BEFORE THE SEATTLE ETHICS AND ELECTIONS COMMISSION

In the Matter of Appeals of City Attorney's Explanatory Statement for Seattle Referendum No. 1	)	No. 11-2-0603-1 CITY ATTORNEY'S RESPONSE TO OBJECTIONS TO REFERENDUM 1 EXPLANATORY STATEMENT

I. INTRODUCTION

The Referendum 1 explanatory statement prepared by the Seattle City Attorney pursuant to SMC 2.14.030(A) accurately "describ[es] in clear and concise language, the law as it presently exists and the effect of the measure if approved." Subject to two possible wording changes described below, the City Attorney urges the Commission to adopt the submitted version of the explanatory statement and reject the appellants' suggested amendments.

II. FACTUAL BACKGROUND

The City Council enacted Ordinance 123542 by overriding a mayoral veto on February 28, 2011. This ordinance (**Attachment A**) consists of eight sections, one of which (Section 2) accepts three agreements between the City and the State regarding the deep-bore tunnel alternative for replacing the Alaskan Way Viaduct. Each agreement contains an identical Section 2.3, which,

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noting that environmental review of the tunnel alternative is still underway, provides that "only preliminary design work and other work outlined in 23 CFR 636.109(b)(2) may proceed under this Agreement prior to issuance of a Final SEPA/NEPA Environmental Impact Statement (FEIS) and federal Record of Decision (ROD)." Ordinance 123542, Ex. A, Attachments 1, 2, 3 § 2.3. Section 2.3 then explains that the agreements terminate "[i]f an alternative other than the Proposed Bored Tunnel is selected..." However, if the tunnel alternative is selected, the non-preliminary-design work under the agreements may not proceed until "after issuance of the ROD and...after WSDOT and the City Council each provide notice to the other that it wishes to proceed with the Agreement." (This notice will be referred to as the "Section 2.3 notice.") Section 6 of Ordinance 123542 provides that "[t]he City Council is authorized to decide whether to issue the notice referenced in Section 2.3 of each Agreement" and that this "decision shall be made at an open public meeting held after issuance of the Final Environmental Impact Statement."

PSN submitted a referendum petition regarding the entirety of Ordinance 123542. After considering summary judgment motions on a declaratory judgment action (in which the City argued that the ordinance was not subject to referendum), the King County Superior Court held that only Section 6 of the ordinance was subject to Seattle's referendum power and that the remaining seven sections of the ordinance were outside the referendum power and in effect as of March 30, 2011. *See* PSN Appendix I. The City Council placed Section 6 of Ordinance 123542 on the August 2011 primary ballot as Referendum 1 (R-1). Pursuant to SMC 2.14.020(A), the Seattle City Attorney prepared an explanatory statement "describing in clear and concise language, the law as it presently exists and the effect of the measure if approved." Pursuant to SMC 2.14.030(B), Let's Move Forward ("LMF," a political committee set up to support an "approve" vote on R-1), the Washington State Department of Transportation (the "State"), and Protect Seattle Now ("PSN," a

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political committee set up to support a "reject" vote on R-1) filed objections to the City Attorney's explanatory statement.

III. ARGUMENT

A. The Commission's review of the City Attorney's explanatory statement is de novo.

The City Attorney agrees with the other parties that the Commission's review of the explanatory statement is de novo and that the Commission has the authority to draft the City's final version of the explanatory statement.[1]

B. The City Attorney's explanatory statement complies with SMC 2.14.030(A).

PSN argues that the explanatory statement improperly states "what would and what would not happen if a referendum is rejected." PSN's Br. at 10; *see also id.* at 12. This is not the case. The explanatory statement must describe (1) "the law as it presently exists," and (2) "the effect of the measure if approved." SMC 2.14.030(A). Because a referendum is a vote on whether a particular law that is not presently effective should go into effect, the "law as it presently exists" *is* the same thing as "what would and what would not happen if a referendum is rejected." Since Section 6 of Ordinance 123542 applies to a specific decision that if made will be made after the referendum vote, it is most accurate to describe "the law as it presently exists" in terms of what might or might not happen after the referendum vote if Section 6 is rejected.

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[1] PSN devotes a significant portion of its argument to asserting that the City Attorney is somehow "conflicted" and therefore unable to prepare a fair explanatory statement. This is both irrelevant and inaccurate. It is irrelevant because the standard of review is de novo, and the Commission is therefore ultimately responsible for the final explanatory statement. PSN's "conflict" allegation is inaccurate because the *legal* question of whether an ordinance is subject to the City's referendum power is entirely distinct from the *policy* question of whether an ordinance (or part thereof), once referred to the ballot, should be approved or rejected. The City Attorney took a *legal* position on the former question, which was largely vindicated when the King County Superior Court determined that seven of Ordinance 123542's eight sections were not subject to the referendum power. The City Attorney has not taken a *policy* position on the question of whether Section 6 of Ordinance 123542 (i.e., R-1) should be approved or rejected. Indeed, unlike the City Attorney, PSN *is* taking a policy position advocating a specific outcome on R-1 (as is LMF). The City Attorney's Office, unlike PSN and LMF, is neutral regarding the outcome of the vote on R-1, and the Commission should review the appeals of the explanatory statement with this in mind.

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C. The first paragraph provides important context to the explanatory statement and should be retained.

PSN objects to the first paragraph of the explanatory statement, calling it "confusing and misleading" and "highly prejudicial." PSN's Br. at 10-11. In fact, the first paragraph provides helpful context and furthers the City Attorney's obligation to "describ[e] in clear and concise language[] the law is it presently exists and the effect of the measure if approved." SMC 2.14.030(A). The first paragraph reads as follows:

> 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.

This is an accurate, clear, and concise statement. Approving or rejecting Section 6 of Ordinance 123542 will not have the effect of eliminating or choosing the deep-bore tunnel. Instead, it would do exactly what the second sentences says it would do: "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."[2]

PSN specifically objects to the words "may affect" as "hedging." But the use of "may" is the only accurate way to describe what the referendum would do if approved. It would not be accurate to say that approving Section 6 "would affect" or "would not affect" the City Council's decision process—it *might* affect the process, but it might not. The Council might issue the Section 2.3 notice by ordinance even with Section 6, making Section 6 irrelevant. Alternatively, if the Council decided not to proceed with the non-preliminary-design portions of the agreements, no new ordinance would be necessary, with or without Section 6. That said, if

[2] If the Commission decides to revise the first paragraph, the City Attorney suggests replacing "eliminate" and "choose" with "approve" and "reject" as alternative language that would also be accurate.

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Section 6 was approved, the Council might treat it as a delegation granting it the authority to issue the Section 2.3 notice by resolution rather than by ordinance. Therefore, the explanatory statement says "may affect" because "may affect" is the most accurate and objective way to describe the effect of the referendum vote.

PSN does not even attempt to explain its argument that the first paragraph is "prejudicial and biased." The fact that this paragraph was added in a later draft does not make it prejudicial. This paragraph is not "editorializing"; it simply states the current status of the law (which is the same as the law if the referendum is rejected) and what the law would be if the referendum is approved. And it is difficult to see how this paragraph contains "the sorts of comments that belong in the arguments for and against the measure." It states what the referendum would do and what it would not do without offering any arguments as to why a voter should vote to approve or reject.

Finally, the alterative language proposed by PSN would be inaccurate and misleading. PSN suggests that "[t]he outcome of this ballot measure will determine whether the City Council shall have the sole authority to finally choose the deep-bore tunnel as the City's method for replacing the Alaskan [sic] Viaduct." PSN's Br. at 11. First, it is not accurate to say that the referendum "will determine" the Council's "sole authority," because Section 6's effectiveness as a delegation of authority for the Council to act by resolution might be successfully challenged in court *if* Section 6 were approved and *if* the Council decided to issue the Section 2.3 notice by resolution and not by ordinance. Second, issuing the Section 2.3 notice does not "finally choose the deep-bore tunnel as the City's method for replacing the...Viaduct." The design-build contractor who will actually construct the tunnel if it is selected following the EIS and ROD has a contract with the State, not the City. The City has the power to prefer, not prefer, support, or oppose a tunnel, the City has the power to cooperate or not cooperate with the State regarding the design and construction of a tunnel,

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and the City has the authority to enter into or not enter into the non-preliminary-design portions of the three City-State agreements, but ultimately the proposed deep-bore tunnel is a State project, not a City project. The City is not replacing the Alaskan Way Viaduct, so there can be no "City's method for replacing the...Viaduct." PSN's proposed language is therefore inaccurate and misleading.

LMF and the State propose a more minor amendment to the first paragraph, changing "*decide* whether to proceed with the current agreements" to "*notify the State* whether to proceed with the current agreements." While LMF's and the State's wording is technically accurate, "decide" is the better word. Under Section 2.3 of the agreements, the City and the State are required to issue notices to each other following the EIS if they decide to proceed with the non-preliminary-design portions of the three agreements. But Section 6 pertains to the process of making the decision to issue the notice more than it pertains to the ministerial issuance of the notice.

D. The second sentence of the third paragraph is accurate and should be retained.

PSN objects to the second sentence of the third paragraph while ignoring the preceding sentence. These two sentences operate together to explain how Section 6 of Ordinance 123542 comes before the voters. The statement explains that "[a] sufficient number of Seattle voters signed referendum petitions to refer the Ordinance to a public vote." This is accurate, because the referendum petition requested referral of all eight sections of Ordinance 123542 to the voters. PSN's proposed language leaves voters in the dark as to why only Section 6, and not Sections 1-5 and 7-8, are before them for approval or rejection despite the petition being addressed to the entire ordinance. There is no dispute that the Section-6-only referendum came about because of the Superior Court's decision, and it is not prejudicial to say this.

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E. The explanatory statement accurately explains the City Council's authority with and without Section 6 of Ordinance 123542.

PSN, LMF, and the State all disagree regarding the City Council's authority both with and without Section 6. PSN's views and LMF's and the State's views are diametrically opposed, and the City disagrees with both.

1. The explanatory statement accurately describes the current law.

In a world without Section 6 (i.e., "the law as it presently exists"), PSN believes that the City Council may have no authority to issue the Section 2.3 notice, even by ordinance, *see* PSN's Br. at 12-13, while LMF and the State believe that the City Council may have the authority to issue the Section 2.3 notice by resolution, *see* LMF's Br. at 5-6. Neither view is accurate. Rather, as described in the explanatory statement, without Section 6 the City Council still has authority to issue the Section 2.3 notice but may only do so by ordinance.

Article IV, Section 15 of the Charter provides as follows:

> The City shall, in addition to the powers enumerated in this Charter, have all other powers now or hereafter granted to or exercised by municipal corporations of like character and degree, and also all powers now or hereafter granted to incorporated towns and cities, by the laws of this state, and may exercise the same by ordinance and not otherwise.

The Washington Supreme Court has noted that this provision "imparts on the city council broad legislative powers" and "has repeatedly held that first class cities such as Seattle may enact any ordinance which does not contravene the constitution, state statutes or the city charter." *Daggs v. City of Seattle*, 110 Wn.2d 49, 54, 750 P.2d 626 (1988) (citing *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 792, 666 P.2d 329 (1983); *Winkenwerder v. Yakima*, 52 Wn.2d 617, 622, 328 P.2d 873 (1958)). Absent an argument that a future ordinance issuing a Section 2.3 notice following the EIS would "contravene the constitution, state statutes or the city charter," the City Council

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has the authority to enact such an ordinance. Indeed, PSN's view that the Council may not be able to enact an ordinance issuing a Section 2.3 notice without Section 6 is tantamount to an argument that the City needs an ordinance giving it authority to enact an ordinance. This is an improper and illogical understanding of the City's ordinance authority.

The only legal authority PSN cites for its position is the McQuillian treatise referring to "the usual provision...that for a certain period after submission and rejection of a measure it cannot be passed or repeal by the council contrary to the decision of the voters." PSN's Br. at 12-13. This authority is misplaced for two reasons. First, Seattle's Charter contains no such language, instead providing that ordinances subject to a referendum vote may not "be amended or repealed by the City Council within a period of two (2) years following such approval." Charter art. IV, § 1.N. If an ordinance (or part thereof) is rejected by the voters, the Charter only provides that "it shall be considered as rejected and shall be of no force or effect." Charter art. IV, § 1.M. Second, even if the McQuillian language were in Seattle's Charter, a future ordinance issuing a Section 2.3 notice would not be tantamount to reenacting Section 6 of Ordinance 123542. At most, Section 6 acts as a delegation giving the Council authority to act by resolution in the future, which is not the same thing as actually deciding to proceed with the non-preliminary-design portions of the City-State agreements after considering the EIS.

LMF and the State take the opposite view from PSN, asserting that not only could the City Council issue a Section 2.3 notice without Section 6 but that the Council could do so by resolution. The City Attorney disagrees. While the Council sometimes may act by resolution, the Charter requires certain steps to be taken by ordinance. *See* Charter art. IV, § 14. These include, among others, the power "to control the finances and property of the City," the power to acquire property for the City "by purchase or by exercise of the right of eminent domain or otherwise,"

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"to dispose of all [City] property as it shall have, as the interests of the City may from time to time require," the power "to regulate and control the use" of "streets and other public places," and the power "[t]o construct, purchase, condemn or otherwise acquire, maintain and operate works, plants and facilities" related to public utilities (including water and electricity). *Id.* The three City-State agreements, which would be ed in full by a Section 2.3 notice, contain several provisions that fall within the City's ordinance-only powers. *See, e.g.*, Ordinance 123542, Ex. A, Attach. 1 § 3.2.1 (property transfer), § 4.2.1 (task order payments), § 6.2 (authorization for use of City rights-of-way). As such, without Section 6, an ordinance would be required for issuance of the Section 2.3 notice.[3]

The alternative language proposed by PSN describes the current law as PSN sees it; the alternative language proposed by LMF and the state describes the current law as LMF and the State see it. The City Attorney disagrees with both interpretations of the current law, and the explanatory statement accurately describes the current state of the law.

2. The explanatory statement accurately describes the effect of Section 6.

In a world with Section 6, (i.e., "the effect of the measure if approved"), PSN, LMF, and the State appear to be in agreement that the City Council would definitely have the authority to issue the Section 2.3 notice other than by ordinance if Section 6 is approved. *See* PSN's Br. at 12-13, LMF & the State's Br. at 8-10. This overstates the effect of Section 6. The explanatory statement says that "Section 6 *may* authorize the City Council alone to issue the notice to

[3] LMF and the State also assert that "the City Council is required to issue a notice to the State after the FIES only because the City agreed to do so. In other words, absent Section 2.3 of the Agreements, nothing in the 'present law' requires the City to issue a notice to proceed after review of the FEIS." LMF & the State's Br. at 6. The City disagrees and believes that environmental law requires the City to consider the FEIS before making a final decision to proceed with non-preliminary-design work under the City-State agreements. However, this issue is irrelevant to the explanatory statement. LMF and the State refer to what "present law" would be "*absent Section 2.3 of the Agreements*." But Section 2.3 of the Agreements is part of "present law" because the Superior Court held that Section 2 of Ordinance 123542, which accepted the agreements for the City, was not subject to referendum. As such, Section 2.3 is the law, and its requirements must be part of the explanatory statement's description of "the law as it presently exists."

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proceed with the agreements beyond the initial design phase other than by ordinance" because the effect of Section 6 is not entirely clear. PSN's proposal to change "may" to "would" and LMF and the State's proposal to change "may authorize" to "authorizes" both make the legal effect of Section 6 seem more clear than it actually is. Section 6 by its terms simply authorizes the Council "to decide whether to issue" the Section 2.3 notice.

One could argue that any "authorization" to the Council must be an authorization to act by resolution because, as discussed above, the Council is already authorized to act by ordinance; one could also argue that an ordinance cannot delegate to the Council the authority to act by resolution without doing so explicitly (which Section 6 does not do). If Section 6 is approved, if the Council decides to issue a Section 2.3 notice by resolution, and if that action is challenged, a court will ultimately decide whether Section 6 constitutes an effective delegation. But such a decision is at least three "ifs" away, and for the moment the clearest and most accurate description of Section 6's effect if approved is the "may authorize" language in the explanatory statement.[4]

IV. CONCLUSION

The Commission should adopt the explanatory statement as prepared by the City Attorney, subject to the two minor wording changes offered in Footnote 2.

[4] Although Section 6 requires that a Council decision to issue a Section 2.3 notice "be made at an open public meeting after the issuance of the Final Environmental Impact Statement," these requirements exist even without Section 6, so implying that these requirements would be effects of Section 6 would be misleading. The Open Public Meetings Act already requires decisions of governing bodies to be made at open public meetings, and Section 2.3 of each agreement already requires that the Section 2.3 notices not be issued until after the FEIS.

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DATED this 15th day of June, 2011.

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PROOF OF SERVICE

I certify under penalties of perjury under the laws of the State of Washington that on the 15th day of June, 2011, I caused a copy of the foregoing City Attorney's Response to Objections to Referendum 1 Explanatory Statement, along with Attachment A, to be served upon the following persons via electronic mail:

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Executed this 15th day of June, 2011, at Seattle, Washington.

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