both of these reasons, a public hearing is necessary.

As for whether park land will be "transferred," Black's law dictionary defines that term expansively to include virtually any instance in which an interest in land is conveyed from one entity to another, including by lease or other less formal mechanisms:

> **transfer** *n.* (14c) **1.** Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. • The term embraces every method — direct or indirect, absolute or conditional, voluntary or involuntary — of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. **2.** Negotiation of an instrument according to the forms of law. • The four methods of transfer are by indorsement, by delivery, by assignment, and by operation of law. **3.** A conveyance of property or title from one person to another.

Black's Law Dictionary (10th ed. 2014).

Applying this definition here, it is clear that at least some open land within Volunteer Park, currently under the ownership and supervision of the Parks Department, will be transferred to a separate entity — *i.e.*, the Seattle Art Museum. This transfer will be necessary because at least some open park grounds will be covered by the expanded museum footprint. Whether that conveyance occurs by lease or some other, less formal method, it is a transfer within the common meaning of the term. For this reason alone, a public hearing is required under the plain language of the Hearings Clause.

In turn, the museum expansion would change park land "from park use to another usage," providing a second, independent trigger for the public hearing requirement in the Hearings Clause. This is evident from the Parks Department's own policies and from the museum's historic impact on the naturalistic design and character of Volunteer Park.

In 1996, the Parks and Recreation Department adopted policies on non-park uses of Seattle park lands (herein, "Non-Park Use Policy"[3]), which the City Council subsequently endorsed in Resolution 29475 (Oct. 14, 1996). Among other things, the Department defined the phrase "non-park use" to mean "any use or treatment of park land by private parties or other public agencies that limits or diminishes the ability of the public to use or enjoy park property." *See* Non-Park Use Policy at 4. Here, even if the museum expansion will increase the public's enjoyment of the museum, it will diminish the public's ability to enjoy other, equally important aspects of the park, including open space that the new museum footprint will cover and vistas and viewscapes from the park's east side. Under the Department's own policies, the museum expansion represents a non-park use of parks lands.

In turn, these impacts cannot be divorced from the original intent behind Volunteer Park and the historic controversy over placing an art museum in the park. In 1910, the Olmsted Brothers opposed a proposed museum building in a letter to J.T. Heffernan, President of Seattle's Board of Park Commissioners. In that letter, the Olmsted Brothers expressed their opposition to the building in light of its inconsistency with the naturalistic design and character of the park:

> Volunteer Park belongs to the class of parks which may be distinguished from ornamental public squares, public gardens and public playgrounds by the designation "landscape park." In a landscape park the planning and improvement of its landscape possibilities should always be the first consideration. In a park of that class, there should be no building or other feature no matter how meritorious in itself, that is not introduced as an aid to the public in enjoying the landscape. Any building in a landscape park should be subordinated very completely to the landscape design.
>
> Volunteer Park is obviously a landscape park—not an ornamental public square or primarily a public playground. The conclusion is evident that the proposed art museum is not suggested as a means for the public to enjoy the landscape of the park. Owing to its size and style of architecture the art museum is in no way to be subordinate to the park landscape, but on the contrary the museum would completely dominate a large part if not the whole of the park.

Today, the building is here to stay. But the same concerns that animated the Olmsted Brothers' original opposition to such a building also demonstrate that the proposed expansion would further impact the essential design and naturalistic character of Volunteer Park. That, in turn, will limit or diminish the public's ability to use and enjoy park property and establish a non-park use within the meaning of the Department's Non-Park Use Policy. By diminishing the public's ability to use and enjoy the park, we respectfully submit that the expansion would also represent a conversion of park use to non-park usage within the meaning of Initiative 42's Hearings Clause. As above,

[3] The Department's policy on non-park uses of park lands is available at <https://www.seattle.gov /Documents/Departments/ParksAndRecreation/PoliciesPlanning/PolicyNonParkUse.pdf>.

the city must hold a public hearing to determine whether the expansion is truly necessary, or whether a different alternative with fewer and less intensive impacts would be reasonable and practical within the meaning of the ordinance.

C. Washington Courts Are Unlikely to Defer to the City's Project-Specific Interpretation of Initiative 42.

Finally, Mr. Tobin's memorandum makes two dubious statements regarding the likelihood that a court would defer to the Department on its decision to not hold a public hearing on the museum expansion. First, he asserts that a court would likely defer to the Department's view that the museum expansion is a use of land "for park and recreation purposes," or a "park use," within the meaning of the Preservation Clause. In support, he reasons that because the City Council adopted a resolution directing the Department to promulgate rules defining vague terms in Initiative 42 (*see* Resolution 29521 (Jan. 27, 1997)), a court would likely defer to the Department's current position that the museum expansion does not trigger the ordinance's procedural requirements.

On this issue, we note, first, that the phrases "park and recreation purposes" and "park use" are not among the terms that the Department the was charged with defining — instead, Resolution 29521 charged the Department with defining the terms "preserved," "held," "transaction," "necessary," and "reasonable and practical alternative." Contrary to Mr. Tobin's memorandum, this suggests that the City Council did not view "park and recreation purposes" and "park use" as being ambiguous or otherwise in need of departmental definition.

In turn, while Mr. Tobin cites a single case for his conclusion that a court would defer to the Department — *Thurston County v. Cooper Pont Association*, 148 Wn.2d 1, 57 P.3d 1156 (2002) — that case actually undermines his conclusion. In *Thurston County*, the Court explained that deference is not given when it would defeat the goals and requirements of the underlying statute. *See Thurston County*, 148 Wn.2d at 14 ("deference is only given to policy choices that are consistent with the goals and requirements of" the underlying statute). As discussed above, there is ample evidence that the Department's decision to not hold a hearing in this case offends the goals and requirements of Initiative 42 (including the conversion of outdoor recreation space), especially in light of the historic impacts that the building has had on Volunteer Park and the tension between the proposed expansion and the Olmsted Brothers' original, naturalistic design. It is also unlikely that a court would defer to the Department's one-off, project-specific interpretation in light of its long-standing failure to adopt defining regulations as required by Resolution 29521. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 18 Wn.2d 801, 815, 828 P.2d 549 (2005) (to receive deference, agency interpretation must be adopted as matter of policy, not as an "isolated action"; agency may not "bootstrap a legal argument into the place of agency interpretation"). The City Council directed the Parks Department to adopt rules establishing a formal interpretation of the language of Initiative 42. The Department declined to do so, and cannot claim deference now simply because it has been forced to make a decision on Initiative 42 in the context of this project-specific action.

Next, and likely anticipating our response to the weakness of his deference argument, Mr. Tobin cites several examples of non-traditional uses on land owned by the Seattle Parks and Recreation Department, including Green Lake Theater in Green Lake Park, the Madrona Dance School near

Madrona Park, the Langston-Hughes Performing Arts Center near Pratt Park, the Pratt Fine Arts Center in Pratt Park, the Woodland Park Zoo and Seattle Aquarium, and the Museum of History and Industry adjacent to Lake Union Park. *See* Tobin Mem. at 2–3. The apparent purpose of these examples is to bolster Mr. Tobin's claim that a court would likely defer to the Department's decision to not hold a public hearing under Initiative 42 for the museum expansion.

But these examples have an obvious defect: Only one of them post-dates Initiative 42 — the Museum of History and Industry — and even there the museum use was approved *before* the park was established (and the building itself was built in the 1940s). Thus, it is not surprising that Mr. Tobin provides no evidence that the city ever deliberated over the procedural requirements of Initiative 42 when approving these non-standard park uses. While the examples may illustrate the Department's past practices prior to the adoption of Initiative 42, they clearly fall short of establishing a formal policy interpretation of Initiative 42 that would be entitled to any degree of deference by a Washington court. They do not support the Department's position that it may convert open park space for indoor use without a hearing under Initiative 42.

D. Conclusion

In all, we believe the Department has erred by failing to hold a public hearing under Initiative 42 before approving the expansion of the Seattle Asian Art Museum. We respectfully ask the Department to reconsider that decision, to hold a public hearing, and to determine whether the expansion truly is necessary, or, alternatively, if other reasonable and practical alternatives exist. Volunteer Park is a priceless gem of the Seattle Park System, an invaluable resource for park users, Seattleites, and the residents of Capitol Hill. The public deserves an open hearing on the issue as Initiative 42 requires.

Thank you for your attention to this matter. If you have any questions or would like to discuss this matter further, please do not hesitate to contact me.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

Enclosure
cc: Client