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4 BEFORE THE SEATTLE ETHICS AND ELECTIONS COMMISSION

5 In the Matter of

6 **Appeals of City Attorney's**  
7 **Explanatory Statement for Seattle**  
8 **Referendum No. 1**

Case No. 11-2-0603-1

PROTECT SEATTLE NOW'S OPENING  
BRIEF

9 Protect Seattle Now ("PSN"), the principal sponsor of the referendum petition that led to  
10 Seattle Referendum No. 1, hereby files this appeal pursuant to SMC 2.14.030.B. The explanatory  
11 statement prepared by Seattle City Attorney Peter S. Holmes for Seattle Referendum No. 1 fails  
12 to meet the standard required under SMC 2.14.030.A. The explanatory statement is prejudicial  
13 and confusing. It contains impermissible discussion about what would occur if the voters reject  
14 the measure. And it also includes disputable conclusions about the law as it presently exists and  
15 the effect of the measure if approved.

16 **I. RELIEF REQUESTED**

17 PSN respectfully requests that the Commission adopt PSN's Proposed Substitute  
18 Explanatory Statement. In the alternative, PSN asks that the Commission make the changes  
19 suggested in three proposed amendments.

20 **II. SEATTLE REFERENDUM NO. 1**

21 **A. A Referendum on Section 6 of Ordinance 123542**

22 Seattle Referendum No. 1 concerns Section 6 of Ordinance 123542. This ordinance  
23 approves three agreements with WSDOT that lay out the rights and responsibilities of each party  
24 for preliminary design, final design, and construction of the bored-tunnel alternative for  
25 replacing the Alaskan Way Viaduct. The ordinance contains eight operative sections:

26 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

1 accepts the Agreements by ordinance as provided in RCW 39.34.080, Chapter  
2 RCW 47.12, and other applicable law. The Agreements are:

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

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

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

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

24 Section 3. Signature as a Ministerial Act. The City Clerk is authorized to sign the  
25 Agreements as a ministerial act evidencing the City's acceptance of the  
26 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.

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

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

8 Section 6 is now suspended by operation of Article IV, Section 1.J of the Seattle City Charter.  
9 The remaining sections are currently in effect. However, not all of the operative portions of the  
10 agreement are in effect.

11 Section 6 of the ordinance refers to the identical Section 2.3 that appears in each  
12 agreement, and this Section 2.3 creates a clear temporal dividing line between preliminary work  
13 and final implementation of the tunnel:

14 [1] The PARTIES understand that environmental review of the proposed  
15 PROJECT is underway at the date of this Agreement and agree that only  
16 preliminary design work and other work outlined in 23 CFR 636.109(b)(2) may  
17 proceed under this Agreement prior to issuance of a Final SEPA/NEPA  
18 Environmental Impact Statement (FEIS) and federal Record of Decision (ROD).

19 [2] If an alternative other than the Proposed Bored Tunnel is selected, this  
20 Agreement will be terminated . . . .

21 [3] If the Proposed Bored Tunnel is selected, the remaining work under this  
22 Agreement other than preliminary design work may proceed no sooner than after  
23 issuance of the ROD and only after WSDOT and the City Council each provide  
24 notice to the other that it wishes to proceed with the Agreement. . . .

25 MOA No. GCA 6486 § 2.3, at 9-10; MOA UT 01476 § 2.3, at 8; MOA UT 01474 § 2.3, at 7-8.  
26 Thus, under Section 2.3 of each agreement, “only preliminary design work and other work  
outlined in 23 CFR 636.109(b)(2)<sup>1</sup> may proceed” before the City Council issues a “notice.” The  
procedure and authority for this “notice” is established in Section 6 of the 2011 Ordinance. After

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<sup>1</sup>23 C.F.R. § 636.109(b)(2) is a regulation of the Federal Highway Administration limiting the work that can be done before a final EIS and Record of Decision are issued: “The contracting agency may permit any design and engineering activities to be undertaken for the purposes of defining the project alternatives and completing the NEPA alternatives analysis and review process; complying with other related environmental laws and regulations; supporting agency coordination, public involvement, permit applications, or development of mitigation plans; or developing the design of the preferred alternative to a higher level of detail . . . .” Thus, only preliminary work is permitted under 23 C.F.R. § 636.109(b)(2).

1 the Council decides to issue such “notice,” Section 2.3 of each agreement provides that the  
2 “remaining work” under the agreements “may proceed.” Thus, the “notice” triggers the operation  
3 of the agreements for the final work and construction of the tunnel.

4 Viewed in this context, the legal significance of Section 6 of the ordinance becomes  
5 apparent. It provides, “The City Council is authorized to decide whether to issue the notice  
6 referenced in Section 2.3 of each Agreement.” And this notice, in turn, triggers the operation of  
7 the agreements for the final work and construction of the tunnel. In sum, Section 6 authorizes the  
8 City Council to make a final choice to grant the City’s support to the final design and  
9 construction of the tunnel.

10 **B. The Accepted Ballot Title**

11 The ballot title for Seattle Referendum No. 1 is as follows:

12 The Seattle City Council passed Ordinance Number 123542 entering into  
13 agreements related to the Alaskan Way Viaduct replacement. Section 6 of that  
14 ordinance has been referred to the voters for approval or rejection. Section 6, if  
15 approved, would authorize the City Council to give notice to proceed, beyond  
16 preliminary design work, with three agreements concerning the State’s proposal to  
17 replace the Alaskan Way Viaduct with a deep-bore tunnel. Section 6 states: “The  
18 City Council is authorized to decide whether to issue the notice referenced in  
19 Section 2.3 of each Agreement. That decision shall be made at an open public  
20 meeting held after issuance of the Final Environmental Impact Statement.”

21 Should this ordinance section be:

22 Approved?

23 Rejected?

24 **III. FACTUAL BACKGROUND**

25 **A. The Referendum Petition**

26 The Seattle City Council enacted Ordinance 123542 on February 28, 2011. (Order of  
Dismissal at 2.) On March 29, 2011, PSN and its volunteers filed a referendum petition with the  
Seattle City Clerk, and its sufficiency was later verified by the King County Elections  
Department and the City Clerk. (*Id.*) The referendum petition sought to refer Ordinance 123542  
to the voters of Seattle for their approval or rejection. (*Id.*)

1 **B. City Attorney Files Lawsuit Arguing this Referendum Is Invalid**

2 Also on March 29, 2011, Seattle City Attorney Peter Holmes filed a complaint in King  
3 County Superior Court, seeking a declaratory judgment that the referendum petition was outside  
4 the scope of the referendum power of Seattle voters. (*Id.*) The named defendants were Protect  
5 Seattle Now, two individual referendum petitioners, the pro-tunnel group Let’s Move Forward  
6 (LMF), LMF’s treasurer, and WSDOT. The President of the Seattle City Council, Richard  
7 Conlin, apparently asked Mr. Holmes if he would file such a complaint. (*Id.*) However, the  
8 Mayor of Seattle objected to Mr. Holmes bringing this action, and no authorization from the City  
9 Council as a legislative body appeared in the court record. (*Id.*)

10 **C. A Judicial Rebuke of the City Attorney**

11 On May 20, 2011, the Superior Court entered an order ruling that Mr. Holmes, by filing  
12 the complaint and attempting to keep the proposed referendum off the ballot, had acted  
13 unlawfully. (*Id.* at 3.) As the Court noted, the Seattle City Charter limits the duties and power of  
14 the Seattle City Attorney as follows: “The City Attorney shall have full supervisory control of all  
15 the litigation of the City, or in which the City or any of its departments are interested, and shall  
16 perform such other duties as are or shall be prescribed by ordinance.” Seattle City Charter, art.  
17 XIII, § 3. The Court ruled that the limiting word “supervisory” precluded the City Attorney from  
18 acting unilaterally to initiate a lawsuit in the name of the City of Seattle. (Order of Dismissal at  
19 3.) Further, the encouragement of Councilmember Conlin was insufficient because he did not  
20 have the power to authorize a suit on behalf of the City as a corporate body, according to the  
21 Court. (*Id.*) Concluding that “no city official or body with the power to do so has authorized this  
22 lawsuit on behalf of the City of Seattle,” the Court dismissed the City as party plaintiff. (*Id.*)

23 After this rebuke of the City Attorney’s actions, the Court did recognize that it was  
24 proper under CR 17 to substitute WSDOT as plaintiff in control of the complaint. (*Id.* at 3-4.)  
25 Because the City would be a necessary party if the lawsuit were thus to continue, the Court  
26 ordered the City to be a defendant. (*Id.* at 4.)

1 **D. Over the City Attorney’s Protestations, Seattle Referendum No. 1 Is Ordered onto**  
2 **the Ballot**

3 At an initial hearing on May 13, 2011, the Superior Court preliminary denied the motions  
4 of Mr. Holmes, WSDOT, and LMF seeking a summary judgment that the proposed referendum  
5 was beyond the voters’ power. The Court held that Section 6 of Ordinance 123542 was a  
6 legislative act subject to referendum, and she sought additional briefing on how to proceed in  
7 light of her additional conclusion that the remainder of the ordinance was not referable. Mr.  
8 Holmes then filed a brief arguing that none the ordinance should be placed on the ballot, despite  
9 the clear indication of 29,000 signators that they wished to be consulted on the agreements  
10 approved by that ordinance.

11 The Court again rejected the City Attorney’s arguments and ordered that the City refer  
12 Section 6 of the ordinance to the voters. (Order Allowing Referendum at 4 ¶ 8.) The Court noted  
13 the applicable law that “[p]olicy or legislative decisions are subject to referendum,” and the  
14 Court held that “the decision as to whether the City should ultimately choose to support the  
15 tunnel” is a policy decision. (*Id.* attach. A at 1 ¶¶ 2-3.) Interpreting the agreements approved by  
16 the ordinance, the Court described them as “both narrow agreements that carry out the policy  
17 already enacted in the 2009 Ordinance (administrative decisions) and far reaching agreements on  
18 how to implement a final choice/decision to build the tunnel, if such a choice is made (legislative  
19 decision).” (*Id.* ¶ 4.) Under the agreements, City makes it final choice about whether to support  
20 the tunnel “by giving written ‘notice’ to the other party” after the Final Environmental Impact  
21 Statement and federal Record of Decision are issued. (*Id.* ¶ 5.)

22 Discussing the legal significance of Section 6, the Court wrote:

23 The 2011 Ordinance provides that the parties’ decisions as to whether or not to  
24 give the notice (that is whether or not the City shall choose the tunnel for its  
25 method of replacement of the viaduct if such an option is available after the EIS)  
26 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.

1 (*Id.* attach. A at 2 ¶ 6.) Because “the overriding intent of the referendum was to allow the people  
2 of City to be involved in the final choice of which option the City chooses to replace the  
3 viaduct,” the Court ruled that Section 6, “which states that the choice to be made shall be made  
4 solely by the City Council,” furthered the intent of the referendum petition. (*Id.* ¶ 8.) Finding that  
5 Section 6 could be severed from the remainder of the referendum petition, the Court decided to  
6 allow Section 6 onto the ballot. (*Id.* ¶¶ 9-10.)

#### 7 **E. The Explanatory Statements**

8 After these two defeats in Court, the City Attorney set out to write the explanatory  
9 statement explaining the meaning of the referendum that he had just argued was invalid. In  
10 addition to the City Attorney himself, three assistant city attorneys who had litigated the lawsuit  
11 in Superior Court prepared the final explanatory statement. The City Attorney prepared two  
12 drafts and a final version, which was submitted to the Executive Director of the Seattle Ethics  
13 and Elections Commission. The City Attorney’s adversary in court, PSN, filed two comment  
14 letters on the draft explanatory statements. Aside from a cosmetic suggestion that the explanatory  
15 statement use the term “the State” rather than “WSDOT,” the City Attorney appeared to reject all  
16 of PSN’s comments.

17 PSN now submits this brief objecting the explanatory statement in accordance with SMC  
18 2.14.030.A.

#### 19 **IV. THE ISSUES**

20 PSN’s appeal presents the following issues for the Commission to decide:

- 21 1. Whether the Commission should apply a deferential standard of review to the City  
22 Attorney’s explanatory statement despite his active participation in a lawsuit challenging the  
23 referendum’s validity and arguing the subject ordinance was an administrative detail.
- 24 2. Whether the explanatory statement meets the standards of SMC 2.14.030.A.
- 25 3. Whether the Commission should adopt PSN’s Proposed Amendment No. 1.
- 26 4. Whether the Commission should adopt PSN’s Proposed Amendment No. 2.

- 1 5. Whether the Commission should adopt PSN’s Proposed Amendment No. 3.  
2 6. Whether the Commission should adopt PSN’s Proposed Substitute Explanatory  
3 Statement

4 **V. EVIDENCE RELIED UPON**

- 5 1 Appendix A, Final Ballot Title, May 24, 2011.  
6 2. Appendix B, Final Explanatory Statement, June 2, 2011.  
7 3. Appendix C, First Draft Explanatory Statement, May 31, 2011.  
8 4. Appendix D, Second Draft Explanatory Statement, June 2, 2011.  
9 5. Appendix E, Protect Seattle Now’s Proposed Amendment No. 1  
10 6. Appendix F, Protect Seattle Now’s Proposed Amendment No. 2  
11 7. Appendix G, Protect Seattle Now’s Proposed Amendment No. 3.  
12 8. Appendix H, Protect Seattle Now’s Proposed Substitute Explanatory Statement  
13 9. Appendix I, Order Dismissing City of Seattle as Party Plaintiff and Rearranging the  
14 Parties, *WSDOT v. Protect Seattle Now, et al.*, Case No. 11-2-11719-7 SEA (King County  
15 Superior Court May 20, 2011) (“Order of Dismissal”).  
16 10. Appendix J, Order Denying Summary Judgment in Part, *WSDOT v. Protect Seattle Now,*  
17 *et al.*, Case No. 11-2-11719-7 SEA (King County Superior Court May 20, 2011) (“Order  
18 Allowing Referendum”).  
19 11. Appendix K, 2009 Explanatory Statement for Seattle Referendum No. 1 on Bag Fee  
20 12. Declaration of Gary W. Manca (“Decl. of Manca”)

21 **VI. ANALYSIS**

22 **A. Standards for an Explanatory Statement**

23 RCW 29A.32.241(4) and SMC 2.14.030.A require the City Attorney to prepare an  
24 explanatory statement for each city ballot measure. An explanatory statement must be in “clear  
25 and concise language,” and it must describe “the law as it presently exists and the effect of the  
26 measure if approved.” SMC 2.14.030.A.



1 An explanatory statement occupies an important position in the election pamphlet that  
2 voters will rely upon when deciding how to cast their vote in the upcoming election. It is placed  
3 before the campaign arguments for and against the measure, SMC 2.14.020(B), which suggests  
4 that it must be a neutral description that informs the voters of what their approval would  
5 accomplish legally. Such an implicit requirement of neutrality is reinforced when read together  
6 with other duties of a city attorney, such as the duty to prepare a ballot title that does not  
7 prejudice the voters for or against the measure. *See* RCW 29A.72.050(1). Editorializing and  
8 statements that seek to prejudice the voters for or against the measures should therefore be  
9 confined to the advocacy statements provided for in SMC 2.14.020.C and .E.

10 **B. Standard of Review**

11 The standard of review in this matter should be *de novo* without deference to the City  
12 Attorney's determinations. The applicable laws, RCW 29A.32.241(4) and SMC 2.14.030.A, do  
13 not expressly provide for a standard of review. But the circumstances under which the  
14 explanatory statement was drafted calls for the Commission's careful scrutiny of the issues  
15 raised in this appeal. Mr. Holmes exceeded his authority when he initiated the lawsuit asserting  
16 that PSN's referendum petition was beyond the referendum power. (Order of Dismissal at 2.)  
17 After the King County Superior Court so held, Mr. Holmes persisted in litigating the matter as a  
18 defendant. When the Court ruled that Section 6 of the ordinance is subject to referendum, Mr.  
19 Holmes still argued that Section 6 should stay off the ballot. After the Court disagreed with Mr.  
20 Holmes on this point, Mr. Holmes then drafted the explanatory statement. Not only that, but  
21 three of the assistant city attorneys who litigated the referendum case joined Mr. Holmes in  
22 writing the explanatory statement. Mr. Holmes did not delegate the task to a walled-off group of  
23 assistant city attorneys who had not participated in the litigation.

24 Therefore, Mr. Holmes occupies a position different from the one that the Seattle City  
25 Attorney typically holds in when discharging his or her duties under SMC 2.14.030.A. Rather  
26 than remaining neutral or having a client ordering him to litigate, Mr. Holmes acted on his own

1 accord to argue that the referendum petition was invalid. This argument required him to  
2 characterize the entire ordinance as a mere “administrative act,” rather than as legislation. *See,*  
3 *e.g., Heider v. City of Seattle*, 100 Wn.2d 874, 875, 675 P.2d 597 (1984) (explaining that “the  
4 referendum power extends only to matters legislative in character and not to merely  
5 administrative acts”). Given Mr. Holmes’s previous attempts to belittle the significance of  
6 Ordinance 123542, the Commission should use careful scrutiny in reviewing his description of  
7 the explanatory statement.

8 **C. Proposed Amendment No. 1: Remove the Two Editorializing Opening Sentences**

9 The first two opening sentences of Mr. Holmes’s explanatory statement read as follows:

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

15 (App. B.) These editorializing lines have three principal flaws. The Commission should adopt  
16 PSN’s Proposed Amendment No. 1, which strikes the lines from the statement. (*See* App. E.)

17 The first flaw is that the Seattle Municipal Code does not permit Mr. Holmes to speculate  
18 on what would and would not happen if a referendum is rejected. Rather, SMC 2.14.030.A  
19 provides only for “the law as it presently exists and the effect of the measure if approved.”  
20 “the law as it presently exists and the effect of the measure *if approved*.” (Emphasis added.) The  
21 Code does not say “and if rejected.”

22 The second flaw is that these sentences are confusing and misleading. An explanatory  
23 statement authored by the Seattle City Attorney’s Office should provide “clear and concise”  
24 guidance to the voters on what would happen if they approved the referendum. SMC 2.14.030.A.  
25 Hedging words such as “may affect” have no business in an explanatory statement. Further, it is  
26 misleading to conclusively declare that the ballot measure “will neither eliminate nor choose the  
27 deep-bore tunnel as an alternative to replace the Alaskan Way Viaduct.” To the contrary, the  
28 Superior Court’s final order recognized that the decision at the heart of Section 6 is “whether or

1 not the City shall choose the tunnel for its method of replacement of the viaduct.” (Order  
2 Allowing Referendum attach. A at 2 ¶ 6.) Although the State and the federal government might  
3 make their own choices, the City’s decision to choose the tunnel or not is the core subject of this  
4 referendum. A more accurate description would be, therefore: “The outcome of this ballot  
5 measure will determine whether the City Council shall have the sole authority to finally choose  
6 the deep-bore tunnel as the City’s method for replacing the Alaskan Viaduct.”

7 The third flaw in the explanatory statement’s opening two sentences is that they are  
8 prejudicial and biased. They did not appear in the first draft of the explanatory statement. (*See*  
9 *App. C.*) Rather, they were inserted later. (*See App. D.*) It is not clear which commenter prodded  
10 Mr. Holmes into adding them, but one thing is plain: They are highly prejudicial comments  
11 editorializing on the significance of the vote. These are the sorts of comments that belong in the  
12 arguments for and against the measure, not in an explanatory statement prepared by the City  
13 Attorney’s Office.

14 **D. Proposed Amendment No. 2: Change the Description of Section 6’s Referability**

15 PSN respectfully requests that the Commission adopt PSN’s Proposed Amendment No. 2  
16 (*App. F*), which would strike this sentence from the explanatory statement: “The King County  
17 Superior Court, however, determined that only Section 6 of the Ordinance is subject to a public  
18 vote.” (*App. B.*) A summary of the Superior Court case would be confusing and prejudicial. The  
19 question that would arise in the voters mind is “Why was this in Superior Court?” By implying  
20 that there is some infirmity in the referendum petition, the proposed language creates prejudice.  
21 The Superior Court firmly rejected Mr. Holmes’s argument that the referendum petition was  
22 insufficient simply because it did not single out Section 6: “[I]t is apparent,” the Court explained,  
23 “that had the Court’s ruling been anticipated, the makers of the referendum would have chosen to  
24 go forward with this provision alone.” (Order Allowing Referendum attach. A at 2 ¶ 8.)

25 PSN has not suggested that the explanatory statement include language such as, “29,000  
26 people signed a referendum petition to allow the people of City to be involved in the final choice

1 of which option the City chooses to replace the viaduct, and this referendum is on the ballot  
2 despite the City Attorney’s lawsuit to stop it,” even though such language would accurately state  
3 the procedural history and the Superior Court’s views. Such a statement would be too prejudicial  
4 to the advocates of the “approve” side.

5 The best course is for the explanatory statement to simply reuse the neutral language  
6 from the ballot title, which is reflected in PSN’s Proposed Amendment No. 2: “Section 6 of that  
7 ordinance has been referred to the voters for approval or rejection.”

8 **E. Proposed Amendment No. 3: Omit Debatable Legal Conclusions and Discuss Only**  
9 **the Effect of the Referendum if Approved**

10 PSN also asks that the Commission adopt PSN’s Proposed Amendment No. 3, which  
11 would strike sentences discussing the authority of the City Council to act by ordinance. (*See*  
12 *App. G.*) It would also remove the material speculating on the effect of the voters rejecting the  
13 referendum. (*See id.*) Finally, it would use more concrete words to describe the effect of approval  
14 of the referendum. (*See id.*)

15 Again, SMC 2.14.030.A calls only for a description “in clear and concise language” of  
16 “the law as it presently exists and the effect of the measure *if approved.*” (Emphasis added.) It  
17 does not allow for speculation on what would happen if the measure were rejected. And the City  
18 Attorney’s Office knows this. As Appendix K indicates, when the City Attorney drafted an  
19 explanatory statement in 2009 for the referendum on the bag fee, it confined its explanation to  
20 the effect of the measure if approved. The current explanatory statement is thus a sharp departure  
21 from prior practice.

22 The discussion about the Council’s authority to act by ordinance is confusing and  
23 debatable. The explanatory statement should be limited to the point made by the Superior Court:  
24 Section 6, if approved, would give the City Council the sole authority to decide whether to  
25 finally support the tunnel and implement the agreements. Under settled principles of law, it is  
26 also arguable whether the City Council would have *any* authority to issue the notice to proceed if  
the referendum is rejected. *See, e.g.,* 5 Eugene McQuillin, *The Law of Municipal Corporations* §

1 16.52, at 389 (3d ed. 2004) (“[T]he usual provision is that for a certain period after submission  
2 and rejection of a measure it cannot be passed or repealed by the council contrary to the decision  
3 of the voters.”). Given the lack of clarity on how the Council could proceed after rejection, the  
4 better course—and the course required under the Seattle Municipal Code, is to omit the  
5 speculative discussion about what would happen if the referendum is rejected.

6 At the very least, the Commission should change the word “may” in the first sentence of  
7 Section 3 to “would.” The use of the word “may” is a hedge that clashes with the Superior  
8 Court’s clear conclusion about the effect of Section 6. The Court explained:

9 The 2011 Ordinance provides that the parties’ decisions as to whether or not to  
10 give the notice (that is whether or not the City shall choose the tunnel for its  
11 method of replacement of the viaduct if such an option is available after the EIS)  
12 shall be solely in the control of the City Council after an open public meeting.

13 (Order Allowing Referendum attach. A. at 2 ¶ 6.). Mr. Holmes should not be permitted to deviate  
14 from this judicial interpretation. The difference is subtle but real, and it also departs again from  
15 the City Attorney Office’s settled practice. In the explanatory statement for the bag-fee  
16 referendum, the City Attorney’s Office used the word “would” to describe the effect of approval.  
17 (*See App. K.*) For these same reasons, the final clause in the first sentence of Section 4 should be  
18 stricken (... and the City Council may be able to decide ...).

#### 19 **F. Proposed Substitute Explanatory Statement**

20 Appendix H is PSN’s proposed substitute explanatory statement. In addition to  
21 incorporating PSN’s proposed amendments and the principles that underlie them, the substitute  
22 statement achieves more clarity than does Mr. Holmes’s statement. To begin with, it more  
23 clearly separates the discussion of the law as it presently exists and the law that would exist if the  
24 referendum is approved. Rather than separating the explanation of Ordinance 123542 into two  
25 separate sections, the substitute statement combines the discussions into Section 2. The substitute  
26 statement also incorporates the general description of the referendum process that the City  
27 Attorney used in 2009 for the bag-fee referendum. (*See App. K.*)

DATED this 8th day of June 2011.

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MANCA LAW, PLLC

By: s/ Gary Manca  
Gary W. Manca, WSBA No. 42798  
Attorney for Protect Seattle Now