The Honorable Douglas North
Oral Argument: February 22, 2013 at 1:30 P.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

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

I. INTRODUCTION

If there ever was a case in which the proverbial SEPA cart was put before the horse racing to the finish line, this is it.

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When faced with determining whether it is appropriate to commit significant public resources for a long term commitment to permit, construct, purchase, and lease a large-scale and expensive arena, Washington's State Environmental Policy Act, Ch. 43.21C RCW, ("SEPA") mandates that government bodies approach their decision with minds open to more than pre-conceived proposals and that the decision-makers be fully informed as to the ramifications of project approval as well as reasonable alternatives *prior* to taking action.

WSA Properties, III, LLC ("ArenaCo"), through its principal, Chris Hansen, approached the Mayor of Seattle in Spring 2011 with a proposal to enter into a new public-private partnership for the construction and operation of a new NBA arena in the SODO neighborhood of Seattle. Without stopping to consider the environmental and economic impacts of such a proposal on the Port and industrial area, Seattle, and eventually King County, launched into an intensive series of confidential negotiations resulting ultimately in the Seattle City Council and King County Council taking action authorizing the Mayor and Executive to enter a binding, complicated, and long-term Memorandum of Understanding ("MOU") and Interlocal Agreement ("ILA") providing ArenaCo precisely what it wanted: an arena in SODO.

While the MOU commits the parties to preparing an environmental impact statement ("EIS") before the final Arena site is approved, the complicated and long-term commitments made in the MOU dictate that the EIS will be little more than a costly ritual without real practical effect. By approving the MOU and ILA, the City and County have released the proverbial "snowball" that will result in virtually unstoppable political momentum to approve the Arena on the SODO site.

Because construction of a third major sports facility in SODO will result in significant environmental impacts to the human and built environment, including impacts to traffic and

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freight mobility, and because there are likely reasonable alternative locations that should be considered in detail by Seattle and King County *before* making *any* public commitments, the International Longshore and Warehouse Union, Local 19 ("ILWU") seeks this Court's declaratory ruling that the City and County's actions approving the MOU and ILA *prior* to completion of an EIS violated SEPA and are consequently null and void.

II. RELIEF REQUESTED

ILWU seeks an order granting summary judgment and declaring that the City and County's actions approving the MOU and ILA *prior* to completion of an EIS violated SEPA and are consequently null and void.

III. STATEMENT OF FACTS

The facts in this case are straight-forward, undisputed, and serve as stepping stones to the principal legal issues in this important public project case.

A. Chris Hansen's Offer to Build an Arena in SODO

In July 2008, after several years of ownership fights and litigation over their contractual duty to remain in Seattle, the Seattle Supersonics left for Oklahoma City and became the Oklahoma Thunder. In the Spring of 2011 Christopher Hansen, a Seattle-born hedge fund manager and San Francisco resident approached the Mayor of Seattle, Michael McGinn, with an offer to return the NBA to Seattle: in a public-private partnership with approximately 40 percent public financial participation, he would purchase an NBA team and build a new arena in Seattle's SODO neighborhood.[1]

To enable the City to negotiate with Mr. Hansen, and unbeknownst to the Seattle City Council or public, Mayor McGinn hired a New Jersey-based sports consultant, Carl Hirsh. The

[1] Complaint and Def. Seattle, King County, and ArenaCo Answer ¶ 21.

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Mayor's office agreed to compensate Mr. Hirsh for these services at a rate of $19,500 per month for approximately four (4) months, or $58,500 (plus travel and expenses). The total contract amount was below $250,000, the level requiring City Council approval. Declaration of Peter Goldman ("Goldman Decl.") ¶ 2, Exs A-C. In addition, in September 2011, Seattle hired Seattle lawyer Hugh Spitzer to serve as bond counsel to enable financing of the SODO Arena. Goldman Decl. ¶ 3, Ex. D.

Confidential negotiations continued with Mr. Hansen and his consultants until approximately mid-May 2012.[2] During this time, Seattle and King County officials and Mr. Hansen and their respective consultants met confidentially in person and by phone, Goldman Decl. ¶ 4, Ex. E, and the City had a "preferred site" in mind. Goldman Decl. ¶ 5, Ex. F.

Concurrently with negotiating with the City and County, Mr. Hansen was quietly purchasing properties in SODO under and adjacent to the proposed arena site for the arena itself, parking, and related structures and improvements. As of today's date, Mr. Hansen has purchased (or has options to purchase) multiple properties for the SODO Arena.[3] Although the project has not yet gone through Seattle's land use approval process, Mr. Hansen now evidently owns much of the land and parking required for the arena. Mr. Hansen' investor group reportedly paid approximately $53 million for these properties, between 40 and 500 percent greater than fair market value for like-kind property. Goldman Decl. ¶ 6, Ex. G. One article boasted about an "eye-catching" price of $21.6 million for a building that was valued 20% lower just a month earlier. Goldman Decl. ¶ 7, Ex. H. As reflected in a staff email, Seattle City officials were

[2] Complaint and Def. Seattle, King County, and ArenaCo Answer ¶ 22.
[3] Complaint and Def. Seattle, King County, and ArenaCo Answer ¶ 23.

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clearly aware that Hansen was purchasing property for an arena at the same time they were negotiating with him over location and financial terms. Goldman Decl. ¶ 8, Ex. I.

B. The Memoranda of Understanding

Negotiations between Hansen, Seattle and King County concluded in mid-May, 2012. Energized by "Bring Back Our Sonics" fanfare, Mayor McGinn, Executive Dow Constantine, and Chris Hansen called a major press conference on May 16, 2012, in order to "detail a pair of agreements between the City, County, and ArenaCo to govern the financing of a proposed new multi-purpose arena in Seattle's Stadium District." The agreements included an initial MOU dated May 18, 2012. Goldman Decl. ¶ 9, Ex. J. [4] This initial May 18 MOU explicitly designated the Arena's "Location" and "Project Site" to be on the First Avenue site in SODO and contained extensive and complex terms pertaining to public investment, revenue sharing and dedication, public security, and joint design review.

Since legislative authority was necessary for the Mayor and Executive to sign the MOU, the Mayor and County Executive forwarded the May 18 MOU to the Seattle and King County Councils. After several joint and separate public hearings and extensive behind-the-scenes negotiations between individual councilmembers and Chris Hansen and his consultants, the Councils approved a *revised* MOU (dated October 9, 2012) on October 15, 2012, and authorized the Mayor and County Executive to sign it.[5] The Mayor and Executive signed the MOU in a signing ceremony on October 16, 2012, and, evidently, again on December 3, 2012.[6] Goldman Decl. ¶ 10, Exs. K and L.

[4] The MOU rolled out at the May 16 press conference was dated May 18, 2012. An amended MOU approved by the Seattle and King County Council on October 16, 2012 and signed by Mayor McGinn and Executive Constantine on December 3, 2012 substantially modified the May version.
[5] King County Answer ¶ 17 (citing Seattle Ordinance No. 12409; King County Ordinance No. 17433).
[6] Seattle Answer ¶ 17; King County Answer ¶¶ 2, 16, 17.

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The final MOU contains complex and extensive terms governing the proposed public-private partnership. The principal terms cementing the deal are as follows:

- ArenaCo purchased land in the SODO industrial neighborhood of Seattle for purposes of constructing a new "multi-purpose sports and entertainment facility." MOU, at 1, Recital A.

- Seattle and King County will "participate in the development and ownership of the Arena on the Project Site." MOU, at 1, Recital C.

- The MOU contains the essential business terms of the deal, was binding and enforceable on all parties, and establishes the process by which the parties will move forward towards signing the final Transaction documents. MOU, at 1, Recital D.

- ArenaCo is "proposing to develop and operate the Arena on the Project Site," which is on First Avenue in Seattle's SODO neighborhood. MOU, at 1-2, Recitals A. and § 2.

- The arena will be approximately 700,000 square feet and accommodate up to 19,000 attendees. MOU, at 2, § 3(a).

- Seattle and King County will collectively use $200 million in their respective municipal bonding authority and invest this money in an initial 30 year partnership with ArenaCo. MOU, at 7, § 13(a). Specifically, Seattle will make a $120 million contribution and King County will invest $80 million, subject to acquisition of an NHL hockey team.

- ArenaCo will reimburse Seattle for up to $5 million in "development" costs for Seattle's administrative work towards the project. ArenaCo will additionally pay $150,000 to study the future of the Key Arena. MOU, at 2, § 3(b).

- ArenaCo will design, finance, and construct a state-of-the-art 18,000 person arena on the First Avenue site in SODO and purchase an NBA team. MOU, at 23, § 16(a)1.

- ArenaCo will initially purchase the land for the arena. MOU, at 3 (§ 4). ArenaCo will then sell Seattle this land at "fair market value" and Seattle will, in turn, ground-lease it to ArenaCo for $1 million a year for an initial 30 year term with four (4) five (5) year options to renew. MOU, at 3-4, §§ 8-9; 7, § 13(a).

- Seattle and King County will purchase the arena from ArenaCo for $200 million (MOU, at 5 (§ 10)) and have the right to "sell" it back to ArenaCo for $200 million at the expiration of the Use Agreement. MOU, at 15, § 13(j)(i).

- ArenaCo will lease the arena back from Seattle at an initial rate of $4 million per year. MOU, at 7, § 13(a).

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- Seattle and King County will have "reasonable on-going input" relative to the design of the Arena and "ArenaCo will fully and fairly review and make good faith efforts to address satisfactorily" the City and County's "reasonable" design terms. MOU, at 22, § 16.

- ArenaCo will conduct day-by-day operations of the Arena. MOU, at 19, § 15(a).

- ArenaCo will make a $2 million annual contribution into a capital improvement account. MOU, at 18, § 14.

- ArenaCo will fund a "SODO Transportation Infrastructure Fund" in the amount up to $40 million to fund "transportation improvements in the area south of downtown Seattle." MOU, at 6, § 11(a) and (b).

- Seattle and King County will have the right to use the Arena no fewer than 12 times per year so long as any proposed date does not conflict with an official arena event. MOU, at 21, § 15(c).

- ArenaCo will make up to $7 million available to immediately remodel Key Arena and Key Arena will be made available as a temporary home for the new NBA team until the Arena is completed. MOU, at 26, § 17. ArenaCo will fund a Key Arena "repurposing" study in the amount of $150,000. MOU, at 2, §3(b).

C. Promise to Conduct Post-MOU SEPA Review of the Arena Proposal

It is undisputed that the construction of an arena-sized building requires review under the SEPA and that Seattle has agreed to prepare an "EIS" for the proposal and *not* use the SEPA fast-track process known as the "Determination of Non-Significance." Before Mayor McGinn and Executive Constantine signed the MOU, Plaintiff's counsel advised Seattle and King County in writing to cease further development of it; counsel reasoned that project-level SEPA review had *already* been triggered for the proposed arena because the City and County had been presented with a "proposal" to construct a *public* project. Goldman Decl. ¶ 11, Exs. M-N. Seattle and King County, however, rejected these comments and concluded that no SEPA review

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was required *before* signing the MOU. In a letter dated August 13, 2012, Seattle and King County wrote as follows:

> The City and County reaffirm that the Arena project will receive extensive SEPA review. However, such review is not required prior to the execution of the MOU. By entering into the MOU, the City and County would not be undertaking or binding themselves to any action that would have an environmental impact or that would limit the choice of reasonable alternatives.

Goldman Decl. ¶ 12, Ex. O.

Seattle and King County insisted they were in compliance with SEPA by including a provision in the MOU providing that SEPA review of ArenaCo's proposal to construct the Arena in SODO would be conducted in a *future* EIS. Section 5 of the MOU provides as follows:

> **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. Consistent with Section 4 of this MOU, ArenaCo will reimburse the City for the costs incurred by the City as part of the SEPA review and will be responsible for funding any required mitigation imposed through SEPA substantive authority.

Goldman Dec., Ex. K (MOU) at 3, §5.

Although Section 5 of the MOU purports to reserve final site selection to the Seattle and King County Councils *after* an EIS was completed, in two significant ways the MOU places sideboards on the *scope* of the Arena's EIS: it affirms the SODO site as the "Project Site." *Id.* at

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1 (Recital A); and it specifies that only *one* alternative site—at the Seattle Center—will be considered as an alternative site (in addition to a "no-action" alternative). *Id.* at 3, § 5. In addition, the MOU contains no explicit acknowledgement that the Arena is a "*public* project" under SEPA and that Seattle and King County will commence a process under WAC 197-11-060. Finally, the MOU contains no business terms pertaining to the construction of the Arena on any alternative site in the region.

On October 25, 2012, Seattle issued a Determination of Significance for the Arena proposal, assumed "lead agency" status, and commenced the "scoping" process. Goldman Decl. ¶ 13, Ex. P. "Scoping" involves the identification of a project's impacts and the potential alternatives that will be analyzed in the EIS. Seattle's EIS scoping notice mirrored Section 5 of the MOU. It announced that the "proposal" was to construct an arena on the "Project Site" in SODO and that the EIS would only analyze a Seattle Center and "no-action" alternative. The scoping period ended on November 30, 2012.

The MOU also kicked off an ArenaCo public "design review process" with the City of Seattle Department of Planning and Development. This included ArenaCo's release of several potential architectural renderings of the SODO arena and public hearings before Seattle's Design Commission. Goldman Decl. ¶ 14, Ex. Q.

D. Environmental Issues

Because Seattle is preparing an EIS for the Arena, the environmental issues (and their potential mitigation) implicated by the Arena will theoretically be vetted in that document. However, it is important to note that *momentum* generated by the MOU raised genuine environmental concerns voiced by numerous businesses and trade associations. These include the Port of Seattle, the Manufacturing Industrial Council of Seattle, the Washington State Freight

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Mobility Strategic Investment Board, the Seattle Freight Advisory Board, the Pacific Merchant Shipping Association, the Seattle Marine Business Coalition, the Seattle Planning Commission, the Washington State Transportation Commission, Burlington Northern Santa Fe Railway Co., the Seattle Mariners, the Port of Moses Lake, and the Washington Public Ports Ass'n. Goldman Decl. ¶ 15, Ex. U-EE.

IV. STATEMENT OF ISSUES

1. SEPA requires preparation of a threshold determination or EIS at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified. Once the City and County were presented with ArenaCo's proposal to enter into a public-private partnership for the construction and operation of an arena in the SODO neighborhood should the City and County have begun preparation of an EIS *prior* to negotiating and approving the terms of a long-term binding MOU and ILA that envisions the Arena in SODO?

2. SEPA prohibits government agencies from taking action prior to completion of an EIS where the action will set in motion a construction proposal that could have an adverse environmental impact. By approving the MOU and ILA, did Seattle and King County take action that will result in a SODO-based Arena snowballing forward with virtually unstoppable administrative and political momentum that could lead to significant adverse environmental impacts?

3. SEPA prohibits government agencies from taking action prior to completion of an EIS where the action limits the choice of reasonable alternatives. Because the MOU limits review of alternative locations to *only* the proposed SODO location and the Seattle Center (with

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no Eastside King County alternative), did the City and County's action approving the MOU limit the choice of reasonable alternatives?

V. EVIDENCE RELIED UPON

This motion relies upon the Complaint for Declaratory Judgment and Injunctive Relief; the previously filed Answers thereto; and the Declaration of Peter Goldman.

VI. ARGUMENT

A. Standard of Review

The issues before this court require interpretation of a statute – specifically, whether SEPA required preparation of an EIS *prior* to the City and County's entry into the MOU and ILA. The standard of review for interpretation of a statute is *de novo*. *Glasser v. City of Seattle*, 139 Wn. App. 728, 736, 162 P.3d 1134 (2007); *Dioxin/Organochlorine Ctr. V. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 352-53, 932 P.2d 158 (1997).

B. SEPA Should Be Liberally Construed and Vigorously Enforced

The State Environmental Policy Act (SEPA) is Washington's most fundamental and pervasive environmental law. Richard L. Settle, *The Washington State Environmental Policy Act: A Legal Policy and Analysis* ("*Settle*") § 1.25 at p. 1-39 (Rev. 24, Dec. 2012). The statute contains both procedural requirements and substantive authority. Procedurally, the statute requires the integrated use of environmental values in the decision making by all state and local agencies. RCW 43.21C.030(2)(a). Substantively, SEPA grants governmental agencies the authority to use the environmental documentation to condition, and even deny, projects and governmental actions based upon environmental impacts. RCW 43.21C.060.

The principal vehicle for assuring that environmental factors are fully considered in governmental decision making is the EIS, which is required to be prepared for all major actions

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significantly affecting the quality of the environment. RCW 43.21C.030(2)(c). Because complete and accurate information is a prerequisite to sound environmental action, the requirements of SEPA have been construed liberally.

The Washington Supreme Court has declared unequivocally that SEPA is to be given "broad and vigorous construction." *Eastlake Community Council v. Roanoke Associates, Inc.*(*Eastlake*), 82 Wn.2d 475, 490, 513 P.2d 46 (1973). SEPA's policies and mandates are both forceful and demanding.[7] As the court noted in the often-cited language from *Eastlake*:

> To fulfill these purposes of restoring ecological health to our lives, SEPA *mandates* governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters. The procedural duties imposed by SEPA - - full consideration to environmental protection - - are to be exercised to the fullest extent possible to insure that the "attempt by the people to shape their future environment by deliberation, not default" will be realized. In view of this clear legislative mandate . . . SEPA [is to] be given a broad and vigorous construction.

82 Wn. 2d at 490 (emphasis in original, internal citations omitted). *See also, West Main Associates v. City of Bellevue*, 49 Wn. App. 513, 518, 742 P.2d 1266 (1982).

While SEPA itself does not compel environmentally wise choices, its ultimate purpose, is to provide decision-makers – in this case the City and County - with all relevant information

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[7] Far from merely hortatory, SEPA demands full governmental attention and makes it the "continuing responsibility" of all agencies of the state, including its local governments, to "use all practicable means" to "improve and coordinate" their "plans, functions, programs and resources to the end that the state and its citizens may":

> (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> (b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
> (c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
> (d) Preserve important historic, cultural, and natural aspects of our national heritage;
> (e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;
> (f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
> (g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

RCW 43.21C.020(2).

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about the potential environmental consequences of their actions and to provide a basis for a reasoned judgment that balances the benefits of a proposed project against its potential adverse effects. *Citizen Alliance to Protect our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300. Consistent with this purpose, "SEPA mandates governmental bodies consider the total environmental and ecological factors to the fullest in deciding major matters." *Eastlake Comm'ty Coun. v. Roanoke Assocs*., 82 Wn.2d 475, 490 (1973). These considerations must be integrated into governmental decisionmaking processes so that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical consideration." RCW 43.21C.030(2)(b); *Eastlake*, at 492.

C. SEPA Mandates Timely and Early Consideration of Impacts

SEPA mandates consideration of the environmental review "at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *King County v. Washington State Boundary Review Board for King County and the City of Black Diamond ("Black Diamond")*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993); *Magnolia Neighborhood Planning Council v. City of Seattle ("Magnolia")*, 155 Wn. App. 305, 317, 230 P.3d 190 (2010); *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 118, 508 P.3d 166 (1973); *Loveless v. Yantis*, 82 Wn.2d 754, 765-66, 513 P.2d 1023 (1973); WAC 197-11-055(1). In order to effectuate this mandate, the SEPA rules set out the follow requirements for timely environmental review:

> (2) **Timing of review of proposals.** The lead agency ***shall*** prepare its threshold determination and environmental impact statement (EIS), if required, ***at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.***

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> (a) 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.
>
> (i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.
>
> (ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.
>
> (b) Agencies shall identify the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis. Agencies may also organize environmental review in phases, as specified in WAC 197-11-060(5).
>
> (c) **Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action**.

WAC 197-11-055(2)(emphasis added).

Once the EIS is prepared it must "accompany the proposal through the existing agency review processes" so that officials will use it in making decisions. RCW 43.21C.030(2)(d); WAC 197-11-655.

D. Public Project SEPA Review Was Required Prior to the Councils' Respective Approval of the MOU

1. The Arena is a "public project" because the roles of the government and the Arena private investors are "intertwined" under SEPA Rule WAC 197-11-928 and public project SEPA case law

The SEPA provisions applicable to "public projects" vary significantly from those applicable to private projects. First, agencies proposing public projects have a duty to consider a no-action *and* an off-site alternative. WAC 197-11-440(5)(d); *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 38-39, 873 P. 2d 498 (1994). Second, SEPA requires proposals for "public

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projects" to be described in terms of *objectives* rather than solutions. WAC 197-11-060(3)(a)(iii).

Although Seattle and King County may contend the proposed Arena is a private project under SEPA, it is quite clearly a proposal for a *public* project. WAC 197-11-928 provides as follows:

> When the proposal involves both private and public activities, it shall be characterized as either a private or a public project for the purposes of lead agency designation, depending upon whether the primary sponsor or initiator of the project is an agency or from the private sector. *Any project in which agency and private interests are too intertwined to make this characterization shall be considered a public project*…(emphasis added).

In addition, SEPA defines a "private project" as "any proposal primarily initiated or sponsored by an individual or entity other than an agency." WAC 197-11-780.

The proposed SODO arena has overwhelming features of a *public* project and it is clearly not sponsored "primarily" by a private individual or entity. While ArenaCo proposes to construct and own the Arena (for at least 30 years), the City of Seattle agreed in the MOU to *purchase* the real estate underlying the Arena and *lease* that land to ArenaCo for a period of 30 to 50 years. In addition, the City and King County jointly propose to provide $200 million in City/County bond financing (secured by the full faith and credit of the city and county and dedicated Arena revenues and personal guarantees) for the land purchase and/or the Arena construction. Seattle also reserved the right to purchase the Arena from ArenaCo for $200 million 30 years down the road. The City and County are also participating in the design of the Arena and a complex MOU governs ArenaCo. and the City and County's financial relationship, revenue sharing, and default procedures. While ArenaCo may have "initiated" the Arena proposal (proposing it to the City in May 2011), the roles and actions of the government and

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ArenaCo are clearly financially, contractually, and functionally "intertwined" within the plain meaning of WAC 197-11-928. Accordingly, if substance is to prevail over form, the proposed Arena is, in all respects, a public project for purposes of SEPA.

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 873 P. 2d 498 (1994) is the seminal case on public versus private projects under SEPA. In *Weyerhaeuser*, a private waste hauling company ("LRI") sought to construct a new municipal solid waste landfill near Puyallup, Washington. At the behest of Pierce County, LRI initiated and sponsored the project, selected the landfill site, applied for permits, made project decisions, and financed these actions with its own funds. *Weyerhaeuser*, 124 Wn.2d at 39. Because of these private actions, Pierce County and LRI argued that the proposed landfill was a private project for purposes of relieving Pierce County of any duty to consider off-site alternative locations. *Id*.

The Washington Supreme Court, however, held that the proposed landfill was a *public*, not a private, proposal. The court reasoned that the County had encouraged LRI and others to develop the landfill because landfills are typically a governmental function. *Id*. The court held that a public project cannot be made into a private project simply because the government delegated waste hauling and filling—a typical governmental function—to a private entity. *Weyerhaeuser*, 124 Wn.2d at 40. *See also Organization to Preserve Agricultural Lands v. Adams Cy*., 128 Wn.2d 869, 876, 913 P. 2d 793 (1996) ("the classification [of whether a project is public or private] rests not on nominal sponsorship but on a factual assessment of the level of public involvement in the project"). The key issue is "whether the governmental entity has, by means of the project at issue, allowed a private entity to fulfill the government's responsibility" in providing a public service. *OPAL*, 128 Wn.2d at 877.

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As set forth above, Seattle and King County are active participants in financing and developing the proposed Arena: they will be using their municipal debt to finance its construction, Seattle will purchase the private land under the Arena and lease it to ArenaCo, Seattle has reserved a purchase option, and the Arena's revenues from operation will pay off public debt. King County too is involved in promoting this project because King County will invest $80 million in the project if an NHL team can be recruited. Both Seattle and King County are, moreover, parties to a contract with the Arena developer and ArenaCo is essentially building the Arena *for* the City and County to acquire years down the road. *OPAL*, 128 Wn. 2d at 876. Indeed, cities and counties regularly build public arenas and stadiums on their own or through special "districts" (for, example Safeco Field, Qwest Field, and Key Arena). In conclusion, the Arena proposal is for a "public project" and its review under SEPA should have adhered to the public project provisions in SEPA.

2. **A "proposal" for a *public* project existed as soon as the City and County were presented with ArenaCo's proposal to form a public/private partnership to build a new arena in SODO.**

The law could not be more clear: under the plain terms of the applicable SEPA regulations, a "proposal" exists "at that stage in the development of an action 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. Here, there can be no reasonable dispute that the City and County had "a proposal" for a *public* project before them when they signed the MOU.[8] Indeed, a "proposal" existed in spring 2011 when ArenaCo's agent, Chris Hansen, approached Seattle's mayor with an offer to purchase an NBA team and build a new arena in Seattle's SODO

[8] A proposal "includes both actions and regulatory decisions of agencies." WAC 197-11-784.

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neighborhood in a public-private partnership with approximately 40 percent public financial participation.[9] Under the plain language of WAC 197-11-055(2), therefore, the City and County were required to begin their SEPA review process at that point in time *before* entering into extensive private negotiations and certainly before entering into a binding MOU and ILA. At *that* point in time, there existed: a "proposal" (a new arena); a specific preferred location (SODO); the principal features of the proposal and its environmental impacts could be reasonably identified (e.g. anticipated use, traffic, and impacts are certainly measurable); and the City and County knew that the proposal required both governmental action (public financing) and government regulatory decision (permitting).

The City and County's argument that SEPA review was not necessary before approving the MOU because the proposed arena will receive *future* SEPA EIS review is simply wrong. WAC 197-11-055(2)(a)(i) expressly provides that, "The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts." Because the "principal features" of the proposal were known and because its environmental impacts could have been "reasonably identified" the City and County were required to begin preparation of the EIS before any further action. WAC 197-11-055(2)(a).

3. At a minimum, SEPA review was required prior to entering into the MOU because of the unstoppable momentum the MOU would generate in favor of a SODO site

Defendants may argue that WAC 197-11-055(2)(a)(ii) contemplates certain "preliminary steps or decisions" prior to conducting SEPA review and that this included the preliminary

[9] Complaint and Def. Seattle, King County, and ArenaCo Answer ¶¶ 21-22.

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negotiations. But once the City and County knew the preferred arena location and that it would require a private/public partnership, the action was "sufficiently definite to allow meaningful environmental analysis." WAC 197-11-055(2)(a)(ii). Defendants certainly had sufficient information to complete the SEPA process prior to entering into the "binding and enforceable" MOU. "Appropriate consideration of environmental information ***shall be completed before*** an agency commits to a particular course of action." WAC 197-11-055(2)(c). Further, WAC 197-11-070 prohibits government agencies from taking certain action until the final EIS is complete:

> (1) 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 government agency that would: (a) Have an adverse environmental impact***; or (b) Limit the choice of reasonable alternatives.

WAC 197-11-070(1).

Defendants may also argue that the MOU constituted only a preliminary step and that approval of the MOU does not itself result in adverse environmental impacts. This argument turns SEPA's "stop, look, and listen" purpose on its head. Indeed courts have repeatedly confirmed that SEPA review must be completed *before* any government action – especially where that action may snowball into unstoppable political momentum. In *Black Diamond*, for example, the Washington Supreme Court reviewed the City of Black Diamond's action approving a SEPA Determination of Nonsignificance ("DNS") for a proposed annexation. The City argued that the proposed annexation was simply a non-project "map change" and that "any future development of the property is speculative and thus not suitable for full environmental review." 122 Wn.2d at 662. The City argued that this was particularly true where no "official proposals have been submitted to Black Diamond for development of the annexation property." *Id*. The court soundly rejected the City's reasoning:

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> One of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land-use changes would occur as a direct result of a proposed government action. Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

122 Wn.2d at 664 (internal citations omitted, emphasis in original). The court concluded:

> We therefore hold that a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action.

Id.

Similarly, in *Magnolia*¸ Division I of the Court of Appeals reviewed a decision by the City of Seattle approving the Fort Lawton Redevelopment Plan ("FLRP") allowing for the construction of a housing community on the former Army Reserve Center at Fort Lawton/Discovery Park. While the City recognized that the eventual building of the FLRP could have significant environmental impacts, it deferred environmental review and preparation of an EIS until it actually applied for rezoning or land use permits. 155 Wn. App. at 310-311.

The Magnolia Neighborhood Planning Council sued the City seeking declaratory judgment that the City failed to conduct SEPA review and consider the impacts of the ultimate build-out of the FLRP prior to approving the plan. The City argued that full SEPA review was premature because the FLRP was only a plan and itself did not approve development permits.

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Division I agreed with the Neighborhood Council that the City's approval of the FLRP was precisely the type of action that would have the "snowballing effect" described in *Black Diamond. Magnolia*, 155 Wn. App. at 316-17. The court pointed out specifically the detailed description of the ultimate development within the FLRP including the number of residential uses and layout. The court also recognized that by approving the FLRP, the City was committing to the Department of Defense that if the property was transferred to the City the City would develop it as described in the FLRP. *Id.*

Here, unlike in *Black Diamond* and *Magnolia*, the City and County did not even prepare an initial environmental checklist or threshold determination before first negotiating and then approving the MOU. The City and County conducted absolutely no SEPA review but instead blindly moved forward with complex long term negotiations and an even longer term binding MOU and ILA.

Moreover, approval of the MOU and ILA, as in *Black Diamond* and *Magnolia*, will likely set in motion a project that will undoubtedly " 'snowball' and acquire virtually unstoppable administrative inertia." *Black Diamond*, 122 Wn.2d at 664. For example:

- the MOU clearly gave the SODO site enough "momentum" for ArenaCo to retain an architect, design an arena, and initiate a public "design review" process with the City of Seattle..
- the MOU provided enough confidence to ArenaCo in the SODO-sited project to commence "shopping" for an NBA team.
- The then-pending MOU provided enough momentum for ArenaCo to acquire co-investors.

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It all comes down to this: considering ArenaCo's generous terms, the heavily-negotiated terms of the MOU, the elaborate proposed building, the NBA team-recruitment process the MOU spawned, along with Mr. Hansen's repeated statements that no other site in the region is acceptable to him, can anyone reasonably say that, after a perfunctory EIS is completed, members of the Seattle and King County Councils would not be under tremendous political pressure to vote for siting the Arena in SODO? No, and that's why the court should hold the MOU violated fundamental principles of SEPA.

E. SEPA Requires Consideration of Off-Site Alternatives for Public Projects

One of the primary reasons that an EIS was required early, before *any* commitments were made, is that the proposed arena is a "public project" and therefore requires consideration of off-site alternatives. Before committing public money, the public decision-makers must provide the opportunity to consider and weigh the impacts of constructing a new arena at different locations.

1. **Consideration of alternatives is the heart of the EIS**

SEPA requires that an EIS contain a detailed discussion of alternatives to the proposed project. RCW 43.21C.030. "The required discussion of alternatives to a proposed project is of major importance, because it provides a basis for a reasoned decision among alternatives having differing environmental impacts." *Weyerhaeuser v. Pierce County*, 124 Wash. 2d 26, 38, 873 P.2d 498, 504 (1994). As summarized by Professor Settle:

> Open-minded, imaginative design and consideration of alternative courses of agency action is crucial to SEPA's ultimate quest – environmentally enlightened government decisionmaking. Unless agencies venture beyond traditional modes of operation, the mere preparation of impact statements environmentally analyzing customary agency conduct would be little more than a costly ritual without practical effect. … Thus, in both EIS preparation and the entire process of agency decisionmaking, the development, analysis, and consideration of alternatives is required.

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Settle, § 14.01[2][b] at p. 14-59. Pursuant to WAC 197-11-440(5)(b), the alternatives that must be considered are those which could "feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation."

2. **The MOU Unreasonably Restricts Review of Alternative Sites**

The MOU identifies only *one* alternative site that will be analyzed in the upcoming EIS process, at the Seattle Center. Goldman Dec., Ex. K at 3, §5. This pre-EIS limitation patently violates SEPA.WAC 197-11-070 prohibits government agencies from taking certain action until the final EIS is complete:

> (1) 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 government agency that would:*** (a) Have an adverse environmental impact; ***or (b) Limit the choice of reasonable alternatives.***

WAC 197-11-070(1). By taking action to approve the MOU, however, Seattle and King County has taken action to "limit the choice of reasonable alternatives" to the proposed SODO location and an alternative at Seattle Center.

On the contrary, an alternative examining one or more sites *outside* of Seattle is required, appropriate, and reasonable for several reasons. First, King County is also financially participating in this public project by committing to invest $80 million (subject to recruitment of an NHL team). King County has also been an active participant in all aspects of the local approval (the King County Council approved Executive Constantine to sign the MOU). In fact, the ILA specifies that the Arena will "provide general benefits" to *both* Seattle *and* King County and King County will hold a 40% interest in the ground lease. Goldman Dec., Ex. L, Item 1. D, § 4(A). Second, like Safeco and CenturyLink Fields, the proposed Arena will serve a regional and county-wide market. Third, Seattle already has two stadia in its SODO industrial

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neighborhood that currently experience severe vehicular congestion; accordingly, there are strong reasons why Seattle and King County would want to look elsewhere in King County for a suitable site. Finally, it is well-accepted that there are multiple potential Arena sites outside of Seattle that have excellent highway access and are served (or will be served) by light rail and bus service. This is not just a conceptual discussion; the media reports that a Chicago investor is actively exploring an arena site for NHL hockey in Bellevue. Goldman Decl. ¶ 16, Ex. FF.

WAC 197-11-060(3)(a)(iii) directs agencies to "describe public or non-project proposals in terms of objectives rather than preferred solutions." Consequently, the EIS must ask *where* the most feasible potential sites for a new sports arena in our region are and not limit SEPA EIS review only to locations that are preferred by ArenaCo. By approving an MOU that contractually limits review to SODO and Seattle Center, the City and County have acted to limit the choice of reasonable alternatives in violation of WAC 197-11-070.

VII. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment and declare as a matter of law that the City and County's actions approving the MOU and ILA were "actions" taken in violation of SEPA, and declare both the MOU and ILA null and void. Further requests for relief will follow the Court's decision on summary judgment.

Respectfully submitted this 4th day of January, 2013.

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