BEFORE THE SEATTLE ETHICS AND ELECTIONS COMMISSION

In the Matter of **Appeals of City Attorney's Explanatory Statement for Seattle Referendum No. 1**	Case No. 11-2-0603-1 PROTECT SEATTLE NOW'S REPLY BRIEF

Protect Seattle Now ("PSN") submits this brief replying to the response brief of the City Attorney.

I. ANALYSIS

A. Proposed Amendment No. 1: Remove the Two Editorializing Opening Sentences

PSN reiterates its request that the Commission adopt PSN's Proposed Amendment No. 1, which would strike the first two opening sentences of Mr. Holmes's explanatory statement. The City Attorney argues incorrectly that these sentences meet the standard of SMC 2.14.030(A).

As SMC 2.14.030(A) states, the role of the City Attorney in drafting an explanatory statement is confined to describing "the law." The City Attorney is not supposed to inject himself into questions of politics, and the broader meaning of the referendum should be left to the campaigns and elected officials to discuss. The choice of a replacement for the Viaduct is largely a political decision, and voter sentiment about one of the replacement options—the deep-bore tunnel—will inevitably drive the result on Seattle Referendum No. 1. By attempting to downplay the referendum's political significance, the City Attorney has assumed a role that SMC 2.14.030(A) does not permit and that prejudices the vote.

The City Attorney's stingy view of the referendum's meaning traces its roots to his lawsuit to keep the referendum off the ballot. To advocate for the legal position that Ordinance 123542 was not within the voters' referendum power, the City Attorney had to argue that the entire ordinance was merely an "administrative" action, rather than a "legislative" action. *See,*

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e.g., *Heider v. City of Seattle*, 100 Wn.2d 874, 875, 675 P.2d 597 (1984) (explaining that "the referendum power extends only to matters legislative in character and not to merely administrative acts"). After thus playing down the ordinance's significance, the City Attorney has inevitably had difficulty coming to grips with the meaning of a referendum on part of that ordinance.

Whereas the City Attorney has taken the position that the referendum has no bearing on the final decision to choose the tunnel, the Superior Court—the only third-party neutral that has interpreted the ordinance and this referendum—recognized that the decision at the heart of Section 6 is about whether to proceed with the tunnel. The City Attorney, however, claims that "[t]he City is not replacing the Alaskan Way Viaduct, so there can be no 'City's method for replacing the . . . Viaduct.'" City's Attorney's Resp. at 6. This argument must be rejected as conflicting with the only judicial interpretation in this case. In Judge Middaugh's final order, she ruled that the decision at the heart of Section 6 is "whether or not the City shall choose the tunnel for its method of replacement of the viaduct." (Order Allowing Referendum attach. A at 2 ¶ 6.) She also explained that the referendum would "allow the people of the City to be involved in the final choice of which option the City chooses to replace the viaduct." (*Id.* at 2 ¶ 7.) The referendum pertains to the City's choice of the tunnel. When compared against this judicial understanding of the ordinance and this referendum, the City Attorney's first two sentences are misleading or incomplete, and the Commission should strike them.

The sentences' inadequacy and prejudicial nature is further underscored when viewed against the other limitations of SMC 2.14.030(A). The explanatory statement may discuss only "the law as it *presently* exists and the effect of the measure *if approved*." SMC 2.14.030(A) (emphasis added). By telling the voters what the referendum would not do, the first sentence exceeds these limitations. The second sentence is also flawed under the narrow standard of SMC 2.14.030(A). Judge Middaugh's order interpreted Section 6 as stating that the choice of the tunnel as the City's final option for replacing the Viaduct "shall be solely in the control of the

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City Council after an open public meeting." (Order Allowing Referendum attach. A at 2 ¶ 6.) Thus, approving the referendum would *definitely* have an effect on the City's decision-making authority. The explanatory statement confusingly downplays this component of Section 6, and yet the City Attorney still asserts that the use of the term "may effect" is permissible. *See* City Attorney's Resp. at 4. The City Attorney cannot speculate what the City Council might or might not do with its authority if the referendum were approved or rejected. Essentially, the City Attorney suggests that the explanatory statement should be able to hypothesize how government actors will proceed under the law. This is not permissible. Rather, the explanatory statement must describe the law; speculation about the way that the law is implemented is not a proper subject for the explanatory statement. The City Council would definitely have the sole authority to make the final decision if Section 6 is approved, and that is all the explanatory statement may say.

The City Attorney also brings up the irrelevant point that Section 6, if approved, might be challenged in court as an improper delegation of authority to the City Council. *See* City Attorney Resp. Br. at 5. It is pure speculation that someone would challenge Section 6 in court if it were approved, and such a scenario has no bearing on how Section 6 would change the law. Theoretically, any referendum or initiative could be challenged in court for violating the city charter or a constitutional provision. But that does not give the City Attorney a license to muddy the explanatory statement, when SMC 2.14.030(A) dictates that it be "clear and concise." Judge Middaugh interpreted Section 6 as a clear delegation of the sole authority to make the final decision on whether to proceed with the tunnel as the City's final policy choice for replacing the Viaduct, and the Commission should respect that decision by striking the first two sentences of the City Attorney's explanatory statement.

In sum, the first two sentences of the explanatory statement largely address a political question that does not involve "the law," they are prejudicial, they conflict with Judge Middaugh's interpretation, and they contain superfluous material that is not allowed under the

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Seattle Municipal Code. Therefore, the Commission should adopt PSN's Proposed Amendment No. 1, which strikes the first two sentences of the City Attorney's explanatory statement. The City Attorney did not think them important enough to include in his first draft of the explanatory statement, and so surely the statement is sufficient without them.

B. Proposed Amendment No. 2: Change the Description of Section 6's Referability

PSN continues to believe that a summary of the Superior Court case would be confusing and prejudicial. The City Attorney posits that "[t]here is no dispute that the Section 6-only referendum" originated in a court case, and that voters might wonder why the other sections are not on the ballot. City Attorney's Resp. at 6. However, there is also no dispute that the Court ruled the City Attorney lacked the authority to initiate the lawsuit. Agreement about the procedural facts is not the test for whether material should be included in an explanatory statement. An explanatory statement should be neutral. Further, a question arising in a voter's mind is not a sufficient reason to include information in the explanatory statement. After all, another question that would arise in a voter's mind would be, Why was this issue in Superior Court? PSN concedes that it would not be proper to answer this question by including a statement that the City Attorney unlawfully started a lawsuit against the petitioners who gathered 29,000 signatures to place the ordinance on the ballot.

The best course is for the explanatory statement to simply reuse the neutral language from the ballot title, which is reflected in PSN's Proposed Amendment No. 2: "Section 6 of that ordinance has been referred to the voters for approval or rejection." If this language was sufficient for the ballot title, it should be good enough for the explanatory statement.

C. Proposed Amendment No. 3: Omit Debatable Legal Conclusions and Discuss Only the Effect of the Referendum if Approved

PSN agrees with the City Attorney that, at the very least, the City Council would have to enact an ordinance to issue the notice to proceed if Section 6 did not exist. The resolutions that Let's Move Forward and the Washington State Department of Transportation are inapposite. They concerned a legally mandated notice about a future city action. Such notices are typically

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administrative acts and comply with the procedural rules embodied in the municipal code, state laws, and constitutional due process. The Section 2.3 notice to proceed is entirely different. As Judge Middaugh recognized, this notice to proceed would legally bind the City to the remainder of the work called for under agreements after the federal Record of Decision is issued. The notice has legal effect, and Judge Middaugh ruled that the decision about whether to issue the notice to proceed is a legislative act. The Council cannot take legislative actions by resolution. *See* Seattle City Charter, art. IV, § 7 ("Every legislative act of said City shall be by ordinance."). Thus, had Section 6 never existed, the baseline requirement for a notice to proceed would have been an ordinance.

However, whether an ordinance would be sufficient, if Section 6 is rejected, is a debatable issue that should not be resolved in the explanatory statement. Once the City Council sought to delegate sole authority to itself—a delegation that could be rejected in this referendum—the Council has arguably changed the legal footing of its authority. This basic issue was first addressed a century ago in *Stetson v. City of Seattle*, 74 Wash. 606, 134 P. 494 (1913), where the issue was "whether it is within the power of the council to pass an ordinance which in effect alters, amends, or repeals an ordinance previously adopted by a referendum vote of the people." *Id.* at 611. The Court held that "a referendum ordinance cannot be altered, or repealed by any less authority than that which called it into being." *Id.* at 612. To amend or repeal an ordinance approved by referendum, the Council must place an amending or repealing ordinance on the ballot for approval or rejection. *Id.* The same logic applies to the voters' rejection of an ordinance. The Council cannot simply enact the same law in another ordinance. Because rejection of Section 6 would strip the Council of authority to issue a notice to proceed, there is a legally unresolved issue of whether the Council would have to enact a substantially different ordinance or refer the notice-to-proceed ballot directly to the voters.

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The Commission need not decide this issue. To adopt PSN's Proposed Amendment No. 3, it simply needs to recognize that it is a legal question that should not be resolved in the explanatory statement.

II. CONCLUSION

For the forgoing reasons, the Commission should reject the arguments of the City Attorney and should adopt the proposed amendments or the proposed substitute explanatory statement of PSN.

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