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MEMORANDUM

TO: All Members of the Charter Review Commission

FROM: Janice E. Ellis, Prosecuting Attorney

DATE: April 19, 2006

RE: **2006 Charter Review Process**

The strength of the Snohomish County Charter rests in its simplicity and its clarity. As times change and the demands upon government evolve, Snohomish County government adapts and responds to the community's new circumstances. The ability of our County Council, our Executive, and each separately elected official to effectively, efficiently, and lawfully exercise authority is enhanced through the clear language of our Charter.

Portions of the Charter can be improved and will benefit from the process in which you are now engaged. Section 8.40 charges you to review the Charter "to determine its adequacy and suitability to the needs of the county." The community's confidence in the integrity of the structure of Snohomish County government is founded upon your work and the amendments you recommend. Thank you for your service.

This memorandum addresses a few issues that may be of interest to your Commission. I have listed them below and outline them briefly on the following pages. I welcome questions about them now and in the future.

- Intergovernmental Relations
 - Charter Section 1.30
- Powers and duties of the Executive and the Prosecuting Attorney
 - Charter Sections 3.20, 3.120
- The Executive's veto authority
 - Charter Section 3.20(6)
- The Executive's signature authority and that of other elected officials
 - Charter Section 3.20(8)
- Disability of elected officials
 - Charter Section 4.80
- Biennial budgeting
 - Article 6
- Eminent Domain
 - Post-*Kelo* concerns

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- Housekeeping
 - Gender neutral language, Charter Sections 2.20, 2.30, 2.110, 4.40, 4.80, and 6.110
 - Minor Party designation, Charter Section 4.20
 - Budget revisions, Charter Section 6.75
 - Emergency Appropriations, Charter Section 6.85
 - Non-codified ordinances, Charter Section 2.100

1. Intergovernmental Relations

Charter Section 1.30 authorizes Snohomish County government to participate in cooperative ventures with other entities. This is an important public policy.

Interlocal agreements are the means by which Snohomish County government may participate in these endeavors. Current Charter language provides that “the county *may* by ordinance authorize participation in any function . . .” (emphasis added). The meaning and effect of use of the permissive term “may” has been debated. Some would prefer the use of the prescriptive term “shall,” others would prefer that the Charter be amended to authorize interlocal agreements without Council action.

I encourage you to work closely with your counsel to review and assess the policy implications of stiffening or relaxing the process under which Snohomish County government may enter into interlocal agreements. Clarified language will help ensure consistent compliance with this important Charter section.

2. Powers and duties of the Executive and the Prosecuting Attorney

The powers of the Executive are enumerated in Charter Section 3.20. One of those powers includes the authority to employ legal counsel as allowed by Washington law. Section 3.20(10). The County Council has the same authority. Section 2.20(5).

The role of the Prosecuting Attorney is addressed in Section 3.120:

The county prosecuting attorney shall have all the powers, authorities and duties granted to and imposed upon a prosecuting attorney by state law and as provided by this charter.

This language is consistent with our state Constitution. Art. XI, /4. The duties of the prosecuting attorney are established by state law. RCW 36.27.020. That law provides that the prosecuting attorney shall be the legal advisor to the legislative authority, to county officers, and shall prosecute and defend all actions in which the county is a party.

The independence of the prosecuting attorney has been assured through these structures. Thus, although the office of the prosecuting attorney is a part of the

Executive branch of government, it is not an Executive department. The prosecuting attorney is thereby available to provide legal advice and representation to the county as a whole and to members of all three branches of government. Each branch of government also has the ability to retain separate legal counsel when there is a need for independent advice, when a conflict of interest exists, or when a specific area of expertise is needed. It is through such a process that this Commission has retained outside counsel to assist you with your work.

The housekeeping amendments to Charter Sections 3.20(13) and (14) that were submitted by Executive Reardon conflict with these duties. The Executive has proposed adding new subsections to Charter Section 3.20 that would, if adopted, authorize the Executive to:

(13) Institute and defend all types of litigation and direct litigation in cooperation with the Prosecuting Attorney or designated counsel for the County.

(14) Settle litigation and claims for which a budgetary appropriation or other authorization has been made.

It is a primary duty of the prosecuting attorney to institute and defend litigation in which the County is involved. RCW 36.27.020. Further, the proposed amendments would exempt the Council's role in the litigation process. It could also be read to authorize the Executive to institute and manage litigation in which the judicial branch, the legislative branch, and/or separately elected officials are involved. The Executive's proposal has far-ranging implications, and is contrary to the language in our state Constitution and to ch. 36.27 RCW. I oppose the proposed housekeeping amendments.

3. The Executive's Veto Authority

Under Charter Section 3.20(6), if the Executive exercises his veto authority, he may only do so by rejecting the entire ordinance. The Executive's inability to veto a limited, specific section of a County ordinance can be problematic.

Councilmember Nelson has proposed language that would authorize the Executive to veto a section of an ordinance, rather than the entire ordinance. This is an important policy initiative that will, if adopted, ameliorate the problems that are sometimes encountered under the current Charter language. I encourage you to carefully consider this proposal with the assistance of your independent counsel.

4. The Executive's signature authority and that of other elected officials

Sheriff Bart has raised concern about restrictions upon independent elected officials to spend funds authorized by the County budget. Succinctly, these restrictions are viewed as undermining the authority of elected officials to independently manage their respective offices.

This is a policy matter that can be addressed through amendments to Section 3.20(8) of the Charter. Alternatively, it is a policy matter that can be addressed by the County Council through legislation that could delegate specific authority to one or more elected officials. You may wish to work with your independent counsel to probe this issue further.

5. Disability of Elected Officials

Executive Reardon has proposed Charter language that would establish a process for the County to follow if an elected official becomes incapacitated while in office. This is an important policy consideration; one that is necessary to ensure the continuity of government in times of crisis. I strongly encourage you to evaluate this issue with your independent counsel. See, for example, the process that exists under the state Constitution to replace the prosecuting attorney in similar circumstances. Art. 4, §9.

6. Biennial Budget

I encourage the Commission to support a biennial budget by amending Article 6 of the Charter (and related sections that also refer to an “annual” budget. See, e.g., Sections 5.30 and 5.70). As other elected officials have commented, a biennial budget will improve the efficiency of the budgeting process and promote better long-range planning. Currently, an extraordinary amount of time is annually invested in the budget process. Once adopted, little time passes between January 1st, when the budget becomes effective, and July 1st, when the next year’s budget proposals are due – too little time to assess the effectiveness of new positions and programs.

7. Eminent Domain

A national debate about the scope and limits of a government’s condemnation authority was sparked by the U. S. Supreme Court’s decision in *Kelo v. New London*, 125 S.Ct. 2655 (2005). Briefly, our Nation’s highest court upheld New London’s decision to condemn blighted property to promote economic development. Many are concerned that the decision will embolden municipal corporations to seize one citizen’s private property for the purpose of encouraging another person’s private enterprise.

Most Washington State legal scholars do not share this concern. The Fifth Amendment to the U. S. Constitution provides: “. . . nor shall private property be taken for public use, without just compensation.” By contrast, Article I, Section 16 of our state Constitution requires: “Private property shall not be taken for private use No private property shall be taken or damaged for public or private use without just compensation having first been made” Our State Supreme Court has relied on the differences between the federal and state constitutions to emphasize the more restrictive nature of eminent domain in Washington state.

Washington courts . . . have provided a more restrictive interpretation of public use. In fact, this court has consistently held that a “beneficial use is not necessarily a public use.” *In re Petition of City of Seattle*, 96 Wn.2d 616, 627, 638 P.2d 549 (1981) (citing *State ex rel. Or.-Wash. R.R & Navigation v. Superior Court*, 155 Wash. 651, 657-58, 286 P. 33 (1930) and *Hogue v. Port of Seattle*, 54 Wn.2d 799, 825, 831, 837-38, 341 P.2d 171 (1959)).

Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 360, 13 P.3d 183 (2000). Several bills were introduced to address the *Kelo* decision during the last legislative session. Ultimately, none passed. The Legislature appears to have concluded that the private property rights of Washington State residents are adequately protected under our state Constitution and Washington State Supreme Court decisions.

8. Housekeeping

A. Gender-neutral language. The 1996 Charter Review Commission proposed gender-neutral language for Sections 2.20, 2.30, 2.110, 4.40, 4.80, and 6.110. Your Commission may wish to recommend these amendments again.

B. Minor Party designation. Charter Section 4.20 should be updated, as requested by the Auditor, to change the term “independent party” to “minor party” to conform with state law.

C. Budget revisions. The 1996 Charter Review Commission recommended the same language change to Section 6.75 that is recommended this year by Executive Reardon. I recommend adoption of this language to improve the administration of the budget and to overcome procedural challenges that occur when unanticipated situations arise.

D. Emergency Appropriations. The 1996 Charter Review Commission recommended the same language change to Section 6.85 that has been recommended by the Executive. I recommend adoption of this language for the same reasons set forth in paragraph D, above.

E. Non-codified ordinances. Under Charter Section 2.100, ordinances of a general and permanent nature must be codified. As Councilmember Nelson noted, it may be unnecessary and inefficient to codify all ordinances. Councilmember Koster recommends indexing the non-codified ordinances. This is a policy issue that will benefit from your review. Clarified procedures – whatever they are – will help promote the County’s ability to fully comply with the Charter.

cc: Steve Reinig, Administrative Analyst, Charter Review Commission