News Release Detail

SUBJECT: Holmes asks court for declaratory judgment on tunnel referendum

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This morning the City Clerk's Office received an estimated 28,929 signatures in support of a voter referendum on Ordinance No. 123542. This ordinance approves three agreements between the City of Seattle and the State of Washington regarding the design and construction of a deep bore tunnel to replace the Alaskan Way Viaduct. Seattle's governing body—the City Council and the Mayor—is responsible for enacting City ordinances, subject to the initiative and referendum powers. As City Attorney, I don't vote on or veto ordinances, and I am personally neutral regarding the ultimate choice for replacing the viaduct. My obligations as City Attorney are to ensure that the City complies with the law and to look out for the best interests of Seattle and its citizens. To that end, I have filed a Complaint for Declaratory Judgment in King County Superior Court to determine whether Ordinance No. 123542 is subject to Seattle's municipal referendum power. Since this issue is complicated, controversial and important, I want to explain what we're doing, and why.

Nature of the Referendum Power

The Seattle Charter creates a referendum power, meaning that most—but not all—City ordinances can be subject to a referendum vote. If a valid referendum petition has sufficient signatures, the challenged ordinance cannot go into effect until after a vote upholding it. The present referendum would accordingly delay the effective date of Ordinance No 123542 until after the August primary—even if the ordinance is ultimately approved. Some limits on the City's referendum power are spelled out in the Charter, while others are found in Washington State's case law. Two well-established limits by the courts include (1) the rule that the local government "referendum power extends only to matters legislative in character and not to merely administrative acts," e.g., Citizens for Financially Responsible Government v. City of Spokane, 99 Wn.2d 339, 347, 662 P.2d 845 (1983), and (2) the rule that powers delegated specifically to a local jurisdiction's governing body are not subject to the local referendum power, e.g., City of Sequim v. Malkasian, 157 Wn.2d 251, 265, 138 P.3d 943, 951 (2006). Both rules are included in the Complaint and addressed below.

Administrative Acts are not Subject to Referendum

City legislative bodies can take both administrative and legislative actions. "Administrative" in this sense doesn't mean the same as "administrative" rules enacted by an executive agency as opposed to the Legislature. Similarly, not all actions taken by "legislative bodies" are "legislative" as contemplated by the rule on referendums. The Washington Supreme Court has distinguished between the two types of actions by explaining that a power "is legislative in its nature if it

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prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." Citizens, 99 Wn.2d at 347 (quoting 5 E. McQuillin, Municipal Corporations § 16.55 (3d rev. ed 1981)).

With this definition in mind, consider that Ordinance No. 123542 is actually the third law passed regarding the proposed deep bore tunnel project:

- The Legislature passed the first law in early 2009, RCW 47.01.402. That law did not make a final decision to build the tunnel; rather, it directed the State to "take the necessary steps to expedite the environmental review and design processes to replace the Alaskan Way viaduct with a deep bore tunnel under First Avenue from the vicinity of the sports stadiums in Seattle to Aurora Avenue north of the Battery Street tunnel." That state law also contains some additional restrictions on the tunnel project, funding sources and limitations, and the infamous (but in my view unenforceable) cost overrun language.
- In October 2009, the City Council enacted Ordinance 123133, authorizing execution of a Memorandum of Agreement that "outlines the responsibilities of both the City and State and expectations about the role of each in the implementation and funding of the numerous [Alaskan Way Viaduct and Seawall Replacement] Program elements." That Memorandum of Agreement authorized the City and State to negotiate agreements to implement RCW 47.01.402(1) and Ordinance 123133. Ordinance 123133 also declared that "[i]t is the City's policy that the Alaskan Way Viaduct and Seawall Replacement… Program Bored Tunnel Alternative…is the preferred solution for replacing the existing Alaskan Way Viaduct."
- After October 2009, the City and State negotiated three agreements—two covering utilities and one covering other aspects of the project—that provide further details regarding the State's and City's rights and obligations during design and construction. Ordinance 123542—the subject of the present referendum—constitutes the City's acceptance of those three agreements.

It is important to note that no final decision has been made to proceed with the deep bore tunnel project. The state and federal Environmental Policy Acts (SEPA and NEPA) do not allow that decision to be made until after the final environmental impact statement (FEIS) is issued and considered. At this point, the tunnel is still legally a "preferred alternative," and we're still in what's called the "preliminary design" phase. All of the agreements that go beyond preliminary design work—including the State's agreement with its contractor and our three agreements with the State—are contingent upon the tunnel being finally selected following consideration of the FEIS and issuance of a "notice to proceed." This is explained in Section 2.3 of each of our agreements.

Based on my reading of the law, the history of this project, and these agreements, on balance I believe Ordinance 123542 is more likely administrative than legislative. By accepting these three agreements, the ordinance does not "prescribe[] a new policy or plan"; "it merely pursues a plan already adopted by the legislative body itself [i.e., the City Council], or some power superior to it [i.e., the state legislature]." The broad policy here—establishing the tunnel as the preferred alternative for replacing the viaduct—was set more than 16 months ago by the ordinance the City Council enacted in October 2009 and, before that, the state law from early 2009. This year's

ordinance—and the agreements it accepts—adds a great deal of detail to how the City and the State plan to go about building the tunnel if it's selected following the FEIS, but it doesn't change the basic policy decision that the tunnel is the City's preferred alternative. The tunnel was the preferred alternative at the end of 2009, and it will remain the preferred alternative after our three agreements go into effect.

Decisions Delegated to the Governing Body Cannot Be Decided by Referendum

As discussed, administrative acts are not subject to the local referendum power. Moreover, even legislative acts, if based on a local government power delegated directly to the governing body of a local jurisdiction, cannot legally be decided by a voter referendum. Local governments only have the powers delegated to them by the State. Most of those powers are delegated to local governments generally, but some are delegated specifically to the "governing body," "legislative body," or "legislative authority" of a local jurisdiction. Under state law, powers delegated like this may only be exercised by the City Council (subject to a veto and override) and are not subject to the initiative or referendum powers even if our charter or city law says they are. See., e.g., Malkasian, 157 Wn.2d at 261. Some parts of the City-State agreements at issue fall within powers delegated specifically to our governing body by RCW Title 47—the power to transfer City land to the State in connection with a state highway project.

Declaratory Relief Will Reduce Uncertainty and Save Time and Money

In Philadelphia II v. Gregoire, 128 Wn.2d 707, 911 P.2d 389 (1996), our state supreme court said the attorney general should seek a declaratory judgment from a court if he or she believes that an initiative is outside the scope of the State's initiative power. I read this as directing me to do the same when I believe that a proposed referendum is outside the scope of the City's referendum power. That's where we are: Either the ordinance is administrative or within a sphere of authority delegated by the State to our governing body, the referendum can't go forward, and the agreements are in effect, or the ordinance is legislative and not within a sphere delegated to our governing body, the referendum should go on the ballot, and the agreements can't go into effect until after a vote. I think the former is more likely, and a declaratory judgment now will spare the expense of a campaign overturned post-election. If the court disagrees, I'll support putting the referendum on the ballot as long as King County Elections confirms there are enough valid signatures.

This is just a summary of the administrative versus legislative and direct delegation legal issues. There is a significant body of case law on these issues, which will be further addressed when the City briefs the court next month. In the meantime, I've included a list of what I view as the most relevant cases at the end of this statement. I encourage anyone who is interested in this issue to read them and learn more about this area of state law.

There are several additional questions to address:

1. **Named Defendants.** The named defendants in our declaratory judgment action are (1) Protect Seattle Now, (2) Let's Move Forward, (3) the Washington Department of Transportation, (4) Scot Brannon, Protect Seattle Now's treasurer who signed the letter submitting the referendum petition, (5) Andrew Paxton, the Protect Seattle Now chair who signed the receipt for submittal of the petitions to the Clerk, and (6) Phil Lloyd, Let's Move Forward's secretary/treasurer. This isn't intended to stage this lawsuit as "us vs. them"; it's because declaratory judgment law requires us to bring everyone with a direct interest in this issue into the litigation. Protect Seattle Now and Let's Move Forward have both registered with Seattle's Ethics and Elections Commission as committees intending to advocate for and against the referendum; Brannon, Paxton and Lloyd are their official representatives; and WSDOT has an interest here because it's the other party to the three contracts that are dependent upon whether our ordinance is referable. Everyone will have a chance to make their case to the court. If any other parties believe they have an interest warranting involvement in our legal action, they may also seek to intervene.
2. **Timing of Declaratory Judgment Action.** I refrained from intervening sooner in order to avoid interfering with the referendum signature gathering process. The Charter gives referendum supporters a very short period of time to gather signatures. While I don't think this ordinance is subject to the City's referendum power, the referendum supporters only had one shot to gather the required number of signatures, and I wanted them to have the chance to do that without interference before I asked a judge to determine whether state law allows a public vote.
3. **Effect of Successful Referendum.** Since a referendum is only as broad as the subject ordinance, this would just be a referendum on three specific City-State agreements. It's not at all clear what would happen if a referendum stopped the three agreements—we could see anything from the State building the tunnel on its own to a movement towards a viaduct rebuild to a resurrection of surface-transit. If a court rules that the referendum can go on the ballot, and if the voters reject the three City-State agreements—two big "ifs"—we don't know how the State would respond. Keep in mind that not all tunnel opponents agree on what should replace the viaduct. Some support a rebuilt viaduct, and others support surface-transit, so it's hard to say how anyone in City or State government should or would interpret a "no" vote on the tunnel agreements. And if there's discussion of another advisory ballot, I think it would be significantly more useful if it included all options, preferably giving supporters of one specific viaduct replacement option the opportunity to state their second choices.

Finally, I want to be clear that my goal is to get this issue in front of a judge as quickly as possible so we can get an answer as quickly as possible. I'll support any proposals by the other parties to expedite this action as long as it gives everyone enough time to prepare legal briefs.

Administrative/legislative cases:

City of Port Angeles v. Our Water-Our Choice , 170 Wn.2d 1, 7, 239 P.3d 589, 592 (2010)

Bidwell v. City of Bellevue, 65 Wn. App. 43, 45, 827 P.2d 339, rev. denied 119 Wn.2d 1023 (1992)

Heider v. City of Seattle, 100 Wn.2d 874, 675 P.2d 597 (1984)

Citizens for Financially Responsible Government v. City of Spokane, 99 Wn.2d 339, 347, 662 P.2d 845 (1983)

Seattle Bldg. & Constr. Trades Council v. City of Seattle, 94 Wn.2d 740, 620 P.2d 82 (1980)

Leonard v. Bothell, 87 Wn.2d 847, 557 P.2d 1306 (1976)

Ruano v. Spellman, 81 Wn.2d 820, 505 P.2d 447 (1973)

Direct delegation cases:

City of Port Angeles v. Our Water-Our Choice!, 145 Wn. App. 869, 882, 188 P.3d 533, 539 (2008), aff'd 170 Wn.2d 1, 239 P.3d 589, (2010)

City of Sequim v. Malkasian, 157 Wn.2d 251, 265, 138 P.3d 943, 951 (2006)

Whatcom County v. Brisbane, 125 Wn.2d 345, 884 P.2d 1326 (1994)

Seattle Bldg. & Constr. Trades Council v. City of Seattle, 94 Wn.2d 740, 620 P.2d 82 (1980)

Process case:

Philadelphia II v. Gregoire, 128 Wn.2d 707, 911 P.2d 389 (1996)

Links to tunnel-related laws and ordinances

http://clerk.seattle.gov/~archives/Ordinances/Ord_123133.pdf
http://clerk.seattle.gov/~archives/Ordinances/Ord_123542.pdf
http://apps.leg.wa.gov/RCW/default.aspx?cite=47.01.402

Links to reference documents

Stipulation Among Some Parties and Order of Briefing Schedule for Motions of Summary Judgement, City of Seattle v. Protect Seattle Now

Complaint for Declaratory Judgment, City of Seattle v. Protect Seattle Now

Order Setting Civil Case Schedule, City of Seattle v. Protect Seattle Now

Seattle City Attorney on Seattle.Gov http://www.seattle.gov/law/newsdetail.asp?ID=11580&dept=9
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