

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.

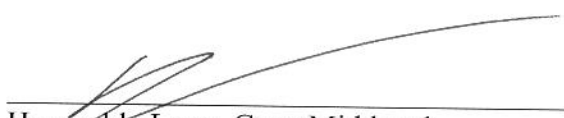
17 *y/lj* The Cover orders as follows.

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

21 8. The City of Seattle is hereby directed to refer Section 6 of the 2011 Ordinance
22 to the ballot in accordance with state and city law.

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:

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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.


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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 place 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.


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