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July 10, 2014

**MEMORANDUM**

To: Friends of Woodland Park Zoo Elephants  
From: Claire Tonry, Smith & Lowney PLLC

Re: **City of Seattle's authority to condition zoo elephant disposition and acquisition.**

**QUESTIONS PRESENTED**

1. Does the City of Seattle have the authority to require that any elephants transferred out of the Woodland Park Zoo (the "Zoo") be received by a facility that is accredited by the Global Federation of Animal Sanctuaries ("GFAS"), and to condition new elephant acquisitions on the Zoo meeting GFAS elephant care criteria?
2. Does the City of Seattle have the authority to require the Zoo to meet GFAS elephant care criteria?

**SHORT ANSWERS**

1. Yes. The City of Seattle has ample authority to condition elephant disposition and acquisition, by either City Council ordinance or resolution, or by Mayoral executive order.
2. Yes. The City of Seattle has the authority to regulate animal care at the Zoo by enacting an ordinance.

**LEGAL BACKGROUND**

State statute permits the City of Seattle to contract with a nonprofit corporation for management and operation of the Zoo, subject to certain conditions. RCW 35.64.010. The contract term and any renewal term must not exceed twenty years. RCW 35.64.010(1). The initial contract and any renewal contracts or modification to the contract must be preceded by a public hearing. RCW 35.64.010(2). The contract must provide for "oversight of the managing and operating entity to ensure public accountability of the entity and its performance in a manner consistent with the contract." RCW 35.64.010(5). Chapter 35.64 does not impose any other pertinent limitations on the contract or the City's authority with respect to regulation of the Zoo.

In 2001, the Seattle City Council passed Ordinance 120697, which authorized the Superintendent of Parks and Recreation to enter into an agreement with the Woodland Park Zoological Society ("WPZS") for operation and management of the Zoo. The agreement

must be substantially in the form of the draft agreement attached to Ordinance 120697. Aside from the substantive provisions of draft agreement, Ordinance 120697 does not impose any pertinent limitations on the Zoo or the City's regulation of the Zoo.

In 2002, the City of Seattle entered into a twenty-year contract (the "Agreement") with WPZS to manage and operate the Zoo. The Agreement transferred ownership of the Zoo animals from the City to the WPZS for the duration of the Agreement. Agreement, § 15.1. Ownership of the animals reverts back to the City of Seattle when the Agreement terminates. *Id.*

The Agreement authorizes WPZS to acquire, sell or "otherwise dispose of" Zoo animals but requires that the acquisition or disposal "be made in strict accordance with (a) all applicable federal, state or local laws, regulations and policies, (b) the guidelines and policies of the AZA, and (c) existing and any adopted acquisition and disposition policies approved by the City." Agreement at § 15.3.

The Agreement requires WPZS to care for all Zoo animals in accordance with "all federal, state and local laws and regulations." Agreement, § 15.2. More generally, the Agreement requires WPZS to comply with all laws and regulations, rules and orders "that may from time to time be put into effect relating to, controlling or limiting the use and operation of the Zoo" and "secure or cooperate with the City in securing, all permits and licenses specifically required for the operation of the Zoo." Agreement, § 31.1.

The Agreement requires WPZS to maintain certain licenses and accreditations, including USDA and Seattle-King County Health Department licenses, and Association of Zoos and Aquariums (AZA) accreditation. Agreement, § 10.1. The Agreement also authorizes WPZS, as the City's agent, "to perform such services under such licenses and permits as are required in the operation of the Zoo to the extent permitted by applicable law..." Agreement § 10.2.

Modification to the Agreement must be approved by the City Council and executed by the Superintendent of Parks and Recreation and the WPZS. Agreement, § 33.12.

## **DISCUSSION**

### **A. The City's authority to condition elephant disposition and acquisition.**

#### **1. The Seattle City Council may condition elephant disposition and acquisition through an ordinance or a resolution.**

The Seattle City Charter confers broad authority on the City Council "[t]o make all such local, police, sanitary and other regulations as are not in conflict with the laws of the state" by ordinance. Seattle Charter, Art. IV, § 14. *See also id.* at § 15 ("The City shall have... all powers now or hereafter granted to incorporated towns and cities, by the laws of this state..."). The City Council may establish policies and take other non-legislative action by adopting a resolution, rather than passing an ordinance. *See Morrison v. Seattle*, 6 Wn. App. 181, 189, 492 P.2d 1078 (1971).

Regulation of animal care and restrictions on disposition of exotic animals are within the City's broad police powers, even when the City has no property interest in the animals. *See City of Seattle v. Petro*, 2010 Wash. App. LEXIS 588, 11 (Mar. 22, 2010) (Seattle's animal cruelty code upheld in part because it promotes safety and welfare). *See also Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 63 P. 3d 142 (2002) (city has a legitimate interest in banning exotic animal ownership). Here, the City's interest in Zoo animal acquisition, disposition, and care is heightened because the City retains a future interest in the animals, the City funds the Zoo, and the Zoo is open to and managed for the public. Agreement, §§ 15.1, 5, 3.4.<sup>1</sup>

Nothing in the state law or City charter restricts the City of Seattle's authority to regulate Zoo animal care or place conditions on disposition of Zoo animals. *See generally* RCW 35.64; Seattle Charter, Art. IV.

Similarly, nothing in Seattle's code or the Agreement limits the City's power to enact new ordinances or adopt new policies on elephant disposition or acquisition. To the contrary, several provisions of the Agreement explicitly anticipate that the City will enact new policies and laws governing Zoo animal care, disposition and acquisition. Agreement at § 15.3; § 31.1. WPZS agreed to comply with any such later-adopted local laws when it entered into the Agreement. Agreement, § 15.2-3; § 31.1. The Agreement also anticipates that the Zoo may be required by law to meet licensing or permitting requirements in addition to AZA, USDA, and King County requirements, and authorizes WPZS to do what is necessary to comply with those requirements. *See* Agreement § 10.2. Such addition requirements may include GFAS accreditation which is analogous to the existing requirements discussed in section 10 of the Agreement. Accordingly, the City Council has the authority to require that elephants transferred out of the Zoo and any newly-acquired elephants be housed in a GFAS-accredited facility.

The City Council could exercise its authority by passing an ordinance requiring that any elephants transferred out of the Woodland Park Zoo be received by a facility that is accredited by the GFAS, and conditioning new elephant acquisitions on the Zoo meeting GFAS elephant care criteria. Alternately, the City Council may impose new conditions on disposition or acquisition of elephants simply by adopting a policy resolution, because the WPZS must comply with later-adopted "acquisition and disposition *policies* approved by the City." Agreement at § 15.3 (emphasis added).

## **2. The Mayor of Seattle may condition elephant disposition and acquisition through an executive order.**

The Mayor of Seattle's powers and duties include seeing that the laws of the City are enforced, directing subordinate officers, and enforcing City contracts. Charter, Art. V, §§ 2, 7. The Mayor's power of executive order is not explicitly identified in the City Charter. *See*

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<sup>1</sup> As the WPZS must return the animals to the City upon termination of the Agreement, the arrangement resembles a bailment. *See Freeman v. Metro Transmission, Inc.*, 12 Wn. App. 930, 932, 533 P.2d 130 (1975) Bailment "arises generally when personalty is delivered to another for some particular purpose with an express or implied contract to redeliver when the purpose has been fulfilled." *Id.* However, in a bailment, the bailor retains ownership of the property. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 432, 788 P.2d 1096 (1990). Here, the City transferred ownership of the animals to the WPZS for the duration of the Agreement, placed conditions on alienation of the animals, and retains a future reversionary interest.

Charter, Art. V, § 2. However, “[a] city's executive orders are presumed to be valid, and grants of municipal power are to be liberally construed.” *Leskovar v. Nickels*, 140 Wn. App. 770, 772-73, 166 P.3d 1251 (2007).

The Mayor has relatively broad authority to issue executive orders, so long as the orders do not run afoul with state law. *Id. See also Carrick v. Locke*, 125 Wn.2d 129, 144, 882 P.2d 173 (1994) (county executive order upheld where it differed but did not conflict with state statute). The Court of Appeal’s analysis is straightforward in this regard, as *Leskovar* illustrates. In that case, the court upheld the Mayor of Seattle’s executive order directing City departments to recognize same-sex marriage for the purposes of employment benefits. *Id.* at 781. The court reasoned that the Mayor was “fully within his rights” to issue the order because employee benefits are a matter of local concern in which the city exercises “broad discretion”, and state statute authorizes cities to provide benefits to their employees. *Id.* at 777.

The analysis is just as simple here. State statute explicitly authorizes – but does not require - the City to contract with a non-profit organization to operate the Zoo. RCW 35.64. In doing so, the state statute recognizes that zoo regulation is primarily a local concern, and delegates regulatory authority to the City. This grant of municipal power is to be “liberally construed” and the Mayor’s executive orders concerning the Zoo will be afforded “broad discretion”, and “presumed to be valid.” *Leskovar*, 140 Wn. App. at 772-73, 777. The Mayor could thus issue an executive order that adopts a City policy that any elephants transferred out of the Zoo be received by a facility that is accredited by the GFAS, and that new elephants only be acquired if the Zoo meets GFAS elephant care criteria. As explained above, such an order would not conflict with any existing state laws or municipal ordinances. Furthermore, the Agreement explicitly anticipates that the City may adopt new policies on Zoo animal acquisition and disposition, so the Agreement would not need to be modified to accommodate such an order. Agreement at § 15.3.

**B. The City’s authority to require the Zoo to meet GFAS elephant care criteria outright.**

For many of the same reasons the City may condition elephant transfers, the City may also require the Zoo to meet GFAS elephant care criteria, regardless of any elephant disposition or acquisition. The Agreement requires WPZS to care for all Zoo animals in accordance with “all federal, state and local laws and regulations” and comply with all laws and regulations, rules and orders<sup>2</sup> “that may from time to time be put into effect relating to, controlling or limiting the use and operation of the Zoo”. Agreement, §§ 15.2, 31.1. However, whereas the City can condition animal transfers merely by adopting a policy resolution or executive order, the only way for the City to regulate animal care outright without amending the Agreement is for the City Council to exercise its legislative power passing an ordinance. *Compare id.* (requiring compliance with laws) *and* Agreement at § 15.3 (requiring compliance with transfer policies). *See also* Seattle Charter, Art. IV, § 14; *Morrison v. Seattle*, 6 Wn. App. at 189.

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<sup>2</sup> In the context of this provision, an “order” must be an order with the force of law, i.e. an executive order adopting a policy would not suffice.

## CONCLUSION

The City of Seattle has ample authority to require that any elephants transferred out of the Zoo be received by a facility that is accredited by the GFAS, and to condition new elephant acquisitions on the Zoo meeting GFAS elephant care criteria. The City can adopt such conditions through a City Council ordinance, a policy resolution, or by Mayoral executive order. An executive order is likely to be the most efficient method for imposing conditions on elephant transfers. The City may also impose elephant care requirements, such as adherence to GFAS criteria, through an ordinance. Whether the City acts through an ordinance, resolution, or executive order, the Agreement need not be modified because it already anticipates and provides for compliance with evolving requirements.

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

By: /s/ Claire E. Tonry  
Claire E. Tonry