



November 4, 2021

Via Email

Antonio Oftelie, Federal Monitor  
Tim Mygatt, Department of Justice  
Matt Waldrop, US Attorney's Office

Dear Dr. Oftelie, Mr. Mygatt, and Mr. Waldrop,

This request comes in follow up to your various conversations with my staff regarding the use of less than lethal tools, and the ordinances passed by the Seattle City Council in this area.

As you know, on August 16, 2021, the Seattle City Council adopted Ordinance 126422, restricting the acquisition and use by the Seattle Police Department of multiple classifications of less lethal tools that are presently authorized and regulated under policies developed under the Consent Decree over the past eight years in collaboration with the Department of Justice and Monitoring Team (the most recent iterations of which were approved by the Court less than ten months ago). *See Attachment A.* Ordinance 126422 amends SMC 3.28.146, which was enacted pursuant to Ordinance 126102, which is in turn enjoined by Court order until such time as its policy terms are either consistent with paragraphs 177-181 of the Consent Decree or rendered moot. *See Dkt. #447.* Paragraphs 177-181, however, are specific to SPD policy; they do not provide a direct mechanism for Court review of City legislation. To achieve congruence and avoid further litigation as to whether the Ordinance is consistent with the Court's previous injunction, Ordinance 126422 thus does not take immediate effect. Instead, it directs SPD to incorporate the Ordinance terms into policy and submit the policy for review and approval under paragraphs 177-181 of the Consent Decree. Assuming the Court determines that such policy meets the purpose and terms of the Consent Decree, this process of an advisory Court ruling seems intended to result in the injunction being lifted and SMC 3.28.146 as amended coming into effect.<sup>1</sup>

SPD, which was not meaningfully engaged during the drafting of either Ordinance, now finds itself caught between competing policies and obligations. To SPD, this intermediate step of drafting policy is not a mere technical exercise of transmitting for court approval the terms prescribed by Council; it is a complex process that includes practical, procedural, legal, safety, and labor considerations. It also must be done with an eye towards the training needed to implement the policies and an assessment on their impact on policing and safety of officers and the public.

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<sup>1</sup> For purposes of this good-faith effort to balance the many competing interests at stake with respect to SPD policy, SPD is intentionally setting aside questions relating to the separation of powers under the City Charter or the force of a law that itself is conditioned upon SPD taking action precedent.

SPD is respectful of Council’s role in passing legislation and of Council’s sense of urgency (indeed, it was the same sense of urgency that drove SPD’s substantial revisions to the Use of Force and Crowd Management policies that were approved by the Court last February). Yet, SPD still has fundamental obligations to implement policies and training most likely to enhance public safety and to ensure that policy revisions hold true to the core principles outlined in Section III(A)(1) of the Consent Decree and remain consistent with law and best practice. *See Attachment B (SPD Memorandum Regarding Review of Use of Force and Crowd Management Policies Pursuant to September 10, 2021 Monitoring Plan Requirement)*. As anyone who has been involved in drafting and training of policy over the life of the Consent Decree well understands, these considerations are complex, extend far beyond simple words on a page, and above all, must be capable of being carried out in a manner that supports the safety and security of the community and officers alike.

In her letter transmitting the Ordinance, unsigned, back to Council (*Attachment C*), Mayor Durkan outlined numerous issues with the legislation, including concerns that the Ordinance essentially paralyzes, by enshrining operational policy in city code, the Consent Decree-driven process for iterative review and reform of policies over time; contravenes current SPD policies and best practice; and is inconsistent with both the language and intent of recently passed state regulation, including provisions that promote the expansion and availability of less-lethal tools. SPD shares in these concerns, but highlights as well a foreseeable consequence of the law:

***By sanctioning some level of violence in crowds until such point as Council’s newly-defined standard of “violent public disturbance” is met (a threshold of violence far exceeding that which would establish, under state and federal law, a “riot”)<sup>2</sup>; by allowing (by omission) for destruction of property absent circumstances otherwise rising to the level of physical harm within the definition of “violent public disturbance”; and by stripping from officers tools or authority to intervene before circumstances escalate to this heightened level of violence against persons, this Ordinance not only leaves property owners unprotected, it leaves SPD with no objectively reasonable or viable means of intervening in such circumstances without increasing the likelihood that higher levels of force will be needed in order to meet, proportionally, the escalated level of violence, thereby subjecting both citizens and officers to greater risk of more serious injury.***

SPD takes seriously Council’s direction as passed in the Ordinance, and appreciates that there may be ways to reconcile the terms of the Ordinance with those principles set forth in the Consent Decree, continuously evolving best practices, new state laws, and the recommendations from OPA management actions and the OIG’s Sentinel Event Review Wave 1 report – many of which are reflected in the policy revisions approved last February. Unfortunately, SPD does not have sufficient

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<sup>2</sup> See Attachment A at § 3.28.146(C) (“Violent public disturbance” means any gathering where 12 or more persons who are present together use or threaten to use unlawful violence towards another person or group of people and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.) Contrast 18 U.S.C. § 2102(a) (“Riot” means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the persons of any other individual[.]”).

in-house expertise nor the resources at this critical point in its staffing crisis to create and propose new policies, let alone operationalize training to those policies, that meet “both masters” and would be suitable for SPD to submit in good faith to DOJ and Court/Monitor for review as required by paragraph 180 of the Consent Decree (which directs that policies “provide effective direction to SPD personnel” in full context of their overall public safety obligations). This is particularly true insofar as SPD has neither the authority nor flexibility to modify any terms of the Ordinance, as would be typical in the back-and-forth course of exchanging, with the Monitoring Team and DOJ, the substantial revisions to policy this Ordinance requires.

The Consent Decree, at paragraph 172(c), provides a pathway for SPD to request technical assistance from the Monitor as needed. The DOJ, likewise, has been gracious over the past nine years in offering its wealth of resources and its perspective through a national lens of best practice. For the reasons stated above, SPD submits this letter pursuant to paragraph 172(c) and precedent to formally request the technical assistance of the Monitor and DOJ in crafting policy revisions that would incorporate the terms of the Ordinance, align with state law, hold true to the core principles of the Consent Decree and recognized best practices, leave room for continued iterative review and revision, and – critically – which can be implemented and trained at scale and successfully utilized in the realities of urban policing, protests, and direct criminal action.

As always, I appreciate your partnership.

Sincerely,



Adrian Diaz  
Chief of Police

CC: Jenny Durkan, Mayor  
Lisa Herbold, City Council, Public Safety Chair  
Lesley Cordner, Asst. Chief, Professional Standards  
Rebecca Boatright, Exec. Dir., SPD Risk Management and Legal Affairs