IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

TACOMA FOR ALL and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, Plaintiffs, vs. CITY OF TACOMA, PIERCE COUNTY, and LINDA FARMER, in her official capacity. Defendants	No. 23-2-08684-3 ORDER REGARDING PLAINTIFFS' MOTION FOR PRELIMINARY INJUCTION AND DECLARATORY RELIEF

This matter comes before the Court on Plaintiffs Tacoma for All's and United Food and Commercial Works Local 367's affidavit and motion for an order to prevent election errors under RCW 29A.68 and for declaratory and injunctive relief.

This case involves the Plaintiffs' challenge to the Tacoma City's Council adoption of a resolution that places an alternative ordinance to the Plaintiffs' citizen initiative regarding tenant rights on the November ballot. Plaintiffs argue that the City Council lacks the authority to put the City Council's tenants' rights ordinance on the ballot as an alternative to the citizen initiative. Plaintiffs seek a declaration from the Court that the City Council's actions are void and enjoining the placement of the City's alternate ordinance on the November ballot.

A. Standing and Pre-Election Review

The first issue is whether the plaintiffs have standing and whether review prior to the election is appropriate. Regarding standing, the Court agrees with the plaintiffs that they have standing, as the interest they seek to protect is within the zone of interests addressed by the initiative and they would suffer an injury in fact if the City's alternative ballot measure were to pass. *Spokane Entrep. Ctr. v. Spokane Moves to Amend the Const.*, 185 Wn.2d 97, 105-06, 369 P.3d 140 (2016). Likewise, the Court finds that pre-election review is appropriate because a pre-election challenge to the scope of initiative power is permitted. *Am. Traffic Solutions, Inc. v. City of Bellingham,* 163 Wn. App. 427, 432, 260 P.3d 245 (2011), *review denied*, 173 Wn.2d 1029 (2012).

B. Source of Authority

The second issue is the source of the City's authority, if any. Plaintiffs argue that the City's authority with respect to ballot measures is found only in the Tacoma City Charter. In its brief, the City argued that its authority was much broader, positing that the "City Council does not require an express grant of legislative authority to place the proposed ordinance (Measure No. 2) on the ballot." *Tacoma brief at 7;* Rather, the City argues that the State Constitution and statewide legislation grants it broad powers that allows it to put Measure 2 on the ballot as an alternative to the Plaintiffs' Initiative. *See generally, Tacoma brief at 7-12.* However, at oral argument, the City seemed to abandon or at least de-emphasize that argument, stating that it was primarily relying on the Tacoma City Charter as the basis for its authority. Thus, it is unclear whether the City is still relying on this argument. To the extent that the City is still arguing that its authority exists from sources outside of the City Charter, the court disagrees. The statute at issue RCW 35.22.200, is an enabling statute, in which the "Washington Legislature granted charter cities the opportunity to afford city voters the initiative process." *Glob. Neighborhood v. Respect Washington*, 7 Wn. App. 2d 354, 391, 434 P.3d

1024, 1044 (2019). It is not, as the City argues, a general statute that allows a City initiative authority outside of the City Charter. Nor is any other statute cited by the City. Thus, if Tacoma has the right to submit an alternative ballot measure (or any ballot measure), that right must be found in Tacoma's City Charter. *See also, City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 385-86, 93 P.3d 176 (2004), *review denied,* 153 Wn.2d 1020 (2005) ("Under the [Seattle] city charter, the council had three options: (1) accept the initiative and enact it into law, (2) reject the initiative and submit it to the voters, or (3) enact an alternative measure and present both its version and the initiative to the voters.")

C. Whether the City has the Authority to Propose an Alternative Ordinance

The relevant portions of Tacoma's City Chart are found in Sections 2.19, 2.21, 2.22 and 2.23. Section 2.19 provides that the "[c]itizens of Tacoma may by initiative petition ask the voters to approve or reject ordinances or amendments to existing ordinances." Pursuant to Section 2.19, if the County Auditor validates the petition, "the City Council may enact or reject the Initiative, but shall not modify it. If it rejects the Initiative or within thirty (30) calendar days fails to take final action on it, the City Council shall submit the proposal to the people at the next Municipal or General Election that is not less than ninety (90) days after the date on which the signatures on the petition are validated." If the initiative is submitted to the people, a majority of votes is required for the initiative to pass. Section 2.23.

The Tacoma City Council also has the right to submit an ordinance to the people. Section 2.22 of the Charter provides that "[t]he Council by its own motion may submit any proposed ordinance to the qualified electors for their approval or rejection in the same manner as provided for its submission upon petition." Plaintiffs, however, argue that the City does not have authority to submit an ***alternative*** ballot measure. They reference the Seattle City Charter, which expressly

allows for the City to submit an alternative to a citizen proposed initiative. Because the Tacoma City Charter does not have this "alternative" language, plaintiffs argue that no such express authority exists. The City counters that Section 2.22 provides that the City may submit "any proposed ordinance" and therefore the City's measure is within its authority.

The Court agrees with the City. The word "any" when used in legislation means all and is interpreted broadly. *See, e.g., NOVA Contracting, Inc. v. City of Olympia*, 191 Wn.2d 854, 865 426 685 (2018). The Court does not find that an "alternative" ordinance is a separate category from "any proposed ordinance" found in the City Charter at Section 2.22. The use of the word "alternative" is not categorical, but merely descriptive. To conclude that "any" does not include alternatives is contrary to standard statutory construction principles. As such, the Tacoma City Charter provided the City with authority to present an alternative ordinance.

Notwithstanding this general authority, in their briefing Plaintiffs further argued the City Charter and RCW 29A.72.050(4) preclude the offering of an alternative ballot measure. The parties agree that the Tacoma City Council did not present its ordinance as a stand-alone ballot measure. Rather, it is presented as an alternative to the citizen initiative. As such, the parties agree that under state law, this arrangement results in a plurality-vote situation, in which either measure may prevail by a plurality of the vote. *In re Ballot Title Appeal of City of Seattle Initiatives 107-110*, 183 Wash. App. 379, 387 (2014); RCW 29A.72.050. The dispute is over whether this is permissible under the Tacoma City Charter. Plaintiffs argue that the City Charter does not allow for this alternative, plurality prevails situation. At the second oral argument, however, plaintiffs appeared to have abandoned this argument. The case cited for the plaintiffs' argument, *In re Ballot Title Appeal of City of Seattle Initiatives 107-110*, 183 Wash. App. 379, 387 (2014), approved of the alternative ballot measure format found in 29A.72.050(4) despite the Seattle City Charter having the same

majority required language found in the Tacoma City Charter. As such, plaintiffs conceded that 29A.72.050(4) had the effect of modifying the City Charter. To the extent this argument was not abandoned, it fails.

In summary, the Court concludes that the City Charter does provide the authority to present an alternative ordinance to the voters. However, that that does not end the inquiry. The issue then becomes whether this authority was exercised in a valid manner under the State Constitution.

D. State Constitutional Limitations on the Initiative Process

A constitutional analysis can either be a facial challenge or an as applied challenge. See *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 736–37, 406 P.3d 1199, 1213–14 (2017).

> To prevail on a facial challenge, the party must show "no set of circumstances" where the regulation "as currently written ... can be constitutionally applied." *City of Redmond v. Moore*, 151 Wash.2d 664, 669, 91 P.3d 875 (2004). To prevail on an as-applied challenge, the party must prove an otherwise valid regulation is unconstitutional as applied to that individual." *Moore*, 151 Wash.2d at 668-69, 91 P.3d 875.

Id.

Plaintiffs argue that *Eyman v. Wyman*, 191 Wn. 2d 581, 589 (2018) prohibits the actions taken by the City. In the context of the citizen initiative process, the Washington Supreme Court quoted with approval from a Massachusetts Supreme Court case holding that

> "[t]he language and structure of [the constitution] thus demand that a legislative substitute for an initiative petition must offer a true alternative and may not constitute a second approach which departs from the basic purpose of the initiative petition." To hold otherwise, the court explained, would "countenance the [debilitation] of the initiative petition," "fly in the face of the evident intent of the distinguished members of the Constitutional Convention," and "interfere with the ability of the people to declare their position on the basic question originally proposed" by the initiative.

Eyman v. Wyman, 191 Wn.2d 581, 605, 424 P.3d 1183, 1196 (2018) quoting *Buckley v. Secretary of Commonwealth,* 371 Mass. 195, 200, 355 N.E.2d 806 (1976). The Court further held that no finding of bad faith, i.e. an intent to violate the constitution, is required to find a constitutional violation. *Eyman v. Wyman*, 191 Wn.2d 581, 605-06, 424 P.3d 1183, 1196 (2018).

The City argues that *Eyman v. Wyman* is inapplicable because local initiative power is not derived from the State Constitution. But *Eyman* is not cited here for the source of authority, but rather the constitutional limits rooted in fundamental fairness, due process and separation of powers. See *Eyman v. Wyman*, 191 Wn.2d 581, 424 P.3d 1183, 1196 (2018); *see also, In re Recall of W.,* 155 Wn.2d 659, 671, 121 P.3d 1190 (2005).

Here, the City passed Amended Resolution 41328. This Resolution proffered the alternative measure (known as Measure 2) to the Citizen Initiative (Measure 1). This alternate ordinance was passed by the City Council and enacted into law. The Amended Resolution provides that if Measure 2 received the majority of votes, it would be repealed and re-enacted, thus remaining a valid, voter-approved law. But if Measure 1 received the majority of votes Measure 2 would fail, meaning that Measure 2 is ***not*** repealed, but "would remain in effect as a City Council enacted ordinance." Amended Resolution 41328 at 3-4. In other words, whether Measure 1 or Measure 2 received more votes, Measure 2 would still be law.

Pursuant to RCW 29A.72.050(4), the ballot presented to the voters would read as follows: 1) Should either Measure 1 or Measure 2 be enacted into law?; and 2) Regardless of whether you voted yes or no above, if one of these measures is enacted, which one should it be? [Measure 1 or Measure 2]. The problem is that neither the ballot title nor explanatory statements clearly explain that

Measure 2 already is law and will remain law regardless of the vote. Moreover, both questions ask whether Measure 2 should be enacted, when it was already enacted by the vote of the City Council.[1]

Plaintiffs argue this is misleading and confusing. The Court agrees. This is really a false choice as it implies that, at most, one proposed measure will be approved. The reality is that Measure 2 was already approved and would remain law regardless, and Measure 1 may also be approved. Plaintiffs argue that this prejudices them because an individual may want both Measures to pass but might slightly favor Measure 2 and vote for Measure 2. But if that person knew that Measure 2 would be law regardless of the vote, that person might vote for Measure 1.

To be clear, this Court is not ascribing bad faith or ill intent to the City Council. The Court does not know the City Council's motives. But under the *Eyman* case, the City's motives are irrelevant to the analysis. The Court concludes that Measure 2 is not a true alternative (because it would be law regardless of the outcome of the vote), and "interfere[s] with the ability of the people to declare their position on the basic question originally proposed" by the initiative. *Eyman v. Wyman*, 191 Wn.2d 581, 605, 424 P.3d 1183, 1196 (2018) quoting *Buckley v. Secretary of Commonwealth,* 371 Mass. 195, 200, 355 N.E.2d 806 (1976).

As noted above, the Court finds that the City, in theory, had the authority to present an alternate ordinance to the voters. In this Court's opinion, the presentation of an un-adopted Measure 2 as an alternative to Measure 1 would have complied with Washington law. But when the City adopted that ordinance prior to sending it to the voters and approved the Amended Resolution with

[1] This also raises the issue of whether Section 2.22 in the City Charter gives the City the ability to present an already-approved ordinance to the people, as Section 2.22 reads that the Council by its own motion may submit any ***proposed*** ordinance.

the repeal and re-enact language, it resulted in a false choice between Measure 1 and Measure 2 as discussed above, and ran afoul of the State Constitution as described *in Eyman v. Wyman.*

E. Ballot Title

Plaintiffs also request the Court rule on the language of the ballot title, regardless of the Court's ruling on the substantive question discussed above. To that end, in the event a higher court determines that both measures should go to the voters, this Court agrees with the language changes proposed by plaintiffs on page 25 of their August 3,2023 memorandum.

CONCLUSION

Based on the foregoing, the Court enjoins and prohibits Pierce County and the Pierce County Auditor from placing the City Council alternative (Measure 2, also known as 1B)[2] on the November 2023 general election ballot (or subsequent election ballots), tabulating votes on the alternative, or otherwise furthering an election on the alternative.

SO ORDERED this 30 day of August, 2023.

Judge Timothy L. Ashcraft

FILED
DEPT. 2
IN OPEN COURT
AUG 30 2023
PIERCE COUNTY, Clerk
By _____
DEPUTY

[2] The parties agreed that if both measures went to the voters, naming the City Council alternative as Measure 1B is appropriate.