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

DECLARATION OF KYMBERLY K.
EVANSON IN SUPPOT OF OBJECTION
TO EXPLANATORY STATEMENT BY
LET'S MOVE FORWARD AND
WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

12
13 I, KYMBERLY K. EVANSON, declare under penalty of perjury under the laws of the
14 State of Washington that:

15 1. My name is Kymberly K. Evanson and I am an attorney at the law firm of Pacifica
16 Law Group, LLP, and counsel for Let's Move Forward and Phil Lloyd, in the above-
17 captioned matter. I am over the age of eighteen and am competent to make this declaration. I
18 have personal knowledge of the facts stated herein, which are true and correct.

19 2. Attached hereto as **Exhibit 1** is a true and correct copy of Ordinance 123542, passed
20 by the City Council on February 28, 2011.

21 3. Attached hereto as **Exhibit 2** is a true and correct copy of Section 2.3 of Memorandum
22 Agreement GCA 6486 between the Washington State Department of Transportation and the
23 City of Seattle.
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EXHIBIT 1

Council Bill 117101 Ordinance 123542

AN ORDINANCE relating to the State Route 99 Alaskan Way Viaduct and Seawall Replacement Program; entering into certain agreements with the State of Washington as provided in RCW 39.34.080, RCW chapter 47.12, and other applicable law; and ratifying and confirming certain prior acts.

WHEREAS, in the 1950s, the City of Seattle and the Washington State Department of Transportation jointly designed and built the Alaskan Way Viaduct to accommodate passenger and freight mobility into the foreseeable future; and WHEREAS, in 2001 the Nisqually earthquake damaged the Alaskan Way Viaduct and Seawall; and

WHEREAS, the Alaskan Way Viaduct and Seawall are at risk of sudden and catastrophic failure in an earthquake and are nearing the end of their useful lives; and

WHEREAS, various studies have determined that it is not fiscally responsible to retrofit the viaduct, and that retrofitting would cause significant construction impacts; and

WHEREAS, in March 2007, the Washington State Governor, the King County Executive, and the Mayor of Seattle pledged to advance a series of key State Route 99 projects (Moving Forward Projects) that will facilitate the removal and/or repair of key portions of SR 99, including the Yesler Way Vicinity Stabilization Project, Electrical Line Relocation, the SR 99 South Holgate Street to South King Street Viaduct Replacement Project, and Transit Enhancements and Other Improvements; and

WHEREAS, in 2008 the State and City agreed to guiding principles for replacing the Alaskan Way Viaduct: improve public safety; provide efficient movement of people and goods now and in the future; maintain or improve downtown Seattle, regional, Port of Seattle and state economies; enhance Seattle's waterfront, downtown and adjacent neighborhoods as a place for people; create solutions that are fiscally responsible; and improve the health of the environment; and

WHEREAS, in 2008 the State and the City considered feedback from 16 meetings of a stakeholder advisory committee made up of representatives from business, labor, environmental, and neighborhood interests, and more than one thousand public comments collected during quarterly public meetings and more than 50 community briefings; and

WHEREAS, in January 2009, the Governor of Washington, the Mayor of Seattle and the King County Executive jointly recommended replacing the Alaskan Way Viaduct with a bored tunnel beneath downtown Seattle; and

WHEREAS, the Washington State Legislature passed Engrossed Substitute Senate Bill 5768 and the Governor signed the bill into law designating and funding the preferred Bored Tunnel Program as the replacement for the Alaskan Way Viaduct, pending the completion of environmental review; and

WHEREAS, the proposed Alaskan Way Viaduct and Seawall Replacement (AWVSR) Program consists of a four-lane bored tunnel and improvements to City streets, the waterfront, and transit, and the Moving Forward Projects; and

WHEREAS, in October 2009, the City Council passed and the Mayor signed Ordinance Number: 123133, which established the Bored Tunnel Alternative as the City's preferred alternative and which authorized a memorandum of agreement between the State of Washington and the City of Seattle; and

WHEREAS, that agreement contemplated that the State and City would negotiate further agreements detailing the State and City's relative rights and responsibilities in the State highway project; and

WHEREAS, in August 2010, the City Council passed Resolution Number: 31235, which expressed the City Council's intent to authorize additional agreements with the State if:

- 1) The State awarded a contract consistent with the Draft Design-Build Contract;
- 2) The State demonstrated it could complete all elements of WSDOT's Program within the Program Budget;
- 3) The State provided the City with clear documentation identifying all changes between the Draft Design-Build Contract and the awarded construction contract; and
- 4) The State Legislature has not enacted legislation to overturn WSDOT's responsibility for Program costs, including cost overruns, as set out in the proposed agreements between the State and City; and

WHEREAS those conditions have been met; and,

WHEREAS Resolution 31235 also restated the City's policy that the State is solely responsible for all costs, including any cost overruns, related to implementing WSDOT's Program; and

WHEREAS the City and State have negotiated final versions of interlocal agreements, which are attached to this ordinance as Exhibit A, Attachments 1, 2

, and 3 ("The Agreements");

WHEREAS in a letter dated January 28, 2011, the State has offered to enter into the Agreements as legally binding contracts between the State and the City; and

WHEREAS the City's timely acceptance of the Agreements by enactment of this ordinance will protect the City's vital interests;

NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. In a letter dated January 28, 2011, (Exhibit A to this Ordinance), the State of Washington has offered to enter into and be legally bound by the Agreements, in the form of Attachments 1, 2 and 3 to Exhibit A, if the City accepts the Agreements by ordinance as provided in RCW 39.34.080, Chapter RCW 47.12, and other applicable law. The Agreements" are:

1. MEMORANDUM OF AGREEMENT NO. GCA 6486, SR 99 ALASKAN WAY VIADUCT, PROPERTY, ENVIRONMENTAL REMEDIATION, DESIGN REVIEW, PERMITTING, AND CONSTRUCTION COORDINATION AGREEMENT FOR SR 99 BORED TUNNEL PROJECT, attached as Attachment 1 to Exhibit A;

2. MEMORANDUM OF AGREEMENT UT 01476 SR 99 ALASKAN WAY VIADUCT REPLACEMENT BORED TUNNEL PROJECT SPU FACILITIES WORK, attached as Attachment 2 to Exhibit A; and

3. MEMORANDUM OF AGREEMENT UT 01474 SR 99 ALASKAN WAY VIADUCT REPLACEMENT BORED TUNNEL PROJECT SCL FACILITIES WORK, attached as Attachment 3 to Exhibit A.

Section 2. Acceptance of the Agreements. By enacting this ordinance, the City of Seattle accepts the offer made by the State and agrees that the City shall be legally bound by the Agreements attached as Exhibit A, Attachments 1, 2, and 3. The Agreements, having been accepted by the legislative authority of the City of Seattle by this ordinance as provided in RCW 39.34.080, RCW Chapter 47.12, and other applicable law, shall be effective as of the effective date of this ordinance.

Section 3. Signature as a Ministerial Act. The City Clerk is authorized to sign the Agreements as a ministerial act evidencing the City's acceptance of the Agreements.

Section 4. As provided in Seattle City Charter Article V, Section 7, the Mayor shall see that the Agreements are faithfully kept and performed.

Section 5. Authority to Amend the Agreements. Section 30.4 of Exhibit A, Attachment 1 provides:

This Agreement including the definition of the PROJECT as more particularly described in the Project Description attached as Exhibit A may be amended only by a written instrument, duly authorized by the CITY and the STATE, and executed by their duly authorized representatives.

For purposes of Section 30.4, "duly authorized by the City" means expressly authorized by ordinance and the City's "duly authorized representative" means the person identified in that authorizing ordinance.

Section 6. The City Council is authorized to decide whether to issue the notice referenced in Section 2.3 of each Agreement. That decision shall be made at an open public meeting held after issuance of the Final Environmental Impact Statement.

Section 7. Any act consistent with the authority of this ordinance taken after the passage of this ordinance and prior to its effective date is hereby ratified and confirmed.

Section 8. This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

Passed by the City Council the 28th day of February, 2011, and signed by me in open session in the authentication of its passage this 28th day of February, 2011.

President Richard Conlin of the City Council

Approved by me this 28th day of February, 2011.

Michael McGinn, Mayor

Filed by me this 28th day February, 2011.

City Clerk

EXHIBIT 2

1
2 1.52 STATE Project Engineer means the person appointed by the STATE to lead the
3 PROJECT during design and/or construction or his or her designee.
4

5 1.53 Street Use Permit means written authorization secured by the STATE from the
6 Director of SDOT for use of the CITY Street Right-of-Way pursuant to Title 15 of the
7 Seattle Municipal Code.
8

9 1.54 Surplus Property means Program Property, excluding Program Transfer Property
10 and other CITY Interest Property, that upon completion of the PROJECT has not been
11 designated as part of the limited access or non-limited access right-of-way of State Route
12 99.
13

14 1.55 Task Force means a group consisting of STATE, CITY, contractor, and other
15 stakeholder staff meeting regularly to review and reach decisions relating to a particular
16 subject, e.g., traffic, structures.
17

18 1.56 Task Order means a document executed by the PARTIES under this Agreement
19 authorizing work by one PARTY to be done on behalf of the other PARTY and that
20 defines the scope and the obligations of the PARTIES for the given element of work. All
21 terms and conditions of the Agreement shall apply to each Task Order.
22

23 1.57 UTILITY means City of Seattle Utility Departments, Seattle City Light and
24 Seattle Public Utilities.
25

26 1.58 WSDOT means Washington State Department of Transportation.
27
28

29 2. GENERAL RESPONSIBILITIES 30

31 2.1 The PARTIES shall manage risk, produce design and conduct construction in a
32 manner that maximizes cumulative public benefits and minimizes cumulative public costs
33 as mutually agreed to by the PARTIES.
34

35 2.2 This Agreement in conjunction with UT 01474 and UT 01476 is prepared by the
36 STATE and CITY, as provided in RCW 39.34.080, RCW 47.12.040 and other applicable
37 law, to govern relationships between the PARTIES and establish each PARTY's
38 responsibilities regarding the PROJECT.
39

40 2.3 The PARTIES understand that environmental review of the proposed PROJECT
41 is underway at the date of this Agreement and agree that only preliminary design work
42 and other work outlined in 23 CFR 636.109(b)(2) may proceed under this Agreement
43 prior to issuance of a Final SEPA/NEPA Environmental Impact Statement (FEIS) and
44 federal Record of Decision (ROD). If an alternative other than the Proposed Bored
45 Tunnel is selected, this Agreement will be terminated pursuant to the provisions of

1 Section 28 of this Agreement. If the Proposed Bored Tunnel is selected, the remaining
2 work under this Agreement other than preliminary design work may proceed no sooner
3 than after issuance of the ROD and only after WSDOT and the City Council each provide
4 notice to the other that it wishes to proceed with the Agreement. WSDOT will provide
5 Notice to Proceed 2, which authorizes final design and construction, to the Design
6 Builder only after issuance of the ROD.

7
8 2.4 The PARTIES shall work collaboratively to resolve issues in a manner that
9 endeavors to open the proposed bored tunnel to the public on schedule.

10
11 2.5 The design and construction of CITY Facilities, including repair, shall comply
12 with City Standards.

13
14 2.6 Each PARTY shall provide the funding and resources necessary to fulfill the
15 responsibility of that PARTY as established in this Agreement.

16
17 2.7 The PARTIES agree to work cooperatively with each other and make reasonable,
18 good faith efforts to timely and expeditiously complete the PROJECT, as provided in this
19 Agreement, including, but not limited to, the selection of a preferred SR 99 design
20 alternative, development of preliminary engineering and final design and construction. In
21 order to optimize design and minimize conflicts, the STATE shall coordinate design and
22 construction of the various contracts making up the PROJECT with design of subsequent
23 PROGRAM stages, and with construction of previous stages of the PROGRAM. The
24 STATE shall be prepared to modify design of the contracts making up the PROJECT, the
25 subsequent PROGRAM stage and/or previous stage if both PARTIES determine the
26 modifications are necessary and reasonable, to minimize design conflicts.

27
28 2.8 The STATE is responsible for designing and constructing the PROJECT except
29 for the CITY's responsibility to relocate Conflicting Facilities as provided in Section 2.10
30 of UT 01474 and UT 01476. The STATE is responsible for taking measures to minimize,
31 limit, and mitigate damage to private property and CITY Facilities that may result from
32 the PROJECT construction, including damage that may result from tunnel-induced
33 Deformation. The STATE is responsible for remedying at its cost such damage should it
34 occur.

35
36 2.9 The PARTIES agree that it is in the public interest for one PARTY to implement
37 portions of the other PARTY's PROJECT responsibilities. Therefore, this SDOT
38 Agreement establishes a Task Order process for use by a PARTY to authorize the other
39 PARTY to conduct work on its behalf and, as may be documented through each Task
40 Order, to agree to reimburse the other PARTY for such services.

41
42 2.10 The PARTIES agree that the STATE is responsible for funding the design and
43 construction of a re-located surface street within the Alaskan Way right-of-way from
44 South King Street to Pine Street, a new surface street from the intersection of Pine Street
45 and Alaskan Way to Battery Street connecting Alaskan Way to Elliot and Western

EXHIBIT 3

Honorable Laura Gene Middaugh
Hearing Date: May 20, 2011
Hearing Time: 1:30 p.m.

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

THE CITY OF SEATTLE, a Washington
municipal corporation,

Plaintiff,

vs.

PROTECT SEATTLE NOW; ANDREW
PAXTON, in his capacity as Protect Seattle
Now's Committee Chair and a principal
referendum petitioner; SCOT BRANNON, in
his capacity as Protect Seattle Now's Treasurer
and a principal referendum petitioner; LET'S
MOVE FORWARD; PHIL LLOYD, in his
capacity as Let's Move Forward's
Secretary/Treasurer; WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION,

Defendants.

NO. 11-2-11719-7 SEA

ORDER GRANTING IN PART AND
DENYING IN PART WASHINGTON
STATE DEPARTMENT OF
TRANSPORTATION'S, CITY OF
SEATTLE'S, AND LET'S MOVE
FORWARD AND PHIL LLOYD'S
MOTIONS FOR SUMMARY JUDGMENT

~~(PROPOSED)~~

This matter came before the court on May 13, 2011, on motions filed by the Washington State Department of Transportation ("WSDOT"), City of Seattle ("City"), Let's Move Forward and Phil Lloyd, requesting an order of summary judgment pursuant to CR 56 declaring that Ordinance No. 123542, enacted February 28, 2011 ("the 2011 Ordinance"), is

1 not referable to the voters and that agreements approved by the Seattle City Council in the
2 2011 Ordinance are in effect as of March 30, 2011, the effective date of the ordinance.

3 The court considered the following documents, in addition to having heard oral
4 argument:

5
6 1. From WSDOT: WSDOT's Motion for Summary Judgment; Declaration of
7 Ronald J. Paananen, P.E.; Declaration of Bryce Brown; Reply in Support of Its Motion for
8 Summary Judgment; and Declaration of Barbara De Ste. Croix, P.E. in Support of WSDOT's
9 Reply in Support of Motion for Summary Judgment; and WSDOT's and Let's Move Forward
10 and Phil Lloyd's Combined Supplemental Brief.

11
12 2. From the City of Seattle: Plaintiff's Motion for Summary Judgment; Reply to
13 Protect Seattle Now's Opposition to Motion for Summary Judgment; Plaintiff's Reply to Sierra
14 Club and Brannon's Opposition to Motion for Summary Judgment; and City of Seattle's
15 Supplemental Memorandum.

16
17 3. From Let's Move Forward and Phil Lloyd: Defendants Let's Move Forward
18 and Phil Lloyd's Motion for Summary Judgment; Declaration of Paul Lawrence in Support of
19 Let's Move Forward and Phil Lloyd's Motion for Summary Judgment; Declaration of Carol
20 Binder; Declaration of Donald Newby; Declaration of Jan Drago; Declaration of John Odland;
21 Declaration of Warren Aakervik; Let's Move Forward and Phil Lloyd's Reply in Support of
22 Motion for Summary Judgment; and WSDOT's and Let's Move Forward and Phil Lloyd's
23 Combined Supplemental Brief.

1 4. From Sierra Club and Brannan: Sierra Club Seattle Group and Scot Brannon's
2 Combined Response to Motions for Summary Judgment of Peter Holmes, WSDOT, Let's
3 Move Forward and Phil Lloyd; Declaration of Knoll Lowney in Support of 56(f) Motion and in
4 Opposition to Motions for Summary Judgment; Factual Record, Volume I; and Sierra Club and
5 Scot Brannon's Supplemental Brief.
6

7 5. From Protect Seattle Now: PSN's Combined Brief in Opposition to the Pending
8 Motions for Summary Judgment of WSDOT, Let's Move Forward and Phil Lloyd, and the
9 City of Seattle; Declaration of Gary W. Manca in Support of PSN's Combined Brief in
10 Opposition to the Pending Motions for Summary Judgment; Declaration of Cary Moon in
11 Support of PSN's Combined Brief in Opposition to the Pending Motions for Summary
12 Judgment; PSN's Exhibits in Support of PSN's Combined Brief in Opposition to the Pending
13 Motions for Summary Judgment; and PSN's Supplemental Brief Regarding Scope of
14 Referendum.
15

16 Based on its consideration of these documents and the arguments of counsel, the court
17 concludes the following:

18 1. This matter is ripe for decision. Referendums apply to legislative issues and it
19 is certainly appropriate to decide that before it goes on the ballot, if there is a legitimate
20 dispute. There is clearly a legitimate dispute here.
21

22 2. Whether the 2011 Ordinance (Ordinance No. 123542) is referable is a question
23 of law that is appropriate for resolution on summary judgment; there are no genuine issues of
24 material fact that would preclude entry of summary judgment.
25
26

1 3. The 2009 Ordinance (Ordinance No. 123133) was clearly a statement of policy,
2 and as such was a legislative action that was referable, but there was no referendum on this
3 ordinance. Therefore, the City's authority to enter into the three Agreements is not referable.

4 4. Sections 1 through 5 and Sections 7 and 8 of the 2011 Ordinance are
5 administrative and their enactment is not referable. The Agreements attached to the
6 2011 Ordinance are also administrative and not referable.

7 5. Section 6 of the 2011 Ordinance represents a policy decision, and therefore its
8 enactment is a legislative action that is referable.

9 6. Section 2 of the 2011 Ordinance states in part that the attached Agreements will
10 be effective as of the effective date of the ordinance. Section 8 states the effective date will be
11 30 days after the approval of the ordinance by the mayor. The 2011 Ordinance reflects that it
12 was vetoed by the Mayor, and that the Mayor's veto was overridden by the Council on
13 February 28, 2011. The 2011 Ordinance was thus effective as of March 30, 2011. Therefore,
14 because Section 2 and Section 8 of the 2011 Ordinance are administrative and not referable,
15 the Agreements are deemed to be in effect as of the effective date of the 2011 Ordinance,
16 which was March 30, 2011.

17 *The Cover orders as follows:*

18 *4/19*
19 7. The motions for summary judgment are GRANTED with respect to Sections 1-
20 5 and 7-8 of the 2011 Ordinance, and with respect to the effective date of the Agreements. The
21 motion is DENIED with respect to Section 6 of the 2011 Ordinance.

22 8. The City of Seattle is hereby directed to refer Section 6 of the 2011 Ordinance
23 to the ballot in accordance with state and city law.
24
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9. Additional conclusions are attached as Appendix A and incorporated herein.

DATED May 20, 2011.

Honorable Laura Gene Middaugh
King County Superior Court

Presented by:

ROBERT M. MCKENNA
Attorney General

s/Bryce E. Brown

BRYCE E. BROWN, WSBA #21230
Senior Assistant Attorney General

PACIFICA LAW GROUP LLP

By s/ Paul J. Lawrence

Paul J. Lawrence, WSBA #13557
Kymberly K. Evanson, WSBA # 39973
Attorneys for Defendants
Let's Move Forward and Phil Lloyd

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ATTACHMENT A

1. In 2009 the city established an ordinance stating the policy decision that it was the preference of the City for the tunnel option for replacement of the viaduct. Due to legal requirements a final decision as to which option for the project would be actually chosen could not be made at that time. Any final decision as to an actual choice had to wait until after the Environmental Impact Statement (EIS) and Record of Decision (ROD) were completed.
2. Just as the decision as to preference was a policy decision, so is the decision as to whether the City should ultimately choose to support the tunnel.
3. Policy or legislative decisions are subject to referendum. Administrative decisions are not subject to referendum.
4. The Agreements that are the subject matter of the 2011 Ordinance are both narrow agreements that carry out the policy already enacted in the 2009 Ordinance (administrative decisions) and far reaching agreements on how to implement a final choice/decision to build the tunnel, if such a choice is made (legislative decisions).
5. The Agreements state that each party to the agreement has the right to choose whether to go forward with the agreements after a review of the EIS and the ROD. Under this provision neither party is bound to choose the option of a tunnel even if it is available after the EIS and ROD are completed. Also, even if the party wishes to choose the option of the tunnel either party may choose not to proceed with the agreements as written and adopted under the 2011 Ordinance; implement that choice, that is the agreements themselves can be renegotiated. Parties manifest their choice by giving written "notice" to the other party. Failure to give the written notice in the time frames specified terminates all future obligations under the Agreements.

6. The 2011 Ordinance provides that the parties' decisions as to whether or not to give the notice (that is whether or not the City shall choose the tunnel for its method of replacement of the viaduct if such an option is available after the EIS) shall be solely in the control of the City Council after an open public meeting. The decision under the ordinance to give this decision making authority solely to the City Council is a policy decision. As such it may be reviewed by referendum.
7. It is clear from all the materials provided that the overriding intent of the referendum was to allow the people of the City to be involved in the final choice of which option the City chooses to replace the viaduct. The discussions as to specifics of contracts relate primarily to the wisdom of the decision, not the specific choices themselves.
8. The only portion of the 2011 Ordinance that relates to that concern is Section 6 which states that the choice to be made shall be made solely by the City Council. Allowing a referendum of this provision to go forward alone does further the intent of the referendum and it is apparent that had the Court's ruling been anticipated, the makers of the referendum would have chosen to go forward on this provision alone
9. The referendum could have been filed on that section alone. However, given the difficulties and complexities involved it could not have been anticipated that this Court would make the decision that it did.
10. The Court may not order matters not subject to referendum, such as administrative decisions, to be placed on the ballot. However, the Court may place valid portions on the ballot if they are severable from the invalid portions. Those portions of the agreements adopted that call for actions prior to the choice of tunnel alternative are administrative and are not subject to referendum. However, they may be easily segregated from the

policy decision (i.e. whether the notice as to whether to go forward with the agreements should be issued solely by the City Council) that is subject to referendum.


LGM