



The Municipal League of King County

810 Third Avenue, Suite 224

Seattle, WA 98104

January 6, 2003

Hon. Margaret Pageler, Chair
Water and Health Committee
Seattle City Council

Hon. Peter Steinbrueck, President
Seattle City Council
600 Fourth Avenue
Seattle, WA 98104

RE: Municipal League of King County Review Committee Report on
I-80 to Save Seattle's Creeks

Dear Councilmembers Pageler and Steinbrueck,

We are pleased to present to you the attached report, which represents the results of our committee's analysis of Initiative 80 over the past several weeks. It is the product of the six committee members listed below, and was produced under the auspices of and according to the standing rules of the Municipal League of King County. While several of our committee members are members of the Municipal League, the majority of committee members are not. All were recruited for their intelligence, integrity, experience with public policy issues, and ability to be fair and objective in their analysis of this initiative. Cumulatively, the committee also represents a balance of perspectives and professional and personal skills.

The committee met four times between December 3rd and December 30th and received briefings from City staff and from I-80 proponents and opponents. In addition to its meetings, members of the committee participated in a site visit to one of the remarkable restored creeks in Seattle, Taylor Creek in Dead Horse Canyon. Given the time of year and the complex nature of the issue under consideration, the timeline for review was very short. We carefully studied a great deal of information, but we did not attempt to analyze this proposed ballot measure in technical detail.

Our conclusion is that Initiative 80 sets out an appealing goal, which the committee strongly endorses, of restoring Seattle's creeks, wherever feasible, to a more natural state that supports fish and wildlife and that enhances the quality of our environment. However, we identified concerns with the Initiative's regulatory approach, with its potential cost impacts and with the ambiguity of some of its language. These concerns are spelled out in the attached report. We support some features of the measure and these are also identified. Similarly, we have briefly

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outlined some of the characteristics of the Mayor's proposed alternative that we found useful.

We encourage the City Council to take the best features of both I-80 and the Mayor's proposal and craft a measure that takes a comprehensive policy approach, weighs the costs and benefits for all concerned, and minimizes the possibility of legal challenges.

If you have any questions please do not hesitate to contact us for clarification. Thank you for the opportunity to contribute to the rich and meaningful public debate on this important topic.

Sincerely,

Kathy Elias, Chair
I-80 Review Committee
Municipal League of King County

Review Committee Members:

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James Fearn
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Municipal League of King County

I-80 Review Committee

Report on Initiative 80 to Save Seattle Creeks

Summary of Measure

Initiative 80 sets out a program to restore urban creeks in Seattle by requiring certain actions by private developers and city government:

- Major creekside developments (greater than ½ acre) are required to restore surface and buried creeks existing in their property or in adjacent public right-of-way; restoration is defined as daylighting piped creeks and historic creek corridors, removing fish passage barriers, establishing 50' buffers and planting native vegetation;
- City government is required to protect and restore creeks on public property;
- City government is required to compensate private property owners when initiative requirements result in a taking of private land for uses that exceed mitigation of the development.
- Pesticide use within 200 feet of any creek is phased out over 18 months.

Exemptions may be provided for creeks that are entirely buried in underground pipes or for creeks in which it can be shown that no benefit to fish would accrue, even after restoration. Provisions are included for submittal of creek restoration plans and for certification by the Department of Fish and Wildlife that the exemption standard has been met.

Twenty-six creeks and their tributaries are listed as falling under the Initiative: Longfellow, Pipers, Taylor, Ravenna, Madrona Park, Frink Park, Mount Baker Park, Mapes, Hamm, Puget Ridge, Victory, Littles, Seola Beach, Fauntleroy, Schmitz Park, Discovery Park, Kiwanis Ravine (Wolfe), Mahteen, Washington Park, Venema, Willow, Mohlendorph, Dead Horse/Mill, Maple Leaf, Little Brook and Thornton Creeks.

The goals of these actions, as stated in the Initiative, are to protect and enhance the natural environment in the city by creating open space; restoring salmon and wildlife habitat; reducing flooding impacts of stormwater overflows in piped creeks; removing fish passage barriers; and enhancing the aesthetic quality of our urban spaces.

To accomplish these goals, the Initiative further sets policy goals for the City with respect to preserving and restoring creeks and requires the development and implementation of a long-term creek restoration plan. I-80 also provides for a maximum fee of \$5 per year per household to be used to fund the public requirements of the Initiative.

I-80 is sponsored by Yes for Seattle, an environmental organization whose goal it is to advance policies with Seattle government that go beyond current City actions. Yes for Seattle states that it is an all-volunteer organization and that it has employed no paid signature gatherers in gathering support for its initiatives. Yes for Seattle previously submitted an initiative to the city regarding water conservation.

Background on Urbanization Effects on Waterways and on Habitat

For over a century, as urban areas were built and as more and more land was developed, water courses were channeled into ditches, pipes, drains, and culverts and often forced out of their historic channels into underground systems. These pipes often became part of stormwater drainage systems that dry up in dry months and flood in rainy months. According to Derek Booth of the University of Washington's Center for Urban Water Resources, in urban watersheds, impervious surfaces, soil compaction, and vegetation clearing reduce the ground's capacity to hold water and thus create voluminous overland flows.¹ Urbanization thus causes rapid surface runoff from entire watersheds into streams and creeks, changing their hydrologic character. The rapid flow, in turn, increases sediment load by many orders of magnitude, alters the gravel beds of streams, clears away deep-rooted riparian vegetation that holds banks, destroys vegetation cover, and scours and erodes stream channels. Native riparian vegetation is subsequently replaced by invasive species, fish and wildlife habitats are destroyed, and water quality in streams deteriorates.

The science of watershed and creek restoration is very recent. Much of it is still in the research stage. According to the UW's Booth, one of the region's prominent researchers in this young field, to restore a watershed for fish habitat, it is necessary to deal with the causes of urban creek degradation, not the symptoms. He recommends addressing the watershed hydrology first, and where this is not feasible (as it may not be in an urban environment), reducing sediment load from hillside sources and then stabilizing channel grades. Booth decries past approaches that have spent large sums of limited resources on structural projects but failed to meet biological goals. He suggests that investing in modest incremental improvements with less ambitious individual goals might produce greater cumulative benefits. Examples of such improvements might be creation of wetland benches or holding ponds in creek corridors to slow down the runoff and reduce sediment loads; replacement of invasive plants with native plants on creek banks; and placement of in-stream gravel beds and woody plants to provide feeding areas for fish and wildlife.

What Has the City of Seattle Been Doing?

Since the 1970s, Seattle, King County and Washington State have begun to reverse the history of waterway deterioration by passing laws and regulations, and making investments in aquatic habitats. Today, government regulations limit development near shorelines and along streams and require mitigation of harmful effects on fish and wildlife. There are monitoring programs

¹ Derek B. Booth, "Are Wild Salmon Runs Sustainable in Rehabilitated Urban Streams?" Salmon in the City Conference, American Public Works Association, May 1998, Mount Vernon, Washington.

that assess changes over time, and public utilities today often employ natural drainage techniques such as ponds and swales rather than underground pipes. Seattle, in particular, has a national reputation for leading efforts to limit further harm and to create sustainable means for preserving the natural environment.

The issue of aquatic habitat management and water quality in our region came to a head in 1999 when one of the native species of salmon, the chinook, was declared threatened under the federal Endangered Species Act. Seattle and many other government agencies were required to take action to reduce negative impacts and to improve habitat conditions for salmon. Seattle developed a policy framework for its work and a plan entitled, *Seattle's Urban Blueprint for Habitat Protection and Restoration*.

The City's policy framework addresses:

- Enhancing growth management strategies for concentrating urban development;
- Making habitat investments that are science-based such as removing fish barriers, restoring urban creeks, and reforesting corridors along waterways;
- Collaboration among regional entities both public and private;
- Increased monitoring and enforcement of industrial and construction activities; and
- Developing new funding strategies such as tax incentives and utility taxes.

The *Urban Blueprint* document describes current scientific information about chinook habitat in our urban aquatic areas and applies research-based methodologies to suggest focus areas for investment. The focus areas identified in the 2001 document are Lake Washington and Lake Union shallow littoral habitat, Chittenden Locks, Salmon Bay and Elliott Bay marine and freshwater shorelines, Duwamish Estuary wetlands and intertidal areas, and marine nearshore habitats. The document is frank in noting that the science of urban habitat recovery is young and there are many uncertainties that require additional research.

Ongoing City creek restoration efforts, specifically, are focused on six major Seattle creeks: Thornton, Pipers, Taylor, Longfellow, Fauntleroy and Schmitz creeks. The City has been conducting watershed analyses for these creeks since 1999 to assess their general condition as well as to inventory biological resources, identify critical fish habitat and assess physical processes. The City has assessed 35 miles of main streams and tributaries and found that approximately 20 miles are potentially fish-bearing and 11 miles actually have resident fish observed in them. Four miles of these creeks are accessible to anadromous fish. The City has also identified a number of factors of concern that need to be addressed, including fish passage barriers, habitat quality and water quality.

Many restoration projects have been identified jointly by Seattle Public Utilities and by the Seattle Parks Department, and the City is today investing \$2 to \$4 million per year in such projects. Together with initiatives by community groups and citizen volunteers, improvements have been made in creek habitat along many of the City's creeks. Besides its explicit efforts related to salmon recovery, the City is working on related management practices for park management, pesticide use, road maintenance and citizen education.

The issues that are addressed by Initiative 80 are thus relevant and timely. The question posed by this analysis is whether the approach taken by the Initiative is advantageous given the context. If the citizens of Seattle are to be asked to increase funding for creek habitat and salmon recovery, what regulatory and policy framework should be applied and how should funds be directed?

Arguments FOR the Initiative

- Sets out a vision of healthy urban creeks and waterways that support fish and wildlife habitat, and enhance the quality of our urban environment
- Protects existing daylighted creeks from future encroachment
- Increases or improves passive open space that improves ecological connections and greenways.
- May help recover threatened salmon in the City and expand wildlife habitat
- Supplements creek restoration activities currently being carried out by the City
- Requires long-term creek restoration planning
- Sets out a framework of creek restoration policies
- Proposes additional, modest public funding for creek restoration
- May contribute to reduced flooding and property damage
- Includes provisions for citizen and property owner education and outreach
- Phases out pesticide use within 200 feet from a creek
- Seizes once-in-a-lifetime opportunities to daylight creeks in large redevelopments such as Northgate, University Village and South Lake Union
- Disallows preemptive vesting by developers
- May encourage developers to think creatively and to work with neighborhoods and the City to incorporate creek and habitat restoration into developments

Arguments AGAINST the Initiative

- Proposes creek restoration and daylighting requirements separate from the larger policy context of regional salmon recovery efforts, growth management, affordability and fiscal considerations
- Creates a creek restoration approach triggered by individual creekside developments, rather than on a systematic, science-based watershed or corridor basis
- Creates restoration and daylighting requirements without regard to cost/benefit analysis
- Requires broadest inclusion of all creeks and their tributaries, historic and current, and creates exemptions that are contradictory and cumbersome
- Is burdensome with respect to cost impacts of daylighting underground creeks and establishing 50' buffers on valuable urban real estate
- Contains ambiguities and uncertainties of language that will likely lead to court challenges and litigation (see below)
- Imposes significant retroactive requirements after permit applications have been submitted, which may create significant individual hardships and may also be contrary to state law
- Could require the City to incur substantial cost for compensating private property owners for "takings" of their land

- Could require developers and property owners to design and create habitat restoration projects that exceed any impacts of the development
- Establishes unrealistic timelines for City actions

Legal Questions Raised by the Initiative

There are at least three significant substantive legal issues that the Council should consider carefully in its deliberations over its response to the Initiative.

1. Takings

The proponents of the Initiative recognize that the enforcement of the Initiative's requirements could result in the City being obligated to compensate private landowners for the loss of their property if such enforcement is found to be a "taking" under the fifth and fourteenth amendments (Initiative section 4C). Therefore, the Council should be briefed on at least the following issues:

- Would the enforcement of the Initiative's requirements constitute a "taking" requiring payment of just compensation, or merely a permitted "regulation" pursuant to the City's "police power" not requiring compensation?
- If a City action as a result of the Initiative were found to be a taking, when would the taking occur? Immediately with respect to all impacted private property? When the impacted owner applied for a development permit? At another time?
- If a City action were found to be a taking, what would the total estimated exposure be for the City assuming that impacted landowners would be entitled to the reasonable value of their property at the time of the taking?

2. Substantive Due Process

Substantive due process is a test of "reasonableness" of legislation in relation to the government's power to enact the legislation. In essence, it prohibits arbitrary governmental action. Although statutes designed to promote the public's enjoyment of space, safety, etc., typically have been upheld under a substantive due process analysis, the Council should obtain an opinion on the specific application of the substantive due process standard to the Initiative. For instance, it is likely that one making a substantive due process challenge to the Initiative would argue that the Initiative is arbitrary in that there is little or no evidence that the requirements imposed by the Initiative will lead to the achievement of the Initiative's professed goals. Such arguments likely would be based on scientific and other expert opinion.

3. Vested Rights

The Initiative claims that "an emergency posed by ongoing flooding, property damage and environmental impacts of degraded and piped creeks" exists and that, as a result, the Initiative's requirements "cannot be defeated by vested rights." This means that landowners with permits to develop property that is implicated by the Initiative would be required to re-submit applications to develop their property in compliance with the Initiative's requirements. Accordingly, the Council should be briefed on at least the following issues:

- Does an “emergency” exist such that vested rights can be repealed?
- What is the scope of the City’s exposure on this issue – i.e., how many properties would lose their vested rights if the Initiative is adopted?
- What is the City’s exposure to a property owner whose vested rights are repealed if a court later finds that an “emergency” permitting the revocation of vested rights did not exist?
- If a court finds that there is no emergency and that the City must respect vested rights, what impact would this have on the Initiative’s ability to attain its goals?
- Is the City pre-empted by state law from revoking vested rights?

Uncertainties in the Language of the Initiative

The authors of I-80 and City staff have presented widely differing interpretations of several important areas of language in the Initiative. Initiative authors have expressed to this review committee their intent in drafting these sections and have offered their interpretations in their public information materials. City staff, on the other hand, explain that, if passed, the Initiative language would be law and subject to interpretation by courts that may not respect the intent of the initiatives drafters. The committee is concerned that due to ambiguities of language, the Initiative could be misused by future parties wishing to either expand on or thwart the original intent. Examples of such ambiguities include:

Definitions of “creek” and “creekside development”

- If a creek is entirely in pipes and no longer flows above ground, it appears to be both included in the provisions of the Initiative and exempted by them. Section 10C includes in the definition of a “creek” “any stream or watercourse that flows year-round and/or potentially supports or historically supported salmonids.” Section 6B, however, exempts a development from its provisions if “so much of the creek downstream is in pipes that the segment in question will as a practical matter never be accessible to salmonids.” Section 6(A)4) also requires daylighting “...if the creek’s channel was on the development site *at any time prior to being moved to its present location.*”
- To comply with these provisions, the precise location of a creek’s historic corridor would have to be known as well as whether the creek historically supported fish. How would compliance be determined if the historic information simply is not available? How would this affect downtown Seattle properties that almost certainly had salmon-bearing creeks flowing on them at some point in time?
- Section 10J(A) states that a “major creekside development” is one that is a commercial, multi-family residential, mixed-use, or light or heavy industrial development, subdivision or short plat...” It is unclear whether the term short plat as used here includes or excludes single-family zoned properties.

Definition of the \$5 fee imposed by the Initiative

- Section 9 states that *public* costs are capped at \$5 per household per year. Is this a revenue cap or an expenditure cap? Do public costs cover comprehensive plan amendments, environmental reviews, regulatory changes? If the costs associated with taking ownership of a restored creek or assisting a developer with restoration exceed the amount generated by the

fee, how are public costs to be covered? Are they to be paid only from the fee imposed by the Initiative, or are these claims to be paid from other city revenues?

- No revenue source equivalent to a general charge per household is currently authorized by state law to cities. In fact, a similar source imposed by Seattle as a street utility fee was struck down by the Washington State Supreme Court just a few years ago.

Impacts on private properties

- While the magnitude of impacts is not addressed in the Initiative language, daylighting a creek channel and establishing a fifty foot buffer on either side could potentially require that entire developable properties be converted into creek corridors at private expense. Yet Initiative proponents have claimed that many or most restorations would have no greater impact than the cost of native plantings, or no more than typical commercial landscaping. The interpretation of the impacts and consequences of the Initiative are thus highly uncertain.
- Section 9C states that contributions by property owners, business and institutions shall be “reasonably limited.” The meaning of this limitation is undefined.

Analysis of Initiative 80

I-80 is an attractive proposal because it creates a vision and has an objective that appeal to anyone who is concerned about the environment. The primary concern with the initiative is that its proposed approach is a random, parcel-by-parcel, regulatory approach and not based on comprehensive watershed and habitat plans and priorities. Its land acquisition and creek restoration projects would be triggered by random private development, on parcels that might be distant from locations of real benefit to the natural environment. I-80 also runs counter to the state’s Growth Management Act and the City’s long-term efforts to support infill and urban center development. It would prevent development of large tracts of urban land that would be set aside in 100-foot creek corridors and would exacerbate Seattle’s affordability problems as these increased private costs would be passed on to homeowners, tenants and businesses.

Under the I-80 approach, a potential scenario might involve the daylighting of a 25-foot length of creek by pumping it to the surface from the pipe in which it has been buried for half a century, and taking developable land on either side to secure 50-foot buffers. This newly daylighted “creek” might sit between adjacent parcels that are already developed and would never be connected to the still-buried segments on either side. In such a scenario the cost of the daylighting would be completely out of proportion to any potential benefit as fish habitat or other environmental amenity. For the private (or public) landowner, the lost development opportunity and foregone revenue would be onerous.

Such a regulatory approach would place an unfair and potentially enormous burden on property owners who happen to be located on or adjacent to historic creeks. Many, if not most, of these property owners purchased their property with no knowledge that a creek existed on the property. To build an addition to the house on the property, or even to do substantial landscaping, these innocent purchasers would be required to incur the expense of daylighting a historic stream, or prove that the historic stream will not support fish, or forgo development of their property. On the public side, the City, the Port of Seattle and the Seattle School District would incur enormous new costs that might not yield any measurable benefits to fish or to the

environment. A more systematic, planned approach to investing taxpayer funds in creek and habitat restoration would be a better choice.

The cost impacts of the initiative are unknown. City staff prepared a worst-case analysis indicating billions of dollars of impact. At the other extreme, Initiative proponents believe the costs would be no more than a few million dollar a year. The true costs are probably somewhere between the City's worse case estimate and the estimates of the proponents, but at present it is impossible to predict those costs with any certainty.

Beyond the fundamental concerns about the Initiative's regulatory approach and its unknown cost impacts, there are severe problems with the language of the measure. There are ambiguities, internal contradictions, and conflicts with other local and state laws. This almost assures expensive and time-consuming court challenges and litigation.

Conclusion

There is no doubt that creek and aquatic habitat restoration are important values for Seattle. As citizens of this region, we place a high value on open space, on the natural environment and on salmon and wildlife. Many citizens and community groups in Seattle have demonstrated their passion for these values by volunteering their time, raising money and working together to achieve the goals of restoring and daylighting creeks. Such efforts should be supported by government and by new public investment. We are concerned, however, that Initiative 80, as drafted, will produce less habitat and environmental improvement, and more court challenges, misunderstandings and potentially onerous impacts on property owners and local governments.

We are also concerned that the Initiative does not seem to encourage the creativity and community partnerships that have characterized many recent creek restoration efforts. Instead, it takes what appears to be a harsh regulatory approach, forcing a few property owners to bear the burden for fixing environmental problems created by 100 years of urban development.

This is obviously not the intent of the I-80 authors, but good intentions do not make good law. We believe that complex problems such as the effects of urbanization on natural waterways require a broader perspective and policy context and more careful attention to language than is reflected in this initiative.

For this reason, we encourage the Council to build on the work and the worthy goals of I-80 proponents and prepare alternative legislation. The Mayor has proposed his alternative and it is time for the Council to take the best of the various proposals and craft its own. While this committee did not prepare a detailed analysis of the Mayor's alternative, we noted some of its features that we liked:

- It takes a science-based and criteria-based approach to project selection;
- It takes a larger view by including watersheds and shorelines, as well as creeks;
- It creates no new land use regulations and imposes no burdens on private property owners;
- It identifies an established funding source that is connected to the program it would fund; and
- It creates a citizen oversight committee to provide public accountability.

On the other hand, we also admired some of the best features of Initiative 80:

- It sets out a broad vision of healthy urban creeks and waterways that support fish and wildlife habitat, increased passive open space and an enhanced aesthetic quality of our urban environment;
- It supplements creek restoration activities currently being carried out by the City;
- It sets out a framework of creek restoration policies and requires long-term creek restoration planning;
- It suggests a broader use of incentives for developers such as open space or other credits.

In their own ways, I-80 and the Mayor's alternative both seek to benefit our natural habitat areas in the city, provide for increased funding to do so, and include programs to reach out to citizens and property owners with educational opportunities. These are goals we can support wholeheartedly.

We urge that any alternative measure be prepared with input from affected stakeholders and with the benefit of public debate, that it weigh the costs and benefits for all concerned, and that it be carefully drafted to minimize the possibility of legal challenges.