

October 20, 2020

VIA EMAIL ONLY

Fox Blackhorn
Compliance Coordinator 2
Public Disclosure Commission
PO Box 40908
Olympia, WA 98504

***Re: City of Newcastle's Response to PDC Complaints – Consolidated Case
No. 78205***

Dear Mx. Blackhorn:

1. Introduction.

This office represents the City of Newcastle (“City”) as its general counsel, and as such I am responding to two complaints filed with the Public Disclosure Commission (“PDC”) from Robert Clark, dated October 5, 2020, and Kandy Schendel, dated October 10, 2020, which have been consolidated as PDC Case No. 78205 (collectively, “Complaints”).¹

The Complaints allege that the City violated RCW 42.17A.555 by misusing public facilities to promote a ballot measure when it posted a news item on its website entitled, “Frequently Asked Questions: Referendum 2” (“FAQ”). However, for the reasons set forth below, the City did not violate state law, and respectfully requests the Complaints be dismissed.

2. Legal framework.

RCW 42.17A.555 prohibits the City from using public facilities to promote or oppose a ballot measure. However, the statute expressly exempts from this prohibition “[a]ctivities which are part of the normal and regular conduct of the office or agency.” RCW 42.17A.555(3).

The PDC has defined the statutory exemption as follows:

¹This letter includes the City’s response to the complaint correction and supplementation from Kandy Schendel on 10/15/20 and 10/18/20, which were consolidated with PDC Case No. 78205.

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WAC 390-05-273 Definition—Normal and regular conduct. Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17A.555, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

The PDC has also adopted the following rule applicable to ballot measures:

WAC 390-05-271 General applications of RCW 42.17A.555.

* * *

(2) RCW 42.17A.555 does not prevent a public office or agency from (a) making facilities available on a nondiscriminatory, equal access basis for political uses or (b) making an objective and fair presentation of facts relevant to a ballot proposition, if such action is part of the normal and regular conduct of the office or agency.

(Emphasis added). To further assist local agencies, the PDC published "*Guidelines for Local Government Agencies in Election Campaigns (Public Disclosure Law Re: Use of Public Facilities in Campaigns)*"², which identifies certain "Basic Principles" applicable to ballot measures:

BASIC PRINCIPLES

* * *

2. The Public Disclosure Commission holds that it is not only the right, but the responsibility of local government to inform the general public of the operational and maintenance issues facing local agencies. This includes informing the community of the needs of the agency that the community may not realize exist. Local governments may expend funds for this purpose provided that the preparation and distribution of information is not for the purpose of influencing the outcome of an election.

* * *

²The publication is found at the following link: <https://www.pdc.wa.gov/learn/guidelines-local-government> (hereinafter "Guidelines"). The City Council reviewed these same PDC Guidelines at the June 19, 2020 Special Meeting in a presentation entitled, "Referendum, Rules of the Road". The written presentation is located at following link: <https://newcastle.civicweb.net/document/32221/3-1%20Referendum%20Rules%20of%20the%20Road%20Slides.pdf?handle=7FE00118F3BE44F385CB545A0DF5064F>

7.a. Historically, the PDC has routinely advised and held that with respect to election-related publications, one jurisdiction-wide objective and fair presentation of the facts per ballot measure is appropriate.

In addition, if an agency* has also customarily distributed this information through means other than a jurisdiction-wide mailing (e.g. regularly scheduled newsletter, website, bilingual documents, or other format), that conduct has also been permitted under RCW 42.17A.555 so long as the activity has been normal and regular for the government agency. For more discussion of fact sheets, see this staff analysis.

b. The PDC will presume that every agency may distribute throughout its jurisdiction an objective and fair presentation of the facts for each ballot measure. If the agency distributes more than this jurisdiction-wide single publication, the agency must be able to demonstrate to the PDC that this conduct is normal and regular for that agency. In other words, the agency must be able to demonstrate that for other major policy issues facing the government jurisdiction, the agency has customarily communicated with its residents in a manner similar to that undertaken for the ballot measure.

(Emphasis added). The Guidelines include a chart which identifies the following permitted activities and resources relating to “Agency Publications (Specific to Elections)”:

- Agencies may develop an objective and fair presentation of the facts regarding agency needs and the anticipated impact of a ballot measure, and may distribute it in the agency’s customary manner. This information may be printed in various languages and communicated in other formats as required by the ADA.
- In the course of regular publications for the agency, the agency may distribute an objective and fair presentation of the facts for each ballot measure in accordance with the normal and regular conduct of the agency.

3. City Enactments.

To better understand how the legal framework discussed above applies to the City’s publication of the FAQ, it is necessary to provide background on certain relevant City legislative enactments.

a. Fiscal Sustainability Plan

On February 18, 2020, the City Council passed Resolution 2020-812, which adopted the City’s Fiscal Sustainability Implementation Plan (“Fiscal Sustainability Plan”).³ The Fiscal Sustainability Plan was adopted after a long public process relating to the City’s fiscal sustainability. One of the

³Resolution 2020-812, and the adopted Fiscal Sustainability Plan have been attached as Attachment 1.

implementing “Goals/Strategy” of the Fiscal Sustainability Plan includes the adoption of a utility tax.⁴

b. Utility Tax Ordinance

Consistent with the adopted Fiscal Sustainability Plan, on June 2, 2020, the City Council adopted Ordinance 2020-0609 (“Ordinance”), which authorized and levied utility taxes “to fund and sustain public safety (police, fire)”.⁵ The recitals within the Ordinance discuss the long history leading up to the Ordinance, and explain that:

- The Washington State Auditor in a 2011 Audit Exception expressed concerns about the long-term financial viability of the City due to reliance on the revenue sources susceptible to impacts from economic conditions, and noted that personnel cuts are a strategy that cannot be employed indefinitely;
- In 2018, the City entered into a contract with Management Partners to provide an impartial review of the operating budget and six-year financial forecast prepared by Newcastle staff;
- This forecast confirmed by Management Partners shows expenditures exceed estimated revenue sources beginning in 2020, and reserves to be depleted if no action is taken to reduce expenditures and/or enhance revenue;
- Management Partners was hired to prepare a Fiscal Sustainability Plan to provide a comprehensive analysis of how the city is operating and what spending changes and revenue enhancements could be made;
- On December 3, 2019, the City council adopted the 2020 budget which anticipated that the City’s annual expenses alone for public safety services (police, fire) would consume all revenue from property taxes;
- On February 18, 2020, the City Council passed Resolution 2020-812, which adopted a Fiscal Sustainability Plan to ensure the City remains viable, and the plan includes certain steps such as increasing cost recovery from developers, decreasing internal costs, increase collection of sales tax revenue, and adopting a utility tax within the City;⁶

⁴ See Attachment 1, Fiscal Sustainability Plan, Goals/Strategy A, “Utility Tax”. The resolution notes that fiscal sustainability has been a topic of public discussion at the following public meetings: January 18, 2019, May 4, 2019, June 18, 2019, July 2, 2019, August 15, 2019, January 21, 2020, and February 4, 2020. See Attachment 1 Resolution 2020-812 at 2.

⁵ See City of Newcastle Ordinance No. 2020-0609 (“Ordinance”), attached as Attachment 2. The cited declaration is located in the title of the Ordinance, and Section 2, Purpose and Need.

⁶ See Attachment 2, Ordinance at 1-2.

The City Council incorporated the recitals as findings to support the Ordinance. The Council also specifically found that the best interest of the public required the levying of utility taxes “for the purpose of funding and sustaining public safety services (police, fire).”⁷

Lastly, the Ordinance also included the exclusive statutory referendum process required by state law under RCW 35.21.706. After the Ordinance was adopted, a petition for referendum was submitted to the City, and thereafter sufficient signatures were submitted and certified so as to place the approval or rejection of the Ordinance on the November 3, 2020, ballot (“Referendum 2”).

c. Public Engagement Strategy

In 2019, the City Council adopted Resolution 2019-790, which adopted the City’s Public Engagement Strategy.⁸ The resolution recognizes that communicating with a broad range of people is “vital for individuals to have a voice in the decisions that affect them.”⁹ The resolution also acknowledges that “providing information increases citizen competence and empowerment as they relate to participatory government.”¹⁰

The Public Engagement Strategy notes that the City’s local public newspaper went out of business in 2016, and that the City “can fill this gap of providing information about City government to the public it serves. Facilitating participation in government is one of our core responsibilities.”¹¹ The Public Engagement Strategy adopts the following relevant “Objectives”:

Communicate Early and Often

- Ensure that City initiatives, issues and projects include early identification and regular public outreach so that citizens are included, heard and informed.
- Keep stakeholders in the loop with consistent updates on City events and news.

Inform and Educate

⁷See Attachment 2, Ordinance at 3, Section 2. Purpose and Need.

⁸See Resolution 2019-790, attached as Attachment 3.

⁹See Attachment 3, Resolution 2019-790 at 1.

¹⁰See Attachment 3, Resolution 2019-790 at 1.

¹¹See Attachment 3, Resolution 2019-790, Ex. A Public Engagement Strategy (“Public Engagement Strategy”) at 3. The Public Engagement Strategy also notes that in 2017 the City contracted with a part-time communications professional to increase the City’s social media presence and timely posting of newsletters and website posts. The 2017 postings increased from 41,187 in 2016 to 268,797 in 2017. *Id.* at 4. As a small “contract” City, the City routinely hires consultants to perform services on its behalf, including communication outreach services.

- Proactively disseminate City news and information to the community in a manner that most will receive.
- Educate residents about City government in an effort to support an active and engaged citizenry.¹²

The Public Engagement Strategy also identifies the “Communication Tools” that staff should strive to use to ensure the City’s message reaches the widest, most diverse audience possible. These tools include: public forums, public comment, email newsletters, email alerts, city website, social media, photos and videos, among other things.¹³

Consistent with the Public Engagement Strategy, the City has routinely and customarily communicated with its residents on major policy issues facing the City. For example, over the past sixteen months the City has posted the following news items on its website relating to fiscal sustainability, utility taxes and voter information:¹⁴

- *FAQ: Referendum 2*, posted 9/18/20 (addressing common questions relating to proposed utility tax);¹⁵
- *City Council Recap/June 2, 2020*, posted 6/15/20 (discussing City Council’s approval of 3% utility tax, beginning Jan 2021);¹⁶
- *Procedures for Filing a Referendum Petition*, posted 6/4/20 (posting procedures for filing a referendum petition to the 3% utility tax);
- *Council to Discuss Utility Tax Ordinance on June 2*, posted 5/29/20 (noting that City Council will consider an ordinance establishing 3% utility tax, and discussing the City’s three main revenue sources (property taxes, sales taxes, and development revenue, and budget deficit);
- *City Hall Ballot Drop Box Open for Presidential Primary*, posted 2/24/20 (posting voter information);
- *City Council Roundup/Feb. 18, 2020*, posted 2/20/20 (discussing adoption of Fiscal Sustainability Plan to address future projected budget shortfalls);
- *City Council Roundup/Feb. 4, 2020*, posted 2/13/20 (noting that council considered solutions to operating budget shortfall and directed staff to bring forward implementation plan);

¹²See Attachment 3, Resolution 2019-790 at 5.

¹³ See Attachment 3, Resolution 2019-790 at 10-11.

¹⁴All news items referenced above have been attached as Attachment 4.

¹⁵ The City acknowledges that while the FAQ was initially published on the City’s website on September 18, it was temporarily withdrawn for refinement, and then re-posted on October 1, 2020. Screen shots of the Sept. 18th and Oct. 1st FAQs are attached as Attachment 5.

¹⁶Consistent with the FAQ, the Recap notes the utility tax will generate about \$880,000 in revenue.

- *Council to Review Survey Results, Discuss Fiscal Sustainability*, posted 01/17/2020 (noting Council will receive an overview of the Fiscal Sustainability Plan);
- *City Council Roundup/Dec. 2, 2019*, posted 12/13/19 (discussing 2020 budget and that “public safety expenditures alone make up nearly half of the City’s operational budget” and using fund balance “not sustainable for the foreseeable future as reserves are drawn down”);
- *City Council Meeting Agenda/Dec. 3, 2019*, posted 11/27/19 (noting budget cuts reduce projected \$1.3 million deficit to just over \$950,000);
- *City Council Roundup/Nov. 5, 2019*, posted 11/7/19 (noting “City Council continued reviewing the 2020 preliminary budget and explored ways to reduce a projected operating deficit of \$1.3 million, driven largely by increasing costs to fund police and fire services”);
- *Update on Newcastle’s Fiscal Sustainability*, posted 10/10/19 (discussing projected operating deficit and potential implementation of utility tax);
- *FAQs/Council Community Conversation*, posted 9/16/19 (FAQ summary provided of questions asked at Community Conversation event, including FAQ on whether City Council was considering a utility tax);
- *Council Budget Retreat is Thursday*, posted 8/12/19 (discussing 2020 budget and development of Fiscal Sustainability Plan to address anticipated long-term structural deficit);
- *Ballot Drop Box Opens on July 18*, posted 7/17/2019 (information on Aug. 6 primary election)
- *City Council Roundup/July 2, 2019*, posted 7/9/19 (discussing review of strategies to address budget fiscal gap; Management Partners’ development of Fiscal Sustainability Plan; and potential new revenue through implementation of utility and admissions taxes and transportation benefit district);
- *Council to Consider Budget Strategies at July 2 Study Session*, posted 6/28/19 (noting Council will review Fiscal Sustainability Plan and proposed strategies to address budget’s fiscal gap);

In addition to posting news on its website relating to policy issues affecting the community, the City routinely communicates with residents by linking these same new items to City social media accounts (Facebook, Nextdoor), and then includes the new items in the City’s email newsletter.¹⁷ Consistent with the City’s Public Engagement Strategy, and customary practice of posting community news items, the City published the FAQ to inform its residents of an upcoming issue on the ballot, Referendum 2. The Complaints were then filed with the PDC relating to the FAQ.

¹⁷A detailed summary of the City’s routine and customary practices relating to public communication is attached as Attachment 6, which includes links to the numerous news items, social media postings and newsletters referenced therein. The City will provide copies of these publications/postings if so requested by the PDC.

Significantly, when contesting the City's authority to post the FAQ, the Complaints do not discuss the "normal and regular" exemption to RCW 42.17A.555. The Complaints do not discuss the City's routine and customary practice of posting news on its website, in social media or newsletters to inform the public of important policy issues. Instead, the Complaints essentially argue against the idea of utility taxes, and debate on behalf of preferred alternatives to addressing fiscal sustainability. However, the City was not required to include discussion of more than one fiscal sustainability alternative in the FAQ.

As such, the FAQ provides fair and objective information about utility taxes, and closely follows the findings of the Ordinance, the Fiscal Sustainability Plan, and adopted 2020 budget forecasting of deficit spending.¹⁸ The FAQ also provides fair and objective information relating to the potential impacts to operations if the Ordinance is approved or rejected under Referendum 2. Consistent with PDC Guidelines, the FAQ seeks to inform residents of the needs of the City that the community may not realize exist. However, the FAQ does not ask residents to vote for or against the utility tax, or otherwise attempt to influence the outcome of the election. The City's posting of the FAQ followed state law and PDC guidelines, and should be affirmed.

4. Conclusion.

In conclusion, as demonstrated above, the City routinely publishes information on its website relating to policy issues such as fiscal sustainability, utility taxes and voter information. The City's posting of fair and objective information relating to utility taxes and Referendum 2 also meets the City's adopted Public Engagement Strategy. Therefore, the City's publication of the FAQ meets the definition of "normal and regular conduct" and as such is permitted under law. Accordingly, the City requests that the Complaints be dismissed.

Please let this office know if you need any additional information relating to this response.

Very truly yours,



Dawn F. Reitan

DFR:cmh

¹⁸The Complaints allege the FAQ has incorrect information, but the FAQ is consistent with the Ordinance which provides that: 1) the 3% utility taxes are not scheduled to increase; 2) a 3% utility tax has not been levied on the stormwater utility; and 3) the Ordinance contains the statutory referendum process identified by the Legislature as the "exclusive" referendum process. See Attachment 2, Ordinance.