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6 **BEFORE THE SEATTLE ETHICS AND ELECTIONS COMMISSION**

7
8 In the Matter of

No. 11-2-0603-1

9 Appeals of City Attorney's
10 Explanatory Statement
11 for Seattle Referendum No. 1

REPLY IN SUPPORT OF OBJECTION TO
EXPLANATORY STATEMENT BY LET'S
MOVE FORWARD AND WASHINGTON
STATE DEPARTMENT OF
TRANSPORTATION

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14 **I. INTRODUCTION**

15 The City Attorney's Explanatory Statement for Seattle Referendum No. 1¹ fails to
16 provide a clear and concise statement of the law as it presently exists and the effect of R-1 if
17 approved. Likewise, the amendments proposed by Protect Seattle Now ("PSN") are largely
18 unacceptable for the same reasons. Accordingly, for the reasons stated herein, Let's Move
19 Forward and Phil Lloyd ("Let's Move Forward") and the Washington State Department of
20 Transportation ("WSDOT") respectfully request adoption of the proposed amendments
21 submitted with their opening brief.
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26 ¹ The Explanatory Statement issued by the City Attorney is referred to in this brief as the
"Explanatory Statement" or "Statement". Referendum 1 is referred to as R-1.

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II. ARGUMENT

Let's Move Forward and WSDOT find limited areas of agreement with both the City Attorney and PSN, and will highlight them below for the convenience of the Commission. However, Let's Move Forward and WSDOT maintain their prior objections to the proposed Explanatory Statement and oppose the substitutions and amendments proposed by PSN. The proposed amendments to the Explanatory Statement submitted by Let's Move Forward and WSDOT provide the clearest and most concise statement of the present law and the effect of R-1 if approved and should be adopted.

A. Points on Which Let's Move Forward and WSDOT Agree with the City Attorney

Let's Move Forward and WSDOT agree with the City Attorney that the first paragraph provides important context to the explanatory statement and should be retained.² Contrary to PSN's assertions, the first two sentences are not "editorializing," but are consistent with the Superior Court's order (and the reality) that R-1 is not about whether the tunnel project will go forward. As the City Attorney points out, "the proposed deep-bore tunnel is a State project, not a City project." City Br. at 6. Accordingly, whether the tunnel will ultimately be built is not a decision the City has the power to make, and certainly not the subject of R-1. Given the fact that City of Seattle voters have previously voted on different options for replacing the Viaduct, it is important to notify the voters up front that R-1 is not a method by which the tunnel alternative will be selected or rejected.³ Let's Move Forward and WSDOT

² "This ballot measure will neither eliminate nor choose the deep-bore tunnel as an alternative to replace the Alaskan Way Viaduct. Rather, as explained below, your vote may affect how the City Council will decide whether to proceed with current agreements on the deep-bore tunnel beyond preliminary design work, after environmental review is completed."

³ The need to emphasize that R-1 does not amount to a choice among Viaduct replacement

1 further agree with the City Attorney's suggested substitution of "approve and reject" for
2 "eliminate and choose" in this paragraph. *See* City Br. at 4.

3 Let's Move Forward and WSDOT also agree with the City Attorney that the second
4 sentence of the third paragraph should remain in the Statement.⁴ This sentence explains why
5 only a small portion of the 2011 Ordinance is on the ballot, and in particular may inform
6 voters who signed the R-1 petition containing the text of the entire 2011 Ordinance that the
7 vote is significantly narrower than the proposed referendum they originally endorsed. The
8 facts set forth in this sentence are not prejudicial to PSN, but rather simply explain the reason
9 for the limited scope of the referendum.
10

11 Finally, as a general proposition, Let's Move Forward and WSDOT agree with the
12 City Attorney that explaining the impact of rejecting R-1 is consistent with explaining the law
13 "as it presently exists." As such, as reflected in Let's Move Forward and WSDOT's proposed
14 amendments, limited discussion of the impact of rejecting R-1 is appropriate.
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16 **B. Points on Which Let's Move Forward and WSDOT Agree with Protect**
17 **Seattle Now**

18 Let's Move Forward and WSDOT substantially agree with PSN's proposed
19 Amendment No. 3 as it pertains to Part 3 of the City Attorney's proposed Explanatory
20 Statement.⁵ Both parties recognize that the City Attorney's discussion of other ordinances,
21 future referenda, potential mayoral vetoes and City Council overrides is confusing and
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23 options is highlighted by PSN's choice of campaign slogan for R-1: "Reject Referendum-1,
24 Reject the Tunnel." *See* www.protectseattlenow.org (last visited June 16, 2011).

24 ⁴ "The King County Superior Court, however, determined that only Section 6 of the
25 Ordinance is subject to a public vote."

25 ⁵ Let's Move Forward and WSDOT do not agree with the portions of PSN's Amendment No.
26 3 that alter Part 4 of the Proposed Explanatory Statement.

1 inappropriate in the explanatory statement. These statements go far beyond the law as it
2 presently exists and the effect of R-1 if approved and will only serve to mislead the voters
3 about the actual import of the vote.

4 The above areas of agreement notwithstanding, Let's Move Forward and WSDOT
5 maintain their previously stated objections to the City Attorney's Statement and oppose the
6 amendments set forth by PSN.

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8 **C. The City Attorney Misinterprets the 2011 Ordinance and the City Charter**

9 The City Attorney now takes the position that the City Council will be required to
10 issue the Section 2.3 notice by enacting another ordinance, unless Section 6 is approved.
11 Contrary to its position before the Superior Court, the City Attorney now appears to interpret
12 the City Charter as requiring an additional *legislative* decision to provide the notice required
13 under the three *administrative* Agreements. This position is inconsistent with the City's
14 position in the Superior Court, and does not make logical sense. Section 2 of the 2011
15 Ordinance accepted the Agreements in full, and "legally bound" the City to the terms of the
16 Agreements. The terms of the Agreements are now part of the 2011 Ordinance, which but for
17 Section 6, is fully in effect. Accordingly, consistent with the Charter, the City has *already*
18 *passed an ordinance* pertaining to "property transfer," "task order payments" and
19 "authorization for use of City rights-of-way." *See* City's Br. at 9. Nothing in the City Charter
20 requires the City to re-legislate those provisions contained in the 2011 Ordinance by passing
21 an *additional* ordinance. To the contrary, the City is simply required to give notice when it
22 decides to go forward under the terms of the 2011 Ordinance.
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1 **D. The Commission Should Not Decide the Issue of Future Council Action**

2 While Let's Move Forward and WSDOT disagree with the City Attorney's narrow
3 interpretation of the City Council's authority under the 2011 Ordinance, this Commission is
4 not the appropriate forum in which to decide the proper form of future Council action, nor
5 would any decision by the Commission on this issue be binding on the City Council. It is the
6 City Council, not the City Attorney nor this Commission, that will decide how the Council
7 proceeds.
8

9 Moreover, as the City Attorney argued before the Superior Court, whether the City
10 Council chooses to issue the Section 2.3 notice is several hypothetical steps away. It is
11 currently unknown whether the FEIS and the ROD will choose the tunnel, whether the State
12 will give its Section 2.3 notice to proceed and whether the City Council will ultimately choose
13 to give its Section 2.3 notice. Before the Superior Court, the City Attorney argued that "no
14 one knows" how the Council will choose to issue the notice, if it chooses to do so at all. *See*
15 *Draft Report of Proceedings: 25:14-26:24. (Attached as Appendix A).*⁶ Furthermore, this
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17 _____
18 ⁶ UNIDENTIFIED ATTORNEY (City Attorney): So I can't represent how that is going to be
19 made because I don't know -- no one knows. If it is done by ordinance, I don't think there is
20 any question that that is an appropriate way to do it

21 UNIDENTIFIED ATTORNEY (City Attorney): Your Honor, I should verify that the same
22 applies, even if it is -- whether it is done by ordinance or not, if it has not been done by
23 ordinance, and someone disagrees with that -- someone has standing to sue and says, "This
24 city action was taken by means other than an ordinance, and according to the charter of city
25 law, it should have been done by ordinance," that is precisely what Protect Seattle Now did
26 with its motion to dismiss. Someone can come to court and say, "This decision was made in
one way and it really should have been made in this other way."

THE COURT: But what if they are wrong?

UNIDENTIFIED ATTORNEY (City Attorney): Well they can invalidate the decision if it
was made improperly, but it is a decision that might never have been made -- be made, and is
dependent upon several steps that haven't been taken. If this court were to decide whether an
ordinance is required, and whether that ordinance in the future that is several hypothetical
steps away, several branches in the decision tree away....

1 issue was never briefed before the Superior Court, the Court's commentary on this point is
2 dicta, and the Court's Order is still subject to appeal.

3 Accordingly, the Commission can, and should, appropriately amend the Explanatory
4 Statement without reaching the issue of whether an ordinance will be required in the future.
5 The proposed amendments offered by Let's Move Forward and WSDOT accurately inform
6 the voters of the content and impact of R-1 without addressing the undecided (and currently
7 unknowable) issue of whether or not a future ordinance may be enacted.⁷

9 III. CONCLUSION

10 Let's Move Forward and WSDOT's proposed amendments offer a clear and concise
11 statement of the law as it presently exists and the effects of R-1. The City Attorney's
12 statement inappropriately confuses the issues with commentary about future ordinances and
13 potential referenda. PSN's proposed amendments are largely unacceptable for the same
14 reasons. This Commission should not decide whether the City Council must enact an
15 additional ordinance to go forward under the Agreements. Rather, the Commission should
16 amend the Explanatory Statement to reflect the present state of the law and the effect of R-1,
17 as proposed by Let's Move Forward and WSDOT.
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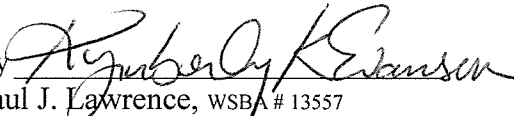
23 THE COURT: That is not something I am going to decide.

24 UNIDENTIFIED ATTORNEY (City Attorney): Right, it is an advisory opinion.

25 ⁷ While Let's Move Forward and WSDOT do not believe it is necessary to include, Let's
26 Move Forward and WSDOT have not objected to the last sentence of Part 1, which informs
the voters that "Section 6 implies that the City Council may give notice to proceed with the
agreements without passing another ordinance."

1 DATED this 16th day of June, 2011.

2
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APPENDIX A

1 SUPERIOR COURT OF THE STATE OF WASHINGTON
2 FOR KING COUNTY

3 CITY OF SEATTLE, a Washington)
4 Municipal Corporation,) No. 11-2-11719-7 SEA
5 Plaintiff,)
6 vs.)
7 PROTECT SEATTLE NOW, ET AL.,)
8 Defendants.)
_____)

9 VERBATIM TRANSCRIPT OF PROCEEDINGS

10 OF

11 A PORTION OF A PORTION OF A HEARING
12 BEFORE THE HONORABLE LAURA GENE MIDDAUGH

13 5/13/2010

14 APPEARANCES

15 For Sierra Club Seattle Group & Scott Brandon: Knoll Lowney

16 For Plaintiff Seattle: John Schochet & Katherine Gurley

17 For Protect Seattle Now: Gary Manca

18 For WSDOT: Bryce Brown & Deborah Kaydon (phonetic)

19 For Phil Lloyd/Let's Move Forward: Paul Lawrence & Kymberly

20 Evanson

21 Also Present: N/A

22 Transcribed at the Request of the Seattle City Attorney's Office

23 Requested by Donna Robinson

24 Transcribed by Brian Killgore
25

1 (Proceedings of 5/13/2010

2 (Excerpt begins at 11 AM)

3 (Speakers do not identify themselves on the
4 record. Many are referred to as "unidentified speaker.")

5 THE COURT: Thank you.

6 I am going to deny the motion to continue for discovery
7 purposes. I don't think that the -- I think this is clearly
8 a matter of law that needs to be decided based on the
9 ordinances before me, and so I am going to deny the motion
10 to continue for discovery.

11 Now, Protect Seattle Now said they needed to continue
12 this so that they could have additional time to respond, and
13 it was brought on a shortened time, so I will listen to your
14 argument about that. So you filed, obviously, a clearly
15 extensive brief.

16 MR. MANCA: Yes, Your Honor, I think it was in
17 reference to the simultaneous consideration of the claims
18 stated in the complaint, and then the claims stated in
19 Protect Seattle Now's counterclaims and cross-claims.

20 The moving parties have placed quite a bit of realize
21 on that tunnel statute that was passed in 2009, as --

22 THE COURT: Okay, my question to you is do you
23 need more time before we go forward with the summary
24 judgment? Why and how long?

25 MR. MANCA: I mean my suggestion is that -- and I

1 saying?

2 UNIDENTIFIED ATTORNEY: Yeah, absolutely, Your
3 Honor.

4 THE COURT: And I think that had -- quite frankly,
5 had Section 2.6 said that the city council, you know, is
6 going to issue an ordinance, whether to issue the notice,
7 then that is the ordinance that would have been -- that
8 wouldn't have been subject to referendum, but here what you
9 are telling me is, and that is what caused me pause, is we
10 may issue this notice and you have authorized us to issue
11 the notice under this ordinance of the 2011 ordinance, and
12 if we decide to issue it in a way that does not allow for
13 citizen review, too bad for you.

14 UNIDENTIFIED ATTORNEY: So I can't represent how
15 that is going to be made because I don't know -- no one
16 knows. If it is done by ordinance, I don't think there is
17 any question that that is an appropriate way to do it --

18 THE COURT: I agree.

19 UNIDENTIFIED ATTORNEY: -- and how about -- but we
20 can have a separate lawsuit in the future about whether that
21 several steps away step --

22 THE COURT: I'm sure we will, and hopefully it
23 will go to somebody else.

24 (Laughter)

25 UNIDENTIFIED ATTORNEY: Your Honor, I should

1 verify that the same applies, even if it is -- whether it is
2 done by ordinance or not, if it has not been done by
3 ordinance, and someone disagrees with that -- someone has
4 standing to sue and says, "This city action was taken by
5 means other than an ordinance, and according to the charter
6 of city law, it should have been done by ordinance," that is
7 precisely what Protect Seattle Now did with its motion to
8 dismiss.

9 Someone can come to court and say, "This decision was
10 made in one way and it really should have been made in this
11 other way."

12 THE COURT: But what if they are wrong?

13 UNIDENTIFIED ATTORNEY: Well they can invalidate
14 the decision if it was made improperly, but it is a decision
15 that might never have been made -- be made, and is dependent
16 upon several steps that haven't been taken.

17 If this court were to decide whether an ordinance is
18 required, and whether that ordinance in the future that is
19 several hypothetical steps away, several branches in the
20 decision tree away --

21 THE COURT: That is not something I am going to
22 decide.

23 UNIDENTIFIED ATTORNEY: Right, it is an advisory
24 opinion.

25 The only question before this court is this ordinance,