Honorable Douglas North
February 22, 2013 @1:30 p.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19, Plaintiff, vs. CITY OF SEATTLE, a Washington municipal corporation; and KING COUNTY, a Washington county, Defendants. And WSA PROPERTIES III, LLC, a Delaware limited liability company, dba ArenaCo, Necessary Party.	No. 12-2-34068-4 SEA KING COUNTY CROSS-MOTION MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

King County moves for summary judgment dismissing the International Longshoreman and Warehouse Union's (ILWU's) State Environmental Policy Act (SEPA) challenge on grounds that: (1) the action was prematurely commenced; (2) speculative economic impacts alleged are insufficient to establish standing under SEPA; and (3) there is no merit to ILWU's claim that SEPA review was required before entering into challenged preliminary agreements.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

The County's motion is based upon the same facts and law that support the County's opposition to the ILWU's motion for summary judgment. In order to avoid repetition, in accordance with this Court's December 3, 2012 Stipulated Briefing Order, such discussion is combined in this single document.

II. STATEMENT OF FACTS

A. Overview

ArenaCo owns property located south of downtown Seattle on which it seeks to develop an arena facility to host an NBA Team, an NHL Team, and various events. The property owner has approached the City and County requesting that the governmental entities participate in its development and ownership of the arena.

To date, neither the City nor the County has made any commitment to approve or participate in the ArenaCo project. To the contrary, as agreements challenged by ILWU make clear, no such decisions will be made until after environmental, financial and civic impacts of the project are fully studied and considered.

The challenged December 3, 2012 Memorandum of Agreement among WSA Properties III, LLC, the City of Seattle and King County (the "MOU"); and December 3, 2012 Interlocal Agreement (the "Interlocal") between the City and County describe the procedures that will be undertaken to allow the City and County to make future decisions whether to take part in the project. The agreements also outline some of the business terms that would be included if the City and County elect to proceed. The agreements specify that if, following the completion of full, SEPA environmental review and satisfaction of many other contingencies, the City and County decide to participate, the actual terms of such participation will be reflected in future Transactional Agreements that have yet to be crafted. *Infra* at pp. 6-11.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

Environmental review was initiated prior to signing the MOU. A threshold determination of significance, requiring preparation of a SEPA environmental impact statement (EIS) was issued on October 25, 2012. Goldman Dec. at Ex. P. Such review is currently in the initial stages of determining the scope of impacts and alternatives to be considered as part of the EIS being prepared. *Infra* at p. 13.

Well before the Interlocal or MOU were executed[1], and even before ordinances authorizing their execution took effect, ILWU filed this action seeking to invalidate the agreements on grounds that preparation of a SEPA EIS was purportedly required before they could be signed.

B. Background Regarding the MOU and Interlocal.

1. May 22, 2012 Agreement Versions

Some background is necessary to place ILWU's claims in proper context. After preliminary discussions regarding his plan to bring a National Basketball Association (NBA) team back to the City of Seattle[2], private investor Chris Hanson submitted a written outline to the City of Seattle and King County of his concept for development of a state of the art, multi-purpose arena on property owned by ArenaCo – the company representing Mr. Hansen. Hill Dec. at Ex.B. Hansen proposed to raise over $500 million in private funds for development of the facility and to both purchase an NBA franchise and seek a partner to recruit an NHL team to new facility. *Id.* The plan included a number of very general principles limiting the nature of the public funding and participation in the project. *Id.*

[1] ILWU's motion incorrectly asserts that the agreements were signed on October 16, 2012. In fact, while the Mayor and Executive signed the authorizing ordinances on October 16, 2012, the challenged agreements themselves were not executed until December 3, 2012. Goldman Dec. at Ex's K and L.

[2] The Seattle Supersonics played in Seattle from 1967 to 2008. In 2006, the team was purchased by an Oklahoma-based group, which moved the team to Oklahoma City before the 2008-2009 NBA season.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

In order to facilitate private funding and NBA/NHL franchise commitments, the Hansen group urged the City and County to develop and execute agreements outlining contours of a proposed deal and procedures that would be undertaken in order to decide whether to participate. After further negotiation and study, on May 22, 2012, King County Executive Dow Constantine and Seattle Mayor Mike McGinn transmitted initial proposed ordinances to their respective councils seeking authorization to enter into: (1) an MOU with ArenaCo regarding its proposed development of the NBA/NHL arena, and (2) an Interlocal between the City and County, identifying their respective obligations as they relate to the MOU if the decision is later made to go forward with proposed arena development.

The initial May 22, 2012 MOU sets forth the basic terms of proposed, future Transactional Agreements among ArenaCo, the City and County with respect to the location, financing, ownership, management, operation and use of an arena, as proposed by Hansen. While the outlines of these proposed terms are described in the MOU at varying levels of detail, no actual agreements regarding such matters were made. Any agreement to participate would be reflected in subsequent Transactional Agreements that would be approved only after a decision is made to participate following completion of environmental review and satisfaction of other contingencies. Hill Dec. at Ex. K, MOU ¶¶ 5, 7 and 21(b). While the MOU commits to a review process for considering the ArenaCo plan, it fully embraces the City and County's obligation and intention to complete SEPA review before making any actual commitment to proceed.

The initially proposed May 22, 2012 Interlocal allocated the respective roles and responsibilities the City and County would assume with respect to arena-related review, acquisition, tax revenue and oversight if they ultimately decide to participate in the arena proposal. Consistent with the MOU, the Interlocal reaffirms that no agreement has been made by

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

the City of County to participate, and reiterates that City and County participation is subject to environmental and other review specified in the MOU. *Id.* at Interlocal §1, Recital C.

After further negotiations with ArenaCo, the City and County adopted ordinances authorizing the Mayor and Executive, respectively, to execute versions of the May 22nd Interlocal and MOU that differed from those that were initially transmitted to the City and County Councils. KC Ordinance 17395, *Id.* at Ex. K; Seattle Ordinance 123979, *Id.* at Ex. O. Because revised agreement iterations authorized by the City's ordinance were significantly different than those authorized by the County's, neither the City nor the County signed the agreements authorized by those ordinances. Instead, further discussions and revisions ensued.

2. December 3, 2012 Agreements

The City, County and ArenaCo continued to negotiate MOU and Interlocal terms in the weeks that followed. After further review and coordination, on October 15, 2012, the City and County Councils each adopted ordinances authorizing the execution of parallel, revised MOU and Interlocal versions. *Id.* at Ex's R and S. Among other revisions, the updated MOU version included more explicit language regarding SEPA responsibilities that must be carried out prior to the City or County committing to go forward with the plan and further clarified conditions precedent to making any County or City decision to participate in the project. The revisions additionally reaffirmed with unmistakably clarity that local government participation in the plan is contingent upon completion of future environmental review and exercise of applicable SEPA substantive authority to decline or revise proposed terms in order to address any environmental impacts. Details of the pertinent agreement terms are set forth in subsections 3(a) and (b) below.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

On October 16, 2012, Mayor McGinn and Executive Constantine signed their respective City and County ordinances authorizing execution of the agreements.[3] KC Ordinance 17433, *Id.* at Ex. S and Seattle Ordinance 124019, *Id.* at Ex. R. Following the effective date of these ordinances, the City, County and ArenaCo each executed the MOU on December 3, 2012. Goldman Dec. at Ex. K. On that same date, the City and County signed the related Interlocal, specifying their respective roles with respect to the MOU. *Id.* at Ex. L.

a. Memorandum of Understanding

This subsection summarizes pertinent sections of the December 3, 2012 MOU at issue.[4]

The MOU begins with a series of recitals acknowledging: ArenaCo's ownership of land located south of downtown Seattle and plan to develop and operate an arena thereon for the purpose of hosting an NBA team, an NHL team and other events, Goldman Dec. at Ex. K, ¶A; ArenaCo's plan that the City and County participate in development and ownership of the arena, *Id.* at ¶B; a joint advisory panel's recommendation that the City and County participate subject to "a number of important issues that should be addressed, *Id.* at ¶C; and the MOU's intent to establish a binding and enforceable process to complete necessary review, including environmental review, and to work in good faith to carry out the process and negotiate transaction documents consistent with the MOU. *Id.* at ¶D.

The MOU thereafter continues by setting forth a series of "Understandings."

[3] Pursuant to King County Charter 230.70, County Ordinance 17433 took effect and provided authority for signing the Agreements on October 26, 2012. Hill Dec. at Ex. S. Seattle Ordinance 124019 specified an effective date allowing for mayoral signature thirty days after the October 16, 2012 ordinance approval. *Id.* at Ex. R.

[4] Pages 6 and 7 of ILWU's motion include a series of bullet points that incorrectly characterize many of the MOU terms in efforts to suggest that the underlying deal being considered has been "cemented." For example, MOU Recital B indicates that ArenaCo has approached the City and County with a proposal to participate in development and ownership of the Arena – it does not indicate that Seattle and King County will participate, as ILWU indicates. While MOU Section 2 references ArenaCo's proposal to develop and operate the arena on the project site, ILWU fails to reference the rest of that section which provides that the "the City and County will evaluate this location and one or more alternative sites, and a 'no action' alternative as part of the SEPA review required in Section 5."

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

Section 1 indicates that the purpose of the MOU is to set forth basic terms of proposed agreements among the Parties with respect to the project, which terms will be memorialized in future agreements and other documents ("Transaction Documents"). Goldman Dec. at Ex. K, *§1.*

Section 2 identifies ArenaCo's proposed location for development and operation the Arena on its SODO property. The provision goes on the specify that

> In considering the City's and County's financial participation in the project, the City and County will evaluate this location and one or more alternative sites, and a "no action" alternative as part of the SEPA review described in Section 5.

Id. at §2.

Section 3 describes the proposed arena capacity, indicates uncertainty with respect to arena design and cost and generally assumes an aggregate project cost of approximately $500 million. *Id.* at §3(a). The Section additionally provides that ArenaCo will reimburse the City and County for expenses incurred in connection with development, execution and performance of the MOU, the Interlocal and other future agreements relating to the project. *Id* at §3(b).

Section 4 affirms ArenaCo's ownership of the proposed arena site and responsibility for obtaining necessary permits and approvals required to develop the project, "including but not limited to environmental review described in Section 5 [of the MOU]." *Id.*at §4.

Section 5 specifies that terms of the MOU and any future related obligations are subject to the completion of SEPA review and imposition of mitigation under SEPA and other laws.

> **SEPA.** The Parties acknowledge that the Project is subject to review and potential mitigation under various laws, including the State Environmental Policy Act, Chapter 43.21C of the Revised Code of Washington ("RCW"), and the state and local implementing rules promulgated thereunder (collectively, "SEPA"). Before the City and County Councils consider approval of the Umbrella Agreement and any Transaction Documents, the City and County will complete a full SEPA review, including consideration of one or more alternative sites, a comprehensive traffic impact analysis, impacts to freight mobility, Port terminal operations, and identification of possible mitigating actions, such as improvements to freight mobility, and improved pedestrian

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

> connections between the Arena and the International District light rail station, the Stadium light rail station, the SODO light rail station, and Pioneer Square. The City and County anticipate that alternatives considered as part of the SEPA review will include a "no action" alternative and an alternative site at Seattle Center. The City or County may not take any action within the meaning of SEPA except as authorized by law, and nothing in this MOU is intended to limit the City's or County's exercise of substantive SEPA authority. …

Id. at §5.

Section 7 acknowledges that, if the City and County determine to proceed with the project, the Parties will enter into a comprehensive "umbrella agreement" that includes certain Transaction Documents in substantially final form as exhibits and incorporate conditions precedent substantially in the form required in Sections 24 and 25 of the MOU.

Sections 8 and 9 describe future conveyance and leasing arrangements that would be undertaken if the City and County decide to go forward with the plan. The transaction is structured around a lease lease-back development as authorized by RCW Chapter 35.42. Section 8 provides that the City would initially purchase the project site from ArenaCo following execution of the Umbrella Agreement and satisfaction of the applicable conditions precedent. The City would then ground lease the site to ArenaCo for a thirty-year period. Section 9 specifies that ArenaCo would construct its arena facility and lease the facility back to the City and County with an option to purchase. The City and County would then either continue to lease the facility from ArenaCo or exercise the option to purchase the facility outright. Under either ownership arrangement, the City and County would enter into an Arena Use Agreement with ArenaCo of not less than thirty years in duration. The Use Agreement, described in MOU section 15, would affirm ArenaCo's sole responsibility for day-to-day operations, expenses and costs for maintenance and repairs.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

Section 10 describes City-County public financing arrangements for site acquisition and the option to purchase the arena that would follow, if the City and County elect to go forward, capping the public contribution at $145 million (payable if only an NBA team is to use the arena) to $200 million (if both NBA and NHL teams are to use the arena) in what is expected to be a $500 million project.

Section 11 provides that a $40 million SODO Transportation Infrastructure Fund will be established if the City and County decide to go forward. The fund would be for transportation improvements to protect port operations and improve freight mobility, pedestrian safety, transit, and traffic management in the SODO area, above and beyond transportation mitigation required by the project's permitting and SEPA process.

Section 12 indicates that that, if the City and County determine to go forward, ArenaCo will install and own all tenant improvements, including seats, suite furnishings, offices, locker rooms, press areas, basketball floor, ice-making systems and equipment, sound systems, scoreboards, concession equipment, training equipment, and other items. These items will become the property of the City and County upon the termination of the Arena Use Agreement.

Section 13 Arena outlines the terms of a long term Arena Use Agreement that would be negotiated and executed if the City and County opt to go forward, , including rights to revenue, rental payment obligations guarantees and security for rent, insolvency protections, options and demolition upon expiration of the use agreement, and the flow of arena tax revenues.

Section 14 identifies what ArenaCo's responsibility would be for capital improvements and repairs.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

Section 15 summarizes what the day to day operational and maintenance responsibilities of ArenaCo would be and requires ArenaCo to enter into license agreements mandating 30-years of use and non-relocation by an NBA team.

Section 16 outlines ArenaCo's responsibilities with respect to arena design, construction and notice to the City and County, and provides opportunity for related City and County input. The section further assigns sole responsibility for design, permitting and construction costs and insurance to ArenaCo; and indicates that design standards must be sufficient to meet NBA and NHL standards and applicable federal, state and local government requirements.

Section 23 outlines a number of additional ArenaCo rights and obligations, including a requirement to reimburse the City and County for the cost of conducting an independent, economic impacts analysis that examines the net economic impacts of the construction and operation of the Arena, including: (a) the net changes in employment, wages, economic activity and tax revenues; (b) the net effects on Port of Seattle economic activity; (c) the net effects on the overall regional economy and the Arena's compatibility with regional economic development plans; and (d) the net effects on women-owned and minority-owned businesses; and

Section 24 forcefully reaffirms that the City and County have no obligation to participate in the development and operation of the arena, and that such obligation shall arise only if they determine to proceed after considering full SEPA EIS review and satisfying a number of other detailed conditions precedent, including the following:

> a. Before the Umbrella Agreement and Transaction Documents may be authorized as described in Section 24.e below, (i) ArenaCo has arranged for all financing or other funding necessary to fully finance or fund the Project; and (ii) the City and County and their respective councils reasonably determine they are satisfied that ArenaCo and its investors have the resources to meet their financial obligations….

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

> b. SEPA and Permitting. Before the Umbrella Agreement and Transaction Documents may be authorized…(i) SEPA review associated with any City or County actions as described in Section 5 of this MOU has been completed through issuance of a Final Environmental Impact Statement; (ii) the master use permit and all other permits required for construction of the Project have been obtained; (iii) the City and County and their respective councils have considered the SEPA review in connection with their respective actions and have determined whether it is appropriate to proceed with or without additional or revised conditions based on the SEPA review; and (iv) any challenges to the Project have been resolved in a manner reasonably acceptable to the Parties.…
>
> c. The City and County shall have determined, in their reasonable discretion, that the condition of title to, and the environmental condition of, the Property is suitable for acquisition and subsequent development for the Arena Facility consistent with this MOU….
>
> d. ArenaCo or a third party under contract with ArenaCo has secured (i) ownership rights to an NBA franchise and (ii)…the rights to the "Sonics" name … and that NBA franchise and the Parties have entered into a non-relocation agreement….
>
> e. The Umbrella Agreement and the Transaction Documents have been negotiated and the City and County are authorized by their councils to execute the documents.…
>
> g. The [Economic Impact] Analysis required by Section 23.g of this MOU has been completed and the City and County and their respective councils have considered the Analysis and have determined whether it is appropriate to proceed with or without additional or revised conditions based on the Analysis….

Id. at §24.

Section 25 sets forth permitting and financing assumptions that serve as conditions precedent for ArenaCo's decision whether to go forward as proposed.

b. The Interlocal Agreement

This subsection summarizes pertinent sections of the challenged December 3, 2012 Interlocal Agreement. Goldman Dec. at Ex. L.

Section 1 includes a series of recitals, acknowledging in part that: ArenaCo has proposed development of a multi-purpose sports and entertainment facility, Recital A; the plan is subject to review and potential mitigation under SEPA and other laws, Recital C; "[b]efore the City and

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

County Councils consider approval of the Umbrella Agreement and any Transaction Documents, the City and County will complete a full SEPA review, consistent with the MOU, including specifically Section 5, 7 and 24," Recital C*;* and the purpose of the Interlocal to establish their respective rights and responsibilities in the event the Arena is developed, Recital E. *Id.* at §1.

Section 4 details what the City and County rights and responsibilities would be with respect to the acquisition of the property and development and acquisition of the proposed arena pursuant to the MOU, if the City and Count elect to go forward. *Id.* at §4.

Section 5 delineates what the City and County MOU-related financing limitations and obligations would be, if they elected to proceed. *Id.* at §5.

Section 7 outlines governance responsibilities of the parties and decision making procedures regarding oversight and administration of arena-related matters and decisions concerning the arena, arena funds and arena facility agreements. The section additionally sets forth the process for preparation and consideration of the economic impact analysis that is provided for in the MOU. *Id.* at §7.

Section 10 indicates that management and decision making for the SODO Transportation Infrastructure Fund described in the MOU will be determined by the City and County in a separate interlocal agreement. *Id.* at §10.

Section 11 makes clear that "[t]he City and County will enter into a lead agency agreement and will coordinate with one another so that full SEPA review is completed for the respective actions of the City and County." *Id.* at §11.

C. ILWU Files Suit

On October 23, 2012, several weeks before the MOU or Interlocal were signed, and prior to the relevant City or County authorizing ordinances taking effect, ILWU filed this action for

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

declaratory and injunctive relief. In essence, the suit alleges that SEPA prohibited execution of the agreements until completion of the EIS that is now underway. ILWU accordingly seeks an order nullifying the agreements on grounds that they allegedly violate SEPA.

It is not clear what SEPA-relevant, environmental interest ILWU has in the challenged agreements. The Complaint generally outlines the important role that the union plays in the Port of Seattle's competitive cargo and cruise operations and the unique understanding ILWU has of the challenges facing their jobs and Port operations. While acknowledging that SEPA mandates consideration of environmental factors, the only harms ILWU alleges it would endure as a result of execution of the MOU and Interlocal are financial. As discussed in the standing section below, even these allegations of economic harm relating to the challenged agreements are speculative.

D. Environmental Review Process Actively Underway.

The City has been actively undertaking environmental review of the arena proposal as the SEPA lead. On October 25, 2012, several weeks before the MOU and Interlocal were executed, the City issued a SEPA threshold determination and scoping notice, indicating that an EIS was being prepared and inviting comments regarding the nature of impacts and alternatives that should be included in the study. Hill Dec. at Ex. U.

ILWU has been actively participating in this EIS scoping process, making many of the same arguments to City SEPA staff that it raises in this case regarding impacts to port operations and the nature of alternatives that should be included in the EIS study. *Id.* at Ex's V and Y. The City is currently in the process of considering these and other scoping comments.

III. STATEMENT OF ISSUES

1. Whether ILWU's challenge should be dismissed because it was prematurely commenced.
2. Whether ILWU's challenge should be dismissed because plaintiff lacks standing.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

3. Whether ILWU's challenge should be dismissed because SEPA review was not required prior to execution of the MOU or Interlocal.

IV. EVIDENCE RELIED UPON

The County's cross-motion and opposition to plaintiff's motion are based upon the Declaration of G. Richard Hill with attached exhibits; and the files and records herein.

V. ARGUMENT

A. ILWU's SEPA Claim was not Ripe When Filed.

On October 18, 2012, plaintiff commenced this action, seeking to challenge the December 3, 2012 MOU and Interlocal. Apparently, ILWU mistakenly believed that the agreements were in effect and capable of being challenged on October 16, 2012, which was the day that the Mayor and Executive signed respective City and County ordinances authorizing execution of the agreements. In fact, neither the MOU nor the Interlocal was executed until December 3, 2012, over six weeks after this action was filed and served. Ordinances authorizing execution of the agreements were likewise not in effect at the time ILWU commenced this action. King County Ordinance 17433 took effect on October 26, 2012, and Seattle Ordinance 124019 took effect on November 15, 2012. *Supra* at fn. 3; Hill Dec. at Ex's R and S.

ILWU's premature effort to challenge agreements that were not in place at the time its action was filed should be dismissed on ripeness grounds. Efforts to challenge the MOU and Interlocal before they were even executed runs afoul of the black letter ripeness principle that non-final acts are not yet reviewable. *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 106, 38 P.3d 1040, 1047 (2002) ("A claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, **and the challenged action is final**.") (emphasis added).

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

The ripeness doctrine is designed to prevent premature judicial intervention in matters that have not yet been finalized. *See Friends of Viretta Park v. Miller,* 87 Wn.App. 361, 383, 940 P.2d 286 (1997). The principle that an act not yet taken is not ripe for judicial review is particularly well-established in the context of claims made under SEPA. SEPA claims may be adjudicated only in connection with review of a final decision on the underlying action considered. RCW 43.21C.075(6)(c) makes clear that any judicial review under SEPA must "be of the governmental action together with its accompanying environmental determinations." This provision precludes judicial review of SEPA compliance until final agency action on the proposal. *State v. Grays Harbor County,* 122 Wn.2d 244, 250, 857 P.2d 1039 (1993) (SEPA determinations are judicially reviewable only after final agency decision is made).

In this case, the challenged MOU and Interlocal execution had not occurred and was not final at the time this action was commenced. Moreover, ordinances authorizing execution of the agreements were not even effective when ILWU initiated its lawsuit. *Supra* at fn. 3. This action should accordingly be dismissed on grounds that it was prematurely filed.

Argument by ILWU that its premature filing should be excused because agreements it sought to challenge were ultimately executed, albeit several weeks after the complaint was filed, should be rejected. A court determines whether a claim is ripe at the time that a complaint is filed. *Callfas v. DCLU*, 129 Wn.App. 579, 597-98, 120 P.3d 110 (2005) (premature claim not rendered justiciable by fact that City took final action while action was pending); *Malama Makua v. Rumsfeld,* 136 F.Supp.2d 1155, 1161 (D.Haw. 2001) (ripeness measured at the time an action is instituted). Though ILWU has been aware of the actual December 3, 2012 signing date, Goldman Dec. at ¶10, it did not seek to amend its action to include a timely challenge to

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

December 3, 2012 agreements. Absent a final action at the time ILWU filed its complaint, this action is not ripe for review and should be dismissed.

B. ILWU Lacks Standing to Challenge SEPA Compliance.

This action should likewise be dismissed because ILWU fails to meet applicable standing criteria, which allow only "persons aggrieved" to obtain judicial review of SEPA matters. RCW 43.21C.075(4). *Trepanier v. Everett*, 64 Wn.App. 380, 382, 824 P.2d 524 (1992). A two part test governs the determination of whether a person is aggrieved for purposes of standing: (1) the endangered interest alleged must fall within the zone of interests protected by SEPA, and (2) the person must allege an injury in fact. *Kucera v. DOT*, 140 Wn.2d 200, 212, 995 P.2d 63 (2000).[5] ILWU fails to satisfy either prong of this test.

1. ILWU's Claim is Outside the Zone of Interests Protected by SEPA.

ILWU's alleged interests are not within the zone of interests protected by SEPA. The zone of interest inquiry looks to whether the asserted harm is within the scope of matters that the relevant statute intends to protect. "SEPA is concerned with 'broad questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources.'" *Property Rights Alliance v. Snohomish County*, 76 Wn.App. 44, 52–53, 882 P.2d 807 (1994).

"It is well established that purely economic interests are not within the zone of interests protected by SEPA." *Kucera*,140 Wn.2d at 212. *See* W*AC* 197-11-448(3)(SEPA does not require review of methods of financing proposals, economic competition, profits and personal income

[5] This two-part standing test also applies to and bars ILWU's constitutional writ and declaratory judgment claims. *See Harris v. Pierce County*, 84 Wn.App. 222, 230-233, 928 P.2d 1111 (1996)(constitutional writ); *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 302-03, 268 P.3d 892 (2011) (UDJA).

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

and wages, and social policy analysis). Courts have not hesitated to dismiss SEPA claims for lack of standing where the harm alleged is economic. *See e.g. Harris v. Pierce County*, 84 Wn.App. 222, 230-31, 928 P.2d 1111 (1996)(concern regarding possibility of property being condemned not in SEPA zone of interests); *Property Rights Alliance,* 76 Wn.App. at 52–53 (concern over property values, property taxes, effects of property restrictions on property value, and cost of transportation facilities outside zone of interests protected by SEPA); *Concerned Olympia Residents v. Olympia*, 33 Wn.App. 677, 681, 657 P.2d 790, 792 (1983) (alleged loss of profit upon sale of property insufficient to support SEPA standing).

The interests ILWU asserts in this case are likewise economic rather than environmental. ILWU represents Port of Seattle workers who are concerned with the hypothetical impact of ArenaCo's plan on competitive port contracts and associated jobs. Complaint at ¶¶ 3–5 and 10-13. Setting aside the speculative link between reduced trade and the essentially procedural agreements being challenged, such economic factors are outside the zone of environmental interests SEPA seeks to protect and are thus insufficient to support ILWU's standing.

2. ILWU Does Not Demonstrate an Injury in Fact.

Even if, for sake of argument, ILWU's assertion of potential economic harms was with the zone of interest protected by SEPA, such impacts are purely speculative and do not satisfy the "injury in fact" element of standing analysis. To establish an "injury in fact" under SEPA, ILWU must show that the challenged agreements will cause them "specific and perceptible harm." *Kucera*, 140 Wn.2d at 213. Where, as here, ILWU alleges a threatened rather than an existing injury, it "must also show that the injury will be 'immediate, concrete and specific'; a conjectural or hypothetical injury will not confer standing." *Suquamish Indian Tribe v. Kitsap County*, 92 Wn.App. 816, 829-831, 965 P.2d 636 (1998).

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

In this case, no reasonable argument can be made that the agreements themselves result in any immediate, concrete and specific impact to ILWU or its members. ILWU's allegation of harm is instead grounded in conjecture that the agreements create momentum to enter into future agreements with actual impacts. The speculative assumption that momentum from the challenged agreements will cause the future agreements to be signed cannot, however, be reasonably squared with unequivocal language in the agreements themselves, which makes clear that no decision to go forward will be made until after full environmental review is completed.

The prospect of injury conjectured by ILWU in this case is far more attenuated than instances that have elsewhere been deemed by courts too conjectural and speculative to establish a requisite injury in fact. *See Harris*, 84 Wn.App. at 231-32 (no "injury in fact" where ordinance identified specific possibility for future condemnation but did not determine with certainty whether and to what extent any property would actually be condemned); *Trepanier*, 64 Wn.App. at 383-84 (bare assertion that reduction of density in city would force new development into unincorporated county insufficient to demonstrate requisite injury in fact); *Property Rights Alliance*,76 Wn.App. at 44 (no injury in fact where only speculation regarding future effects of county-wide planning decision). Here, neither the MOU nor the Interlocal commits the City or County to any particular outcome or mandates any particular result with respect to the ArenaCo proposal. The agreements here explicitly reserve any decision to go forward for a later date, following completion of full environmental review and satisfaction of other MOU contingencies.

Speculation that momentum from the agreements will cause the City and County to enter into future agreements to participate in the arena proposal is insufficient to demonstrate any immediate, specific injury. Because ILWU suffers no "injury in fact" as a result of the challenged agreements, it lacks standing, and this action should be dismissed.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

C. EIS was not Required before Executing MOU or Interlocal.

1. Standard of review.

The City and County are entitled to deference in the review of ILWU's challenge to the appropriate timing of SEPA review.[6] While legal issues regarding the interpretation of SEPA and its rules are reviewed de novo, *Klickitat County Citizens v. Klickitat County*, 122 Wn.2d 619, 632-633, 860 P.2d 390, 398 (1993), here the issue turns on the application of law to a particular set of facts: the appropriate timing of environmental review within a particular, complex development context. Judicial review is accordingly governed by "clearly erroneous" standard. *See Clallam County Citizens v. Port Angeles*, 137 Wn.App. 214, 225, 151 P.3d 1079 (2007) (clearly erroneous standard governs review of determination that action is exempt from SEPA); *Anderson v. Pierce County*, 86 Wn.App. 290, 302, 936 P.2d 432, 439 (1997) (agency's selection of SEPA review process and protection reviewed under clearly erroneous standard). A matter is considered "clearly erroneous" when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Wenatchee Sportsman v. Chelan County*, 141 Wn.2d 169, 176, 4 P.2d 123 (2000). Under this standard, the court does not substitute its judgment for that of the decision-making body, but is to "examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision." *Rural Residents v. Kitsap County*, 141 Wn.2d 185, 196, 4 P.3d 115 (2000).

Even if, for sake of argument, review of ILWU's SEPA challenge was de novo, substantial deference is still afforded to the City and County.

---

[6] "Selection of environmental review process and protection is left to the sound discretion of the appropriate governing agency, not this court." *Anderson v. Pierce County*, 86 Wn.App. 290, 302, 936 P.2d 432, 439 (1997). Subject to WAC 197-11-070 restrictions on taking actions that either have an adverse environmental impact or limit the choice of reasonable alternatives, agencies have the option of identifying "the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis." WAC 197-11-055(2)(b).

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

> In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of a requirement, or the adequacy of a 'detailed statement', the decision of the governmental agency shall be accorded substantial weight.

RCW 43.21C.090. *See Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447 (1990) (while legal question of EIS adequacy is subject to de novo review, court gives agency "substantial weight"); *Clallam County Citizens*, 137 Wn.App. at 224-25 (determination that proposal is categorically exempt is a finding that environmental review is not required and is given substantial weight). Pursuant to this RCW section, in ILWU's attack regarding the absence of an EIS requirement before executing the challenged agreements, City and County decisions are accorded substantial weight.

2. General SEPA Background.

SEPA reflects a public policy of assuring the integration of environmental values and consequences in state agency and local government decision making. RCW 43.21C.030. In order to further this aim, the Act requires that agencies

> include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment a detailed statement on: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

RCW 43.21C.030(2)(c).

This requirement that a "detailed statement" be prepared for "major actions" with significant environmental impacts is implemented through Department of Ecology rules, which provide direction regarding the type and timing of environmental review required under SEPA. *See* WAC Ch. 197-11. Among other matters, such rules outline the process for determining whether an

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

environmental impact statement (EIS) is required for a given action. WAC 197-11-330 ("EIS is required for … major actions significantly affecting the quality of the environment.").

The EIS analyzes probable, significant, adverse environmental impacts of proposed actions and alternatives. *Id.* It additionally provides a framework for governmental entities to exercise substantive SEPA authority to condition or deny a proposed action in order to mitigate its environmental impacts. *See e.g.* WAC 197-11-660.

Decisions whether an EIS is required are made through a SEPA "threshold determination" process. If a proposed action is found to have probable significant adverse environmental impacts, a threshold "determination of significance" is issued, triggering the requirement for preparation of an EIS. Alternatively, for proposed actions that are deemed to not have probable significant adverse environmental impacts, SEPA review is satisfied by the issuance of a threshold "determination of non-significance," and no EIS is required. WAC 197-11-340.[7]

Not all governmental activities are subject to SEPA threshold determination and EIS requirements. *See* Richard L. Settle, *The Washington State Environmental Policy Act: A Legislative and Policy Analysis* §12.01 at 12-1 (2012)("Only 'proposals' for 'actions' by 'agencies' are potentially subject to SEPA's threshold determination and EIS requirements."). In addition, certain categories of actions are expressly exempted from SEPA review due to the fact that they are, by their very nature, not likely be major actions significantly affecting the quality of the environmental. RCW 43.21C.110(1)(a). WAC 197-11-800 *et. seq*. (listing SEPA categorical exemptions).

SEPA rules generally require implementation of the SEPA process prior to making decisions of environmental consequence. WAC 197-11-055 indicates that a threshold

[7] While not at issue here, SEPA rules also authorize a third form of threshold determination, a mitigated determination of nonsignificance, in which features of a proposal are modified or conditioned so as to avoid its probable significant environmental impacts. WAC 197-11-350.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

determination and EIS shall be prepared "at the earliest possible point in the planning and decision-making process, when the principle features of a proposal[8] and its environmental impacts can be reasonably identified." The section goes on to clarify that "[a]ppropriate consideration of environmental information shall be completed **before an agency commits to a particular course of action**," and that "[p]reliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis." WAC 197-11-055(2)(emphasis added). These rules are in keeping with limitations and allowances expressed elsewhere in SEPA rules. WAC 197-11-310 indicates that proposals that both meet the definition of "action" and are not categorically exempt require preparation of a SEPA threshold determination. For such actions, SEPA limits activities that may be taken before the environmental review process is finalized to those that would **not have an adverse environmental impact or limit the choice of reasonable alternatives**. WAC 197-11-070(1) (emphasis added). Preliminary steps, such as issuing requests for proposals, securing options or developing an application for a proposal, are allowed so long as they do not have adverse environmental impacts or limit the choice of reasonable alternatives. WAC 197-11-070(4).

3. EIS not Required Prior to Executing MOU and Interlocal

ILWU's argument that an EIS was required before executing the MOU and Interlocal largely turns on incorrect assumptions: (a) that the agreements are SEPA "actions" subject to SEPA review requirements; and (b) that the agreements will have an adverse environmental impact or limit the choice of reasonable alternatives. For reasons described below, neither assumption is accurate.

[8] "A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the environmental effects can be meaningfully evaluated." WAC 197-11-784.

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

a. MOU and Interlocal are not SEPA "Actions"

Execution of the MOU and Interlocal was not an "action" that is subject to SEPA EIS requirements. SEPA applies to certain "actions" as that term is defined in WAC 197-11-704. *Magnolia Neighborhood Planning Council v. Seattle*, 155 Wn.App. 305, 313, 230 P.3d 190 (2010). *See* WAC 197-11-310 ("threshold determination is required for any proposal that meets the definition of action and is not categorically exempt…"). The term "action" is defined to include both project and non-project decisions. WAC 197-11-704. "Project actions" involve a decision on a specific project such as a construction or management activity located in a defined geographic area. Such actions "include and are limited to" agency decision to:

> (i) License, fund or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract. [or]
>
> (ii) Purchase, sell, lease, transfer or exchange natural resources, including publically owned land, whether or not the environment is directly modified.

WAC 197-11-704(2)(a). *See Magnolia Neighborhood Planning Council*, 155 Wn.App. at 308-309 (city approval of plan for residential development of property, which binds city's use of the property upon federal approval, is a project action and is therefore subject to SEPA). By contrast, "nonproject actions" involve decisions on policies, plans, or programs, including in pertinent part:

> (i) The adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling use or modification of the environment; [or]…
>
> (iii) The adoption of any policy, plan, or program that will govern the development of a series of connected actions (WAC 197-11-060), but not including any policy, plan, or program for which approval must be obtained from any federal agency prior to implementation…

WAC 197-11-704(2)(b).

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

The challenged MOU and Interlocal are plainly not "actions" as SEPA defines these terms. The agreements neither include any agency decision to license, fund, undertake an activity that will modify the environment nor approve the purchase, sale, lease or transfer of natural resources. They likewise do not adopt development standards, plans, policies or programs that will govern later decisions regarding the project. Indeed, the agreements do not purport to commit the parties to any substantive aspect of ArenaCo's proposed development.

To the contrary, the MOU and Interlocal set forth a binding and enforceable process that parties will follow to further evaluate whether to participate in a proposed project whose primary business terms are to be included in later Transactional Documents. Goldman Dec. at Ex's K and L. Actual decisions whether to participate are subject to rigorous conditions precedent, including unambiguous contractual mandates that SEPA review be completed prior to taking any SEPA action and that discretionary SEPA authority be exercised to determine whether to proceed, with or without conditions that differ from those in the MOU.

> **SEPA.** The Parties acknowledge that the Project is subject to review and potential mitigation under various laws, including the State Environmental Policy Act, Chapter 43.21C of the Revised Code of Washington ("RCW"), and the state and local implementing rules promulgated thereunder (collectively, "SEPA"). Before the City and County Councils consider approval of the Umbrella Agreement and any Transaction Documents, the City and County will complete a full SEPA review, including consideration of one or more alternative sites, a comprehensive traffic impact analysis, impacts to freight mobility, Port terminal operations, and identification of possible mitigating actions, such as improvements to freight mobility, and improved pedestrian connections between the Arena and the International District light rail station, the Stadium light rail station, the SODO light rail station, and Pioneer Square. The City and County anticipate that alternatives considered as part of the SEPA review will include a "no action" alternative and an alternative site at Seattle Center. The City or County may not take any action within the meaning of SEPA except as authorized by law, and nothing in this MOU is intended to limit the City's or County's exercise of substantive SEPA authority. …

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

Id. at Ex. K, MOU at §5. The fact that full environmental review will occur before any decision to participate is made by the City or County is reaffirmed throughout the MOU. Section 2 of the MOU requires that "[i]n considering the City's and County's participation in the Project, the City and County will evaluate the location and one or more alternative sites, and a 'no-action' alternative as part of the SEPA review described in Section 5." Section 7 specifies that the future Transactional Documents/Umbrella Agreement "will incorporate conditions precedent substantially in the form set forth in [MOU] Sections 24 and 25…." In turn, MOU Section 24 provides that the obligations of the City and County under the MOU are expressly conditioned upon seven requirements, including the following condition precedent:

> Before the Umbrella Agreement and Transaction Documents may be authorized …(i) SEPA review associated with any City or County actions as described in Section 5 of this MOU has been completed through issuance of a Final Environmental Impact Statement; (ii) the master use permit and all other permits required for construction of the Project have been obtained; (iii) the City and County and their respective councils have considered the SEPA review in connection with their respective actions and have determined whether it is appropriate to proceed with or without additional or revised conditions based on the SEPA review; and (iv) any challenges to the Project have been resolved in a manner reasonably acceptable to the Parties.

Id. at §24(a). *See also* Hill Dec. at Ex S, Ordinance 17433, Statement of Facts 8 and 12 (SEPA review will be completed, will include consideration of reasonable alternatives and will be considered before determining whether to proceed with or without revised conditions).

The Interlocal acknowledges and incorporates these same understandings and limitations. The purpose of the Interlocal is to establish the rights and responsibilities of the City and County if, and only if, a decision is made to go forward with development of the Arena. Section 1 acknowledges at the very outset that the plan is subject to review and mitigation under SEPA, and that "[b]efore the City and County Councils consider approval of the Umbrella Agreement and any Transaction Documents, the City and County will complete a full SEPA review,

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

consistent with the MOU, including specifically Section 5, 7 and 24 [of the MOU]…." Goldman Dec. at Ex. L, Interlocal §§1 and 11.

The authority under SEPA to undertake such early agency planning and preliminary activities parallels the approach that is applied in the National Environmental Protection Act (NEPA) context.[9] Like SEPA, NEPA allows agencies to proceed with initial decisions prior to committing to a proposal. *See Andrus v. Sierra Club*, 442 U.S. 347, 351-52 (1979) (NEPA requirement to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values" is satisfied when review is conducted before the "go-no go" stage of a federal project). *See also Metcalf v. Daley* 214 F.3d 1135, 1143 (9th Cir. 2000) (NEPA study required "before any irreversible and irretrievable commitment of resources" is made); *Center for Environmental Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1006 (9th Cir. 2011) (NEPA review required before "go-no go" stage of a project, …before "making an irreversible and irretrievable commitment of resources").

In essence, the agreements at issue here set forth a process for making future decisions on the proposed action that is described therein. No commitment to go forward has been made. Unlike cases relied upon by ILWU, each of which discusses SEPA study requirements where a SEPA action had been taken,[10] neither agreement here reflects any actual agency decision on the

[9] Washington courts commonly look to NEPA cases in order to construe related SEPA provisions. *PUD Dist. No. 1 v. Pollution Control Hearings Bd.*, 137 Wn.App. 150, 158, 151 P.3d 1067 (2007).

[10] Cases cited by ILWU do not suggest that SEPA review is required even when no decision is being made on any action. *See Magnolia Neighborhood Planning Council*, 155 Wn.App. at 308-309 (SEPA study required for city **decision on action to approve property development plan** will bind city's use of the property upon federal approval is subject to SEPA); *King County v. Black Diamond*, 122 Wn.2d 648, 664, (1993)(city's **decision on annexation action** requires SEPA study of resulting development that is unquestionably likely); *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 119 508 P.2d, 166 (1973)(SEPA study required for **decision on water use permit action**); *Loveless v. Yantis*, 82 Wn.2d 754, 763, 513 P.2d 1023 (1973)(SEPA study required for **decision on action to approve preliminary subdivision application**).

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

underlying proposal they describe. Execution of the agreements was neither a project nor non-project action and was therefore not subject to SEPA EIS requirements. ILWU's claim that an EIS was required is accordingly without merit and should be dismissed.

b. The MOU and Interlocal do not have adverse environmental impact or limit the choice of reasonable alternatives.

The lack of any action requiring prior environmental review in this case is further emphasized as a matter of law by the timing requirements embedded in SEPA, which make clear that execution of the MOU and Interlocal was not precluded because neither agreement has an adverse environmental impact or limits the choice of reasonable alternatives. WAC 197-11-055(2)(c) specifies that "[a]ppropriate consideration of environmental information shall be completed **before an agency commits to a particular course of action**." (emphasis added). In keeping with the notion that SEPA review must be available when decisions of environmental consequence are taken, WAC 197-11-070 prohibits agencies from taking an "action" on a proposal before SEPA review is completed if it will have an adverse environmental impact or limit the choice of reasonable alternatives.

> Until the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would: (a) Have an adverse environmental impact; or (b) Limit the choice of reasonable alternatives.

WAC 197-11-070(1). This provision further clarifies that SEPA "does not preclude developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal, as long as such activities are consistent with subsection (1)." WAC 197-11-070(4).

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

i. Agreements do not have adverse environmental impact.

Neither the MOU nor Interlocal has any adverse environmental impact. As previously indicated, the agreements do not purport to decide either that the arena project may go forward or that the City and County will participate in the proposed development. While ILWU contends that such impacts result from the sheer momentum approval of these agreements creates, such argument is explicitly refuted by forceful contractual language reiterated throughout the agreements that no decision to participate is made thereby and that any such decision is to be made only after full environmental review is completed and other express contingencies are satisfied. *Supra* at pp. 6-11.

This circumstance stands in marked contrast to cases referenced by ILWU, in which courts have reaffirmed SEPA's requirement to evaluate the probable future impact (i.e., the "snowballing effect") of challenged "actions" taken. In *Black Diamond*, the Court required that SEPA consider the probable impacts of future development that was unquestionably likely as a result of a **city's decision to annex a rural area**. 122 Wn.2d at 648. *See also* fn. 10 supra. *Magnolia* essentially reaffirms this notion, holding that SEPA requires that impacts of a **city's approval of a detailed land use development plan** to be considered despite the fact that implementation hinged on future federal agency approval. 155 Wn.App. at 316-17 ("once adopted by the federal government [the approved development plan] … **will bind** the City as to its use of that property")(emphasis added). Both cases simply acknowledge that, before an early, binding decision on a land use action is taken that gives rise to future development, the impact of that probable future development must be evaluated before it is too late to meaningfully control.

Unlike circumstances in *Black Diamond* and *Magnolia*, there is no snowballing effect from agreements that do not make any decision to develop the Arena or otherwise to commit to a

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

course of action. Contract terms make clear that parties are not obligated to go forward with the proposal -- and that the proverbial cart is still behind the horse and proverbial snowball has yet to begin any downhill roll. ILWU's assertion that the agreements create an unstoppable momentum that will inevitably lead to development of the arena is thus legally unsupportable.

ILWU's suggestion that SEPA review was required due to the degree of detail included in the agreements is similarly off the mark. SEPA acknowledges the fact that "preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis." WAC 197-11-055(2)(a)(ii). Indeed, the sorts of detailed preliminary activities explicitly identified in SEPA rules as allowable are closely analogous to the agreements at issue here. SEPA "does not preclude developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal.…" WAC 197-11-070(4). Like the challenged MOU and Interlocal, such option agreements and RFPs commonly include extensive detail regarding terms of possible future action. Such activity, defining the framework for future decisions, is expressly allowed by SEPA, so long as it does not have an adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-055(1) and (4).

ii. Agreements do not limit the choice of reasonable alternatives.

Execution of the MOU and Interlocal similarly did not limit the choice of reasonable alternatives relating to proposed arena development. ILWU's contrary argument is based upon a misreading of the MOU as limiting the EIS to review of ArenaCo's proposed site and one alternative site at the Seattle Center. In fact, while the MOU sets forth alternatives that must be included in the EIS, it does not purport to restrict review to only these alternatives. *See Goldman Dec. Ex. K*, MOU at §2 (in addition to studying ArenaCo's proposed project site, "the City and

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

County will evaluate … one or more alternative sites, and a 'no action' alternative as part of the SEPA review required in Section 5."); and at §5 ("City and County will complete a full SEPA review, including consideration of one or more alternative sites,…. The City and County anticipate that alternatives considered as part of the SEPA review will include a "no action" alternative and an alternative site at Seattle Center.").

While ILWU contends that the Agreements effectively function as a site selection decision, by including particular focus on proposed development south of downtown Seattle, the agreements are clear that no decision is made in the MOU to authorize or otherwise participate in proposed development at that location or elsewhere. "Designation of the proposal as the preferred alternative or benchmark for alternatives analysis is commonplace and allowed by SEPA rules." Settle, *The Washington State Environmental Policy Act: A Legislative and Policy Analysis* §14.01 at 14-60. See e.g. WAC 197-11-440(5)(c)(v).

In any event, ILWU's argument regarding the nature of alternatives that must be considered in the EIS is neither ripe nor legally sound. Review under SEPA must "be of the governmental action together with its accompanying environmental determinations." RCW 43.21C.075(6)(c). This provision bars judicial review of SEPA compliance until final agency action on the proposal. *Grays Harbor County*, 122 Wn.2d at 250. ILWU will have ample opportunity to raise its issues regarding the adequacy of EIS alternatives, after environmental review is competed and associated SEPA actions are taken. Until such time, its claims are premature.

ILWU's premature argument regarding the nature of required EIS alternatives is also meritless. Unlike public project SEPA review, an EIS for a "private project on a specific site," does not require an evaluation of off-site alternatives when, as in this case, the proposed use is

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

allowed under existing zoning. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 12, 38 (1994). WAC 197-11-780 defines "private project" to mean "any proposal primarily initiated or sponsored by an individual or entity other than an agency." While ArenaCo's proposal qualifies as a private project, the private-public project distinction argued by ILWU is of no real significance here because the MOU makes clear that that the EIS will nonetheless consider offsite alternatives. ILWU's further assertion that the EIS must consider alternatives outside the City of Seattle is incorrect. Even if ArenaCo's proposal was properly characterized as a "public project," SEPA rules would not require alternatives outside of the City. *See CAPOW v. Auburn,* 126 Wn.2d 356, 367, 894 P.2d 1300(1995) (EIS study of public action did not require analysis of alternatives outside the city).

VI. CONCLUSION

For reasons set forth above, King County respectfully requests that ILWU's motion for summary judgment be denied and that defendants' cross-motions be granted.

VII. PROPOSED ORDER

A proposed order is attached to this motion.

DATED this 23rd day of January, 2013 at Seattle, Washington.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: S/ Michael J. Sinsky_____
MICHAEL J. SINSKY, WSBA #19073
Senior Deputy Prosecuting Attorney
DEVON SHANNON, WSBA # 34534
Senior Deputy Prosecuting Attorney
Attorneys for King County
W400 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Ph: (206) 296-9015
Fax: (206) 296-0191
Email: mike.sinsky@kingcounty.gov

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191