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

IN THE SUPERIOR COURT OF THE
STATE 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, Defendant, And WSA PROPERTIES, III, LLC, a Delaware limited liability company, Necessary Party	No. 12-2-34068-4 SEA WSA PROPERTIES, III, LLC'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT AND TO DISMISS

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff International Longshore and Warehouse Union, No. 19 ("ILWU") has things backwards. ILWU accuses the City of Seattle ("City") and King County ("County") of "putting the cart before the horse" by approving a memorandum of understanding ("MOU") and

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interlocal agreement ("ILA")[1] relating to a new sports arena ("Arena") proposed by WSA Properties, III, LLC ("ArenaCo") before completing an Environmental Impact Statement ("EIS"). Plaintiff's Motion for Summary Judgment ("ILWU Motion"), p. 1. Yet the State Environmental Policy Act ("SEPA") (RCW 43.21C) does not require an EIS for preliminary steps or decisions. WAC 197-11-055(2)(a). Instead, an EIS must be completed only before an "action" is taken that will cause environmental impacts or limit the range of alternatives. WAC 197-11-310, -704, -070. Here, this has not yet occurred.[2]

Indeed, it is ILWU that has "put the cart before the horse," by improperly asking this Court to adjudicate SEPA claims that are not ripe, in the absence of judicially mandated standing, and in the very midst of the City of Seattle's ongoing SEPA review process. ILWU should bring its energies to bear where the law allows – in the administrative EIS process that will review the environmental impacts of development of an arena at multiple sites. ILWU should not waste the Court's time with lawsuits plainly designed to raise political points rather than to adjudicate legitimate legal claims.

In its Motion, ILWU quotes selectively – and misleadingly – from the MOU in an attempt to portray it as an "action" under SEPA. ILWU Motion, p. 6-7. ILWU even goes so far as to characterize the MOU as "cementing the deal." *Id.*, p. 6. Nothing could be further from the

[1] While ILWU states it is challenging the approval of the ILA, ILWU's arguments are based only on the provisions of the MOU. In this brief, ArenaCo will refer to the MOU and ILA collectively as the MOU.

[2] SEPA requires that an agency conduct environmental review of a proposal it is considering when the proposal is sufficiently developed that its impacts can be meaningfully evaluated. WAC 197-11-784. When reviewing a proposal under SEPA, an agency must make a threshold determination regarding whether the proposal will result in probable significant adverse environmental impacts. WAC 197-11-310. If there are no significant probable significant environmental impacts, the agency issues a determination of nonsignificance ("DNS"). WAC 197-11-340. If there are probable significant environmental impacts, an EIS is required to evaluate these impacts and reasonable alternatives. WAC 197-11-360; WAC 197-11-440. After the EIS is issued, the agency may take an action on the proposal that may have an adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070.

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truth. The provisions ILWU fails to share with the Court tell the real story. Specifically, ILWU glosses over Section 24 of the MOU, which sets out multiple conditions precedent, all of which allow the City and County to decline to contribute financing to the Arena. Declaration of Peter Goldman ("Goldman Declaration"), Ex. K, Recital D, Sections 5, 24. Indeed, contrary to ILWU's representations, the MOU simply establishes a process under which – in the future – (1) the City will consider whether to issue land use permits for the Arena, after conducting full environmental review (*id*, Sections 5, 24.b); and (2) the City and County will consider whether to enter into a transaction for funding of the Arena under specified terms, again after conducting full environmental review (*id*, Section 24). ILWU inaccurately describes the proposed terms of a future transaction as if they were a done deal – but the plain language of the MOU shows this is an intentional mischaracterization. *Id*., Sections 5, 24.

The MOU does not qualify as an "action" under SEPA because it does not approve or fund any activity that will modify the environment nor does it purchase, sell or lease publicly owned land. WAC 197-11-704(2); Goldman Declaration, Ex. K, Section 24. The MOU also cannot result in environmental impacts, since it does not approve any physical activity. Goldman Declaration, Ex. K, Sections 5, 24.b. Finally, ILWU's claim that the MOU "gives ArenaCo precisely what it wanted: an Arena in SODO" (ILWU's Motion, p. 2) is simply false. Directly contrary to this unsupported statement, and far from limiting the range of alternatives to be considered, the MOU *affirmatively mandates* consideration of alternative locations under SEPA. *Id*., Sections 2, 5, 24.b. For these reasons, the City and County were not required to complete SEPA review before approving the MOU. WAC 197-11-070.

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Instead, the City is conducting SEPA review at exactly the right time. The EIS process is ongoing now. This process properly began following submission of an application for land use permits for the Arena to the City Department of Planning and Development ("DPD"), the City agency charged with implementing SEPA and making decisions on land use permit applications. Declaration of G. Richard Hill in Support of Response to Motion for Summary Judgment ("Declaration"), Exs. T, U. This administrative process provides the proper forum for ILWU to raise the issues it attempts to bring prematurely before the Court. In fact, ILWU has submitted comments regarding the alternatives to be considered in the EIS to DPD, and DPD is considering this input. Hill Declaration, Exs. V-Y. Indeed, the lawsuit before the Court today is little more than an effort to enlist the judicial system to interfere with the City's SEPA review process in the very midst of that review.

The law requires that the City have the opportunity to address the issues raised by ILWU during the administrative process. Settle, Washington State Environmental Policy Act: A Legal and Policy Analysis, § 20(c)(i) (Butterworth 1998) (the doctrine of exhaustion of administrative remedies applies to SEPA). ILWU may not "leapfrog" over this process and go directly to court. *Id*. This action is a blatant attempt by ILWU to circumvent the applicable administrative processes and obtain an advisory opinion on the content of the EIS, an issue that is not ripe for review. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) (an action is ripe for review when it is final).

The Court need not reach the remaining issues raised by ILWU. ILWU argues that the original arena concept presented by proponent Chris Hansen in February 2012, eight months before approval of the MOU, constituted a "proposal" triggering the need to begin SEPA review.

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ILWU Brief, pp. 13-14, 17-18. But this is inaccurate, since the proposal was not sufficiently developed to allow evaluation of environmental impacts. WAC 197-11-784. Further, the City has now begun environmental review, so the question of whether SEPA review should begin is moot. *Davidson Serles & Associates v City of Kirkland*, 159 Wn. App. 616, 628, 246 P.3d 822 (2011) (a case is moot if the court can no longer provide effective relief). The only question remaining is whether the City was required to complete environmental review before approving the MOU. As previously discussed, the answer to this question is no.

ILWU also argues that the Arena proposal is a public project and the EIS for the proposal must consider off-site alternatives. These claims go hand in hand because an EIS for a public project must analyze off-site alternatives while an EIS for a private project on a specific site need only analyze alternatives on the same site. WAC 197-11-440(5)(d). But, these claims are premature. The City is in the process of conducting environmental review now. Hill Declaration, Ex. U. ILWU has submitted comments to the City with its opinion regarding the nature of the project and the appropriate range of alternatives. *Id*., Exs. V-Y. The City is considering these comments and, indeed, has already committed in the MOU to analyze alternative sites. Goldman Declaration, Ex. K. Sections 2, 5. Under SEPA, if ILWU wants to challenge the adequacy of the alternatives analyzed in the EIS, it must do so after the EIS has been prepared and a decision made on the Arena. RCW 43.21C.075(6)(c) (SEPA claim must be brought with challenge to underlying action).

For these reasons, the Court must deny ILWU's motion for summary judgment.[3]

[3] This Response responds to ILWU's motion. ArenaCo's cross-motion, which requests summary judgment on the merits, because ILWU has no standing, and because ILWU's claims are not ripe, is set forth infra at pp. 31-39.

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II. STATEMENT OF ISSUE

Should ILWU's Motion for Summary Judgment be denied?

III. FACTS

A. The original arena proposal was conceptual.

On February 15, 2012, Seattle native Chris Hansen submitted a proposal to the Mayor and the County Executive to develop a new sports arena to accommodate professional basketball and hockey teams. Hill Declaration, Exs. A, B. This proposal was conceptual. Mr. Hansen acknowledged that no agreement had been reached with the City or County at that point. *Id.* Indeed, the concept underwent significant revision and refinement by the City and the County as it was discussed over the following months.

B. The Arena Review Panel recommended that City and County "refine details" of the proposal.

Before advancing it to the City and County Councils, the Mayor and County Executive convened an Arena Review Panel to evaluate the proposal. On April 4, 2012, the Panel issued its report to the Mayor and County Executive. *Id.*, Ex. C. The report acknowledges that the proposal "was at a high level, with many details that still need to be worked through." *Id.*, p. 6; *see also* p. 17. The report recommends that the City and County continue to work with Mr. Hansen to "refine details" and begin to address "the multitude of issues at play." *Id.*, p. 17. The report identifies future public processes and approvals required for the proposal to move forward, including approval of an MOU, SEPA review, design review, issuance of building permits, approval of a street vacation, approval of transaction documents, approval of land acquisition and debt issuance. *Id.*, p. 16.

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C. The City and County Councils reviewed and made revisions to the proposal.

Following the issuance of the report, the City, County and Mr. Hansen's team began to address the "multitude of issues" necessary to refine the proposal, including development of a proposed MOU. On May 16, 2012, the Mayor and County Executive transmitted the proposed MOU to the City and County Councils for review and consideration. Hill Declaration, Ex. D. The proposed MOU transmitted to the City and County Councils required SEPA review prior to any action that will result in environmental impacts or limit the range of alternatives to be considered. *Id*., Ex. J, Section 5.

The County Council's Budget and Fiscal Management Committee and the City Council's Government Performance and Finance Committee considered the proposal in several meetings in May, June and July. On July 19, 2012, the City and County Councils held a joint public hearing on the proposal. *Id*., Exs. G, I. On July, 23, 2012, the full County Council took up consideration of the MOU with numerous revisions recommended by the County Council committee. The County Council approved the MOU, with revisions, on July 30, 2012. *Id*., Exs. J, K. Among these revisions were expansions to the section requiring SEPA review before any action that will result in environmental impacts or limit the range of alternatives to be considered. *Id*., Ex. J, Section 5.

Also on July 30, 2012, eight City Council members wrote a letter to Mr. Hansen specifying additional changes to the MOU that would be necessary to gain their approval, including changes relating to SEPA review of transportation and freight mobility issues. *Id*., Ex. L. Subsequently, significant additional modifications were made to the MOU, including revisions expanding the provision requiring SEPA analysis. *Id*., Ex. M. On September 13, 2012,

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the City Council committee voted to recommend approval of the revised MOU and ILA to the full City Council.

On September 24, 2012, the City Council made yet more changes to the MOU and voted to approve the MOU and ILA with these changes. Significantly, these changes included modifications to Section 2 requiring consideration of at least one alternative site. *Id*., Ex. N, O. Additional technical and other minor revisions were introduced on October 8 for final approval on October 15. *Id*., Ex. Q.

Since the version approved by the City Council was not the same as the one approved earlier by the County Council, the County Council committee took the matter up again on October 9, 2012, and recommended approval of the City version. The County Council staff report responded to Councilmembers' questions regarding the impact of the revised MOU, including noting that the MOU "does not preclude sites outside the City of Seattle as potential alternatives to be evaluated during the SEPA process." *Id*, Ex. P, p. 11. The staff report summarized the impact of the amendments included in the final revised City version. *Id.* On October 15, 2012, the City Council and County Council approved the MOU with all of the revisions made previously and additional technical changes and minor adjustments. *Id*., Exs. R, S.

An ordinance signing ceremony was held on October 16, 2012. The MOU was signed by the Mayor and County Executive on December 3, 2012. Goldman Declaration, Ex. K, p. 39.

D. The MOU approves a process for consideration of the Arena and how it will be financed if approved.

MOU does not approve development of the Arena. Instead, the MOU simply describes the process by which the Arena proposal will be reviewed and how it will be financed if

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approved. The scope of the document and its limitations are clearly identified in its recitals. The MOU is intended to be a binding and enforceable agreement only with regard to (a) the "process" to be followed by the parties in conducting necessary reviews, "including all environmental reviews," and in approving future transaction documents "as appropriate"; and (b) the business terms and conditions to be included in future transaction documents, if those documents were ever approved. Goldman Declaration, Ex. K., Recital D. Notably, the MOU provides that the parties intend to work together only to "carry out the process described" in the MOU and "negotiate the terms" of future transaction documents "consistent with this MOU." *Id.* A provision in the original draft submitted by the Mayor and County Executive stating that the parties would work together to "undertake the Project" was deleted by the County Council. Hill Declaration, Ex. J, Recital D.

The MOU expressly acknowledges that SEPA review will occur before the City or County take any action to approve the arena proposal. Specifically, the MOU states:

> **5. 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 Transactional Documents, the City and County will complete a full SEPA review[.] * * * 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. * * *

Goldman Declaration, Ex. K, Section 5; *see also* Section 4 ("[T]he 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.") In these provisions, the MOU sets a minimum range of

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alternatives to be considered but does not preclude consideration of additional alternatives. While Section 5 as originally proposed acknowledged the project is subject to SEPA review, this Section was significantly expanded during the City Council review of the MOU. Hill Declaration, Ex. M, Section 5, Ex, N, Sections 2, 5.

The completion of SEPA review is also a condition precedent to the commitment of public funds to the arena. The MOU states:

> **24. City/County Conditions Precedent.** The obligations of the City and County under this MOU to commit Public Financing are expressly conditioned on the following conditions precedent:
>
> * * *
>
> **b. SEPA and Permitting.** Before the Umbrella Agreement and Transaction Documents may be authorized as described in Section 24.e below, (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.

Goldman Declaration, Ex. K, Section 24. This section was also revised during review of the MOU by the County and City to emphasize the need to complete SEPA review prior to any "action." Hill Declaration, Exs J, M, N, Q, Sections 5, 24.

Under the MOU, there are seven conditions precedent to the City and County's decision to proceed with an action. Goldman Declaration, Ex. K, Section 24.g. In addition to the SEPA and permitting contingency, there is a requirement for an economic impact analysis examining the net economic impacts of the construction and operation of the Facility. *Id.*, Section 23.6,

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Section 24.g. The condition precedent requires that the City and County have considered the economic impact analysis and "determined whether it is appropriate to proceed." *Id*., Section 24.g. If the City or County determines it is not appropriate to proceed, then under the MOU it is under no obligation to do so. *Id*. Each of these conditions be exercised by the Councils in their legislative discretion – the MOU does not bind them to any determination under these conditions. And the councils must adopt independent ordinances both approving the economic study and the transaction documents before proceeding, and then only after an EIS is done.

E. The City commenced the SEPA process upon submission of a sufficiently definite proposal.

Prior to the submission of an application for the Arena to the City, consistent with the process laid out in the MOU, the proposal was preliminary and conceptual in nature. On October 17, 2012, ArenaCo submitted an application for Early Design Guidance to the City. Hill Declaration, Ex. T. This application provided – for the first time – sufficient detail regarding the proposal to allow SEPA review of the proposal.

The City promptly commenced the SEPA review process. On October 25, 2012, the City issued a Determination of Significance ("DS"), which means that preparation of an EIS will be required. *Id*., Ex. U. The City accepted written comments on the DS. One of the attorneys for ILWU in this case submitted a comment letter opining that the proposal is for a public project and stating that this characterization is significant because it affects the City's obligation to consider off-site or no action alternatives. *Id*., Ex. V.

The City also issued a scoping notice stating that it would hold a series of "scoping" meetings in November 2012 and would accept written scoping comments until November 30, 2012. *Id*., Ex. U. Scoping is the process used for determining the probable significant impacts

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and alternatives to be addressed in the EIS. WAC 197-11-408. The City held two public scoping meetings and one scoping meeting for agencies and tribes. At the first public scoping meeting, the only person to testify was one of ILWU's attorneys. Only three individuals spoke at the second public scoping meeting. The City received written comments from 20 agencies, businesses, organizations, individuals and unions before November 30, 2012, including ILWU. ILWU's comments included statements of its belief about the potential impacts of the proposal and the range of alternatives to be considered in the EIS, among other things. *Id*., Exs. W-Y. The City will review and consider these comments as part of the SEPA process.

F. The SEPA process must be complete before the City and County make final decisions on the arena proposal.

Following scoping, the City will prepare a draft EIS and circulate that document for public comment. The City will then prepare a final EIS including responses to all comments received. Not until the final EIS is published will the SEPA process be complete. Under SEPA, the City cannot take action to make a final decision on the arena proposal until after the final EIS is prepared and issued. WAC 197-11-070. The City and County acknowledged this requirement in the MOU. Goldman Declaration, Ex. K, Sections 5, 24. The City reserved the right to condition or deny the proposal based on its substantive SEPA authority. *Id*., Sections 5, 24. Also, the City has no obligation to fund the Facility if it determines that any of the other multiple conditions precedent are not met. *Id*., Section 24.

G. The Arena cannot be developed without numerous discretionary land use permits.

While ILWU portrays the MOU as the City and County's final decision (ILWU Motion, p. 6), the MOU recognized that the Arena requires numerous land use permits in order to proceed. Goldman Declaration, Ex. K, Section 24.b. In addition to SEPA review, the Arena also

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requires design review approval by DPD. As part of the design review process, the Arena must undergo review by the City Design Review Board and Design Commission, both of which hold public meetings on the application and take public comment. *See* SMC 23.76; Hill Declaration, Ex. F, Staff Report, p. 6.

In addition, the Arena requires the vacation of a portion of Occidental Avenue South. This is a discretionary land use decision made by the City Council that requires provision of a public benefit. This process requires public notice, a public hearing before the Council, and opportunity for public comment. RCW 35.79; Hill Declaration, Ex. Staff Report, p. 6.

Finally, the Arena requires building and other construction permits. Hill Declaration, Ex. Staff Report, p. 6.

All of these land use permits are subject to administrative or judicial review. SMC 23.76; RCW 36.70C.

Issuance of land use permits is only one of numerous conditions precedent to any decision by the City and County to provide funding for the Arena. Goldman Declaration, Ex. K, Section 24.

IV. ARGUMENT

A. Standard of Review

ILWU asserts that the standard of review in this action is "*de novo*" because this action presents questions of statutory interpretation. ILWU's Motion, p. 11. But, "[i]t is a well-established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement." *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 440, 836 P.2d 235 (1992). Here, as lead agency, the City is charged with enforcement of SEPA for projects within its jurisdiction. WAC

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197-11-050. Among other things, the City is the only agency responsible for preparation and content of the EIS. WAC 197-11-050(2)(b).[4] Accordingly, the Court should grant deference to the City's interpretation of SEPA.

B. Summary Judgment Standard

Summary judgment "can be granted only if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. [Citation omitted.] *Dombrosky v. Farmers Ins. Co. of Washington*, 84 W. App. 245, 253, 928 P.2d 1127 (1996); *see also* CR 56.

"One who moves for summary judgment . . . must prove by uncontroverted facts that no genuine issue of material fact exists." *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 22, 586 P.2d 860 (1978). "Once the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a material issue of fact. [Citation omitted.]" *Dombrosky, supra*, 84 Wn. App. At 253.

On the other hand, "if the moving party has failed in its burden to establish entitlement to judgment as a matter of law, summary judgment is denied, even if the nonmovant has not submitted evidence to the contrary." *Hiatt v. Walker Chevrolet Co.*, 64 Wn. App. 95, 98, 822 P.2d 1235 (1992).

"The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. [Citation omitted.] * * * The court should

[4] In addition, SEPA provides that the agency's threshold determination on whether to prepare an EIS, and determination of EIS adequacy, is entitled to substantial weight. RCW 43.21C.090. These decisions are subject to review under the "clearly erroneous" standard. *King County v. Washington State Boundary Review Board ("Black Diamond")*, 122 Wn.2d 648, 661, 860 P.2d 1024 (1993).

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grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. [Citation omitted.]" *Dombrosky, supra*, 84 Wn. App. 245.

A nonmoving party may be granted summary judgment if the court determines that there are no genuine issues of material fact and the nonmoving party is entitled to summary judgment as a matter of law. *See e.g., Impecoven v. Department of Revenue,* 120 Wn.2d 357, 365, 841 P.2d 752 (1992); *Washington Ass'n. of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 234, 660 P.2d 1124 (1983), citing *Rubenser v. Felice,* 58 Wn.2d 862, 365 P.2d 320 (1961).

C. The SEPA Process

In order to fully address the insufficiencies of ILWU's SEPA claims, it is necessary to provide a brief background on applicable SEPA law and principles.

First enacted by the Legislature in 1971, SEPA is a legislative pronouncement of our state's environmental policy. *Stempel v. Dep't of Water Res.* 82, Wn.2d 109, 117, 508 P.2d 116 (1973); *see* RCW ch. 43.21C. SEPA does not demand a substantive result; rather, it ensures that environmental values are given appropriate consideration. *See* RCW 43.21C.030(2)(b)(a)-(h); *Glasser v. City of Seattle,* 139 Wn. App. 728, 742, 162 P.3d 1134 (2007).

SEPA requires an agency to conduct environmental review of a proposal submitted to it prior to taking an action that may have an adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070.[5] SEPA review is sequential: (1) initial application for proposal for action; (2) lead agency determination; (3) threshold determination process to identify likely significant adverse impacts; (4) if a determination of significance, then begin the

[5] The Legislature authorized the Department of Ecology ("DOE") to adopt regulations implementing SEPA. RCW 43.21C.110. These SEPA Rules, at WAC 197-11, provide authoritative, uniform statewide standards for SEPA compliance. WAC 197-11-020. The SEPA Rules are entitled to substantial deference. RCW 43.21C.095. In addition, SEPA requires that each agency adopt its own SEPA policies. WAC 197-11-660(3). The City's SEPA policies appear at SMC 25.05.

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environmental impact statement ("EIS") process; (5) public comment; (6) issue final EIS; and (7) appeal period. Upon completion of SEPA review, the agency may then use the EIS documentation to assist in its decision-making.

Here, as will be discussed in greater detail later in this brief, the MOU does not constitute an action nor does it have environmental impacts or limit the choice of reasonable alternatives. Accordingly, the City and County were not required to complete SEPA review before approving the MOU. Following City Council and County Council approval of the MOU, ArenaCo submitted an application for design review of the Arena proposal. Hill Declaration, Ex. T. This was the first time the City had received an application for the proposal. Immediately following the receipt of the application, the City commenced SEPA review by issuing a DS and scoping notice. *Id*. The City is engaging in scoping now. *Id*. The City and County will not take any action that may have environmental impacts or limit the choice of reasonable alternatives until the EIS is complete and the decision makers have had the ability to consider the EIS. Goldman Declaration, Ex. K, Sections 5, 24.

1. Initial SEPA Review Determination.

Not every proposal triggers SEPA review. A "proposal" exists when an agency is presented with an application or has a goal and is actively preparing a decision on one or more alternative means of accomplishing the goal and the environmental effects "can be meaningfully evaluated." WAC 197-11-055(2)(a).

2. Lead Agency Designation.

The "lead agency" is the state or local government agency with the main responsibility for complying with SEPA's procedural requirements. WAC 197-11-788.

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3. Threshold Determination.

When a proposal requires review under SEPA, the responsible official must make a "threshold determination" regarding whether the proposal will result in probable significant adverse environmental impacts. WAC 197-11-310. After the lead agency's review, if the responsible official finds there are no significant probable significant environmental impacts, the agency issues a determination of nonsignificance ("DNS"). WAC 197-11-340.[6] An EIS is not required where the lead agency issues a DNS. *Id.* If there are probable significant environmental impacts, the agency issues a DS and initiates the preparation of an EIS. WAC 197-11-360.

4. Environmental Impact Statement.

Upon the issuance of a DS, SEPA requires the preparation of an EIS to evaluate the significant adverse environmental impacts and reasonable alternatives. RCW 43.21C.030(c); WAC 197-11-360; WAC 197-11-440.[7] The lead agency is responsible for the preparation of an EIS. WAC 197-11-420.

a. Scoping.

The first step in the development of an EIS is "scoping," which aids the determination of the probable significant impacts and alternatives to be addressed in the EIS. WAC 197-11-408. The lead agency will invite the public, agency and affected tribes to comment on the DS. WAC 197-11-408(2). Scoping helps the lead agency narrow the EIS focus to the key analysis areas.

b. Development of the Draft and Final EIS.

[6] The lead agency may also make a determination of mitigated nonsignificance where the applicant clarifies or changes features of the proposal to mitigate the impacts that would be considered significant. WAC 197-11-350.
[7] The ArenaCo proposal qualifies as a "project" action. Defendants provide an overview of the project EIS process.

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After the scoping period is completed, a draft EIS ("DEIS") is prepared. WAC 197-11-420. An EIS shall provide impartial discussion of the significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, which would avoid or minimize adverse impacts or enhance environmental quality. WAC 197-11-440(2). The SEPA Rules mandate that until the responsible office issues the FEIS, no action concerning the proposal shall be taken by the government agency that would: (1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives. WAC 197-11-0-70.

c. SEPA Appeals.

After the FEIS is issued, the agency may take an action on the proposal. WAC 197-11-070. SEPA provides for an appeal to SEPA compliance, including challenging the adequacy of the EIS documentation. RCW 43.21C.075; WAC 197-11-660. Review of SEPA compliance is timely when a government has taken final action on a proposal. RCW 43.21C.075(6)(c) (providing that judicial review under SEPA "shall without exception be of the governmental action together with its accompanying environmental determination."). A party wishing to challenge actions under SEPA must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interest protected by SEPA and (2) the party must allege an injury in fact. *Kucera v. Dep't of Transportation*, 140 Wn.2d 200, 212, 995 P.2d 62 (2000).

D. The City and County were not required to complete SEPA review prior to approving the MOU.

ILWU's central argument is that the City and County should have completed SEPA review before approving the MOU because the MOU is an "action" that will likely "snowball" and create "virtually unstoppable administrative inertia." ILWU's Motion, p. 21; *see also* pp. 10,

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18-22. ILUW's position has not basis either in law or fact. At best, ILUW's claim rests in the realm of its own fantasy. Indeed, contrary to ILWU's claims, SEPA does not require the completion of an EIS prior to the approval of the MOU because: (1) the approval of the MOU is not an "action"; and, (2) even if it were, it is not one that will result in adverse environmental impacts or limit the choice of reasonable alternatives.

1. Approval of the MOU is not an action.

ILWU claims that the MOU is an "action" under SEPA. ILWU's Motion, p. 19. Yet ILWU fails to mention SEPA's definition of this term. Instead, deceptively, ILWU engages in rhetorical excess, referring to the MOU as a "binding and enforceable" agreement that will "snowball into unstoppable political momentum." *Id*.

When one examines the language of the SEPA regulations head on, rather than dancing around them as ILWU does, it is evident that approval of the MOU is not an action under SEPA. "Actions" under SEPA fall within two categories: project actions and nonproject actions.

> A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions 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.
>
> (ii) Purchase, sell, lease, transfer or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

WAC 197-11-704(2) (emphasis added). Nonproject actions involve decisions on policies, plans or programs. *Id*.

Here, the MOU relates to a specific project (the Arena), so it is not a nonproject action. Additionally, it does not qualify as a project "action" because it will not directly modify the

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environment. The MOU simply sets out a process by which the arena proposal will be considered for approval, and financed if it is approved. The MOU does not authorize any physical development activities. The MOU also does not qualify as a project action because it is not a "decision" to purchase, sell, lease, transfer or exchange public property. While the MOU contemplates that the arena may become publicly owned in the future, contingent on its development and financing being ultimately approved, the MOU itself is not a "decision" to do so. Goldman Declaration, Ex. K, Recital D (MOU establishes process), Section 2 (consideration of alternate locations), Section 4 (future land use permitting required), Section 5 (future SEPA review required), Section 24 (multiple conditions precedent to City and County funding).[8]

The MOU is not an "action" under SEPA and, therefore, the City and County were not required to prepare an EIS prior to approving the MOU.

2. Approval of the MOU will not cause adverse environmental impacts or limit the choice of reasonable alternatives.

Even if the MOU qualified as an "action" under WAC 197-11-704(2), which it does not, the City and County still were not required to complete SEPA review before approving the MOU. The SEPA Rules provide:

> (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 governmental agency that would:
>
> (a) Have an adverse environmental impact; or

[8] ILWU bases its argument in part on the provisions of the MOU under which the City may acquire the Arena property and building. ILWU's Motion, p. 5. Yet, property acquisition of this type is exempt from SEPA. The SEPA Rules identify a number of types of actions to which SEPA does not apply. WAC 197-11-800. These are known as categorical exemptions. *Id.* With regard to real property transactions, the SEPA Rules exempt "[t]he purchase or acquisition of any right to real property" and "[t]he lease of real property when the use of the property for the term of the lease will remain essentially the same as the existing use[.]" WAC 197-11-800(5). Accordingly, the Court must reject ILWU's argument based on the MOU's description of potential future real estate transactions.

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> (b) Limit the choice of reasonable alternatives.
>
> * * *
>
> (4) This section 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(1), (4).

In this case, the approval of the MOU is not an action that will result in adverse environmental impacts or limit the choice of reasonable alternatives. The scope of the MOU is limited to establishing a process under which the arena proposal will be considered and the terms under which it might be financed if it were approved. Goodman Declaration, Ex. K, Recital D. The MOU expressly provides that an EIS and economic impact analysis will be completed prior to any decision on development of the arena by the City and County, which would require future action by the City and County Councils. *Id*., Sections 5, 24. The MOU does not authorize any public funding or physical development and consequently will not itself result in environmental impacts. The MOU also states that the EIS will include consideration of at least one off-site alternative. *Id*., Section 5. The MOU establishes a minimum range of alternatives, but does not limit the alternatives that may be considered. The MOU also reserves the City and County's substantive authority to impose mitigation or deny the proposal under SEPA as well as to decline to fund the Arena after considering the SEPA analysis. *Id*. As a result, the MOU does not limit the choice of reasonable alternatives. Also, financing terms may be changed, depending on the results of the economic impact analysis and several other "conditions precedent" identified in the MOU. *Id*., Section 24.

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ILWU argues that SEPA review was required before the approval of the MOU because the MOU "set in motion a project that will undoubtedly snowball" and created "unstoppable administrative inertia." ILWU's Motion, p. 21. Yet the plain language of the MOU itself belies this claim, carefully limiting the scope of the MOU and preserving full decision making authority on the part of the City and County. Goldman Declaration, Ex. K. Recital D, Sections 2, 5, 24. ILWU's argument is based on a fundamental misreading of the MOU. ILWU inaccurately asserts that the MOU "cement[s] the deal" (ILWU Motion, p. 6) and engages in similar mischaracterization throughout its brief. This is the basis for ILWU's argument that the adoption of the MOU is an action. Since ILWU's premise is fundamentally flawed, and not grounded in the actual language of the MOU, its argument fails.

In addition, the authority cited by ILWU is inapposite. ILWU relies on only two cases to support its theory, both of which are distinguishable: *Black Diamond, supra*, 122 Wn.2d 648, and *Magnolia Neighborhood Planning Council v. City of Seattle ("Magnolia")*, 155 Wn. App. 305, 230 P.2d 90 (2010), *review denied*, 170 Wn.2d 1003 (2010). In *Black Diamond*, the City of Black Diamond proposed to annex two areas into its boundaries and issued a DNS for the annexation. The Boundary Review Board approved the annexations. King County appealed. The Court held that an EIS was required for the annexations because

> the likelihood of development of the annexation properties is unquestionable. On even a cursory reading of the record, it is clear that the annexation properties are destined for development. Black Diamond has itself recognized this fact . . . Black Diamond made a finding that the areas in question will be designated 'medium density residential' following annexation.

Black Diamond, supra, 122 Wn.2d at 665. Here, in contrast, the MOU makes it crystal clear that it does not guarantee development of the Arena. To the contrary, there are multiple, substantive

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hurdles that must be crossed before development of an Arena, including preparation of an EIS that considers at least one off-site alternative, and an economic analysis. The City and County have not made any decisions about whether to allow or fund development of the Arena – the MOU simply sets up a process by which those decisions will be made. Goldman Declaration, Ex. K, Sections 5, 24.

Magnolia is also distinguishable. In *Magnolia*, the City approved a plan for residential development of former military base property that required future federal approval for completion, without first completing SEPA review. The City argued it was not required to conduct SEPA review before issuing this approval. The court disagreed, noting that the plan was detailed and included the number of potential units, layout of uses and information indicating potential environmental impacts. 155 Wn. App. at 317. Further, if adopted, the plan would "bind the City's use of the property upon federal approval." *Id.* at 308. Thus, the *Magnolia* Court required a SEPA threshold determination on the redevelopment plan. The fact that the government action in *Magnolia* actually bound the City as to the use of the property is a key factor not present here. Unlike in *Magnolia*, in this case the City and County are not bound by the MOU to approve or fund the Arena. Goldman Declaration, Ex. K, Section 24.

E. The Court need not consider ILWU's argument that a proposal existed for SEPA purposes in February 2012.

As a secondary argument, ILWU claims that the "high level" proposal submitted to the Mayor and County Executive in February 2012 triggered the need for SEPA review. Since SEPA review was not timely commenced, ILWU argues, the MOU must be invalidated. ILWU's Motion, pp. 17-18. This is nonsense.

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Under SEPA, a proposal does not exist until "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 197-11-055(2)(a) (emphasis added). Environmental review does not begin until there is a proposal that is sufficiently developed that its impacts can be meaningfully evaluated. WAC 197-11-784. "Preliminary steps or decisions are sometimes needed before an action is sufficiently definite" to allow meaningful analysis. WAC 197-11-055(2)(a). The proposal for the Arena was initiated by a private party, ArenaCo, and there is no dispute that no application was submitted prior to the approval of the MOU. In addition, while ILWU makes the bare claim that the proposal was sufficiently definite in February 2012 (ILWU's Motion, pp. 17-18), it lacks facts to back up this claim. The mere conceptual and generalize outline of a proposal does not enable the City to conduct the detailed analysis required in an EIS. *See* WAC 197-11-440 (contents of EIS). The City properly waited until it received an application for a proposal to commence environmental review.

Further, the City has now begun environmental review, so the question of whether SEPA review should begin is moot. *Davidson Serles, supra,* 159 Wn. App. at 628 (a case is moot if the court can no longer provide effective relief). The only remaining question is whether the City was required to complete it before approving the MOU. As previously discussed, it was not. ILWU provides no authority for the proposition that the City's decision not to begin environmental review in February 2012, by itself, requires invalidation of the MOU. *See Bremerton v. Kitsap County Sewer District*, 71 Wn.2d 689, 705, 430 P.2d 956 ("where no

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authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

The Court must reject ILWU's claim regarding the significance of the February 2012 initial proposal.

F. ILWU's claim that the project is "public" is premature.

As a tertiary argument, ILWU argues that the Arena is a public project for purposes of SEPA. ILWU's Motion, pp. 14-17. The Court may not consider this argument, as it is premature.

The City is conducting scoping of the EIS now. Hill Declaration, Ex. U. ILWU has submitted comments asserting that the project is public and, therefore, requires consideration of off-site alternatives. *Id.*, Ex. V. The City is considering these comments. Until the City issues the EIS and renders a decision on the underlying project, the adequacy of the range of alternatives analyzed in the EIS is not properly before the Court. RCW 43.21C.075(6)(c) (SEPA claim must be brought with challenge to underlying action).

This requirement of SEPA is consistent with the general requirement that a plaintiff must exhaust its administrative remedies before going to court. *See King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 668-669, 860 P.2d 1024 (1993); *Citizens v. Mount Vernon*, 133 Wn.2d 861, 866-870, 947 P.2d 1208 (1997). The purposes of this rule include:

> (1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

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Washington State Boundary Review Board, supra, 122 Wn.2d at 669; *Citizens v. Mount Vernon, supra*, 133 Wn.2d at 866. In addition,

> Reversal of an agency on grounds not raised before the agency could have a seriously demoralizing effect on administrative conduct. Knowing that even decisions made with the utmost care might be reversed on heretofore undisclosed grounds, administrative agencies could become careless in their decision making. . . . [The principle] thus serves important policy goals associated with the integrity of the administrative process.

Washington State Boundary Review Board, supra, 122 Wn.2d at 669.

This exhaustion of administrative remedies requirement applies in the SEPA context. A leading commentator on SEPA has stated unequivocally that "the strict application of this principle by the courts to similar land use regulatory issues leaves no doubt that it is fully applicable to SEPA issue[s]." Settle, Washington State Environmental Policy Act: A Legal and Policy Analysis, § 20(c)(i) (Butterworth 1998) (emphasis added).

The City is conducting its administrative SEPA review process. IWLU is participating actively in this process, raising the same issues it now attempts to raise before this Court. Hill Declaration, Exs. U-Y. Under SEPA and the doctrine of exhaustion of administrative remedies, IWLU cannot circumvent the administrative process.

Also, the legal significance of the distinction between public and private projects is that an EIS for a public project must consider off-site alternatives. WAC 197-11-440(5)(d). In this case, the City has determined that it will consider one or more off-site alternatives regardless of the nature of the project. Accordingly, the issue is moot. *See e.g., Zehring v. Bellevue*, 103 Wn.2d 588, 589, 694 P.2d 638 (1995) (case is moot if relief requested has already occurred).

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For these reasons, the Court should not reach ILWU's claim that the Arena is a public project.

G. ILWU's claims regarding alternative sites are inaccurate and premature.

ILWU makes a fourth claim, with regard to alternatives. ILWU asserts that: (1) the MOU unreasonably restricts the consideration of alternative sites; and (2) the City must consider alternative sites outside of Seattle. IWLU's Motion, pp. 23-24. Both of these claims are without merit.

Contrary to ILWU's unsupported claim, the MOU does not restrict the alternatives to be considered in the EIS. To the contrary, the MOU mandates consideration of alternatives, including at least one alternative site. The MOU does not prohibit the consideration of more than one alternative site, however, nor does it limit the locations of alternative sites. To the contrary, it states that the City will evaluate the proposed site and "one or more alternative sites." Goldman Declaration, Ex. K, Section 2 (emphasis added); *see also* Section 5. ILWU's claim is contradicted by the plain language of the MOU.

In addition, ILWU's claim regarding the inclusion of an alternative outside of Seattle is premature. The City is conducting the EIS scoping process now. Hill Declaration, Ex. U. The purpose of scoping is, among other things, to identify the alternatives to be analyzed in the EIS. WAC 197-11-408(2)(b). ILWU has commented on the range of alternatives and the City is considering these comments. Hill Declaration, Ex. W-Y. ILWU must allow this administrative process to proceed. Ultimately, the City will issue the EIS and a decision on the application for design review. Such a decision is subject to administrative appeal to the City's Hearing Examiner. SMC 23.76.006.C.1.b. Judicial review of EIS adequacy, including the range of

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alternatives studied, is only ripe when the government has taken final action on a proposal. RCW 43.21C.075(6)(c). To the extent ILWU challenges the range of reasonable alternatives in this action, ILWU's claim is premature. The Court need not address ILWU's allegations here.

V. CONCLUSION

In sum, the MOU is not an action nor does it result in adverse environmental impacts or limit the choice of reasonable alternatives. The City and County were not required to complete SEPA review before approving the MOU. The Court should not consider ILWU's other claims as they do not provide a basis for invalidation of the MOU and improperly attempt to circumvent the administrative process. For these reasons, the Court should deny ILWU's motion for summary judgment.

CROSS-MOTION FOR SUMMARY JUDGMENT AND TO DISMISS

I. INTRODUCTION

The Court should grant summary judgment in favor of Defendants for three reasons. First, ILWU lacks standing. ILWU has alleged only speculative, economic injury, which is insufficient to confer standing under SEPA. Accordingly, the Court lacks jurisdiction to consider ILWU's claims

Second, this action is not ripe for review: First, because the City has not made a final siting decision; and second, because this action presents an improper "orphan" SEPA claim.

Third, ArenaCo is entitled to summary judgment as to the substantive claims set forth by ILWU. ArenaCo has fully briefed the basis for summary judgment infra at pp. 1-29. Accordingly, the Court should grant summary judgment in favor of ArenaCo.

II. STATEMENT OF ISSUES

The issues raised in this cross-motion for summary judgment are:

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1. Whether the Court should grant summary judgment to ArenaCo because ILWU lacks standing?

2. Whether the Court should grant summary judgment to ArenaCo because the claims raised by ILWU are not ripe?

3. Whether the Court should grant summary judgment in favor of ArenaCo because there is no genuine issue of material fact and ArenaCo is entitled to judgment as a matter of law?

III. EVIDENCE RELIED UPON

This motion relies on the pleadings and papers on file in this action and the Hill Declaration, including its exhibits.

IV. ARGUMENT

A. The Court must dismiss this action because ILWU lacks standing.

ILWU lacks standing to bring this action. ILWU failed to allege injuries within the zone of interests protected by SEPA. Instead, ILWU merely listed speculative, conjectural threats to a range of economic interests spanning from job loss to losing Seattle's identity as a leading trade city. Plaintiff's Complaint for Declaratory and Injunctive Relief ("Complaint"), ¶¶ 9-15. In addition, because ILWU raised only hypothetical threats of the speculative economic injury arising out of the MOU, ILWU's allegations fail to establish injury in fact. Since ILWU has no standing to maintain this action, under applicable law, the Court must dismiss this action.

1. ILWU fails to allege an interest within SEPA's protected zone of interest.

A party wishing to challenge actions under SEPA must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interest protected by SEPA and (2) the party must allege an injury in fact. *Kucera v. Dep't of Transportation*, 140 Wn.2d 200, 212, 995 P.2d 62 (2000) (citing *Leavitt v. Jefferson County*, 74 Wn. App. 668, 678-79, 875 P.2d 681

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(1994)). Organizational plaintiffs, such as ILWU Local 19, must meet the same standing test. *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 312, 230 P.3d 190 (2010). In its complaint, ILWU fails to establish either required standing element.

a. Economic harm is not within the zone of interests protected by SEPA.

SEPA is concerned with "broad questions of environmental impacts, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources." *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52-53, 882 P.2d 807 (1997); *see* RCW 43.21C.010 (stating SEPA's purpose). These standards guide SEPA's zone of protected environmental interests. It is well-established that purely economic interests are not within the zone of interests protected by SEPA. *Kucera*, 140 Wn.2d at 212; *Snohomish County Property Rights Alliance*, 76 Wn. App. at 52-53; *Concerned Olympia Residents for the Env't. v. City of Olympia*, 33 Wn. App. 677, 682, 657 P.2d 790 (1983) ("CORE").

The harm that ILWU has alleged in its complaint is nothing more than a litany of purely economic concerns, all of which are outside of SEPA's zone of interest:

- Discretionary rerouting of global freight away from the Port of Seattle;
- Reduced trade;
- Loss of Port of Seattle Terminal 46 or Terminal 30 operations;
- Loss of ILWU Local 19 member jobs;
- Loss of industrial jobs;
- Loss of Port of Seattle revenues;
- Loss of local and state tax revenues;

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- Loss of competitiveness for Washington State exports; and ultimately
- Loss of Seattle's identity as a leading city in trade and trade competiveness.

Complaint, ¶¶ 11-13.

ILWU's concerns are solely economic and therefore outside SEPA's zone of protected environmental interests. *Kucera*, 140 Wn.2d at 212. Accordingly, ILWU lacks standing to maintain this action.

b. Property ownership within the general vicinity is insufficient to confer standing.

ILWU's ownership of property over three-quarters of a mile from the Project Site is insufficient to confer SEPA standing. For property ownership to suffice to confer standing, the party must own property that is "immediately adjacent" to a proposal. *Anderson v. Pierce County*, 86 Wn. App. 290, 300, 936 P.2d 432 (1997); *Harris v. Pierce County*, 84 Wn. App. 248, 251, 928 P.2d 1111 (1996) (holding owning property that could be condemned by a proposed action is an insufficient interest under SEPA); *CORE*, 33 Wn. App. at 682-83 (ownership of commercial property 3,500 feet away from site insufficient to establish standing as within the zone of interests protected by SEPA).

ILWU Local 19's headquarters is located at 3440 E. Marginal Way South. Complaint, ¶ 9. The site of the arena proposed by ArenaCo is located at 1700 First Avenue South. Hill Declaration, Ex. T. The properties are separated by over 5,000 linear feet. *Id*, Ex. Z. This distance prohibits ILWU from relying on mere property ownership within the general vicinity to fall within SEPA's zone of protected interest.

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2. ILWU has failed to establish an immediate, concrete and specific injury.

Even if ILWU's allegations were within SEPA's zone of interest, which they are not, ILWU failed to establish the requisite injury in fact.

ILWU must present sufficient evidentiary fact to show the challenged SEPA determination will cause specific and perceptible harm. *Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994) (citing *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992), *review denied*, 119 Wn.2d 1012 (1992)). Where plaintiff party alleges a threatened injury, as opposed to an actual injury, it must also show the threatened injury will be immediate, concrete and specific. *Id.* No standing is conferred to a party alleging a conjectural or hypothetical injury. *Snohomish County Property Rights Alliance*, 76 Wn. App. at 53. ILWU's bald assertions of injury are insufficient to support standing absent evidentiary facts to support it. *CORE*, 33 Wn. App. at 683-84.

Here, ILWU claims standing purely on speculative assertions of remote economic injuries. For instance, ILWU asserts that loss of Terminal 46 or Terminal 30 operations may occur due to the alleged mere perception of freight movement disruption and that such a loss could lead to a parade of alleged economic injuries, eventually culminating in the loss of "Seattle's identity as a leading city in trade." Complaint, ¶ 12. But ILWU does not – and cannot – demonstrate that these effects are likely to result from the action challenged in this case, which is approval of an MOU that merely sets up a process for future consideration of whether to permit development of a new arena in the City. Indeed, ILWU's one attempt at establishing evidentiary facts fails. ILWU asserts that even the threat of freight disruption could lead to the potential expiration of the Terminal 46 lease. Complaint, ¶ 11. However, the Port of Seattle

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recently entered into a long-term lease agreement with the Terminal 46 operator through 2025, revealing the lack of evidence for even ILWU's speculative alleged injuries. Hill Declaration, Ex. AA ; *CORE*, 33 Wn. App. at 683-84.

ILWU has no factual basis to support its hypothetical claim that signing of the MOU will adversely affect Washington's "globally connected trade economy" or how any such impact would result in injury-in-fact to ILWU or its members. *CORE*, 33 Wn. App. at 683-84. Furthermore, ILWU offers no evidentiary facts to support its claim. *Id.* ILWU's asserted economic injuries are not immediate, concrete or specific. Therefore, ILWU fails to establish the prerequisite injury in fact for SEPA standing.

Accordingly, the Court must dismiss this action as ILWU lacks standing.

B. ILWU's Challenge to the MOU is Not Ripe.

ILWU's challenge to the MOU is not ripe. Therefore, ILWU's claims should be dismissed under Civil Rule 12(b)(6).

1. This action is not ripe for declaratory judgment.

A justiciable or "ripe" controversy must exist before a court may rule by declaratory judgment. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). A justiciable controversy is (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that are direct and substantial rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *First United Methodist Church v. Seattle Landmarks* Board, 129 Wn.2d 238, 245, 916 P.2d 374 (1996). Another standard is that "a claim is ripe for judicial determination if the issues raised are primarily legal and do not require further

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factual development, and the challenged action is final." *Walker*, 124 Wn.2d at 411 (emphasis added). If an element is missing, then the claim is a prohibited advisory opinion. *Id.*

Here, the disagreement about the Arena is not an actual, present dispute because the City has not made a final siting decision. The MOU expressly reserves the City's or County's ability to choose alternative locations or impose mitigation measures under SEPA. Goldman Declaration, Ex. K, Sections 2, 5, 24. For this reason, there is no justiciable controversy.

2. This action presents an improper "orphan" SEPA claim.

Judicial review of SEPA compliance is only available after the City has taken final action. RCW 43.21C.075(6)(c). ILWU ignores SEPA's prohibition on piecemeal SEPA challenges. ILWU's present challenge is not ripe for review.

Review of SEPA compliance is timely when a government has taken final action on a proposal. RCW 43.21C.075(6)(c) (providing that judicial review under SEPA "shall without exception be of the governmental action together with its accompanying environmental determination."). Courts have recognized that the judicial review provision "precludes judicial review of SEPA compliance until final agency action on the proposal." *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 250, 857 P.2d 1039 (1993) (quoting Settle, Washington State Environmental Policy Act: A Legal and Policy Analysis, § 20 (Butterworth 1992).). A SEPA decision cannot be appealed without appealing the underlying land use decision. *Lakeside Indus. v. Thurston County*, 199 Wn. App. 886, 902, 83 P.3d 433 (2004). The linkage between SEPA compliance judicial review and final agency action is to foreclose multiple lawsuits challenging a single agency action and to deny the existence of "orphan" SEPA claims unrelated to any government action. *Id.* (internal quotations omitted); *see*

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Settle, Washington State Environmental Policy Act: A Legal and Policy Analysis, § 20.01 (Matthew Bender & Co. 2011).). SEPA compliance is "not subject to piecemeal, isolated adjudication, but must be evaluated as an integrated element of government decisionmaking." *Id.,* § 20.01 at 20-4. ILWU attempts to seek judicial review of the City's SEPA compliance before the City has taken final action on the arena proposal.

As discussed in ArenaCo's response to ILWU's motion for summary judgment, the execution of the MOU is not an "action" under SEPA. The MOU provides: "The City and County may not take any action within the meaning of SEPA except as authorized by law, and nothing in the MOU is intended to limit the City's or County's substantive SEPA authority." Goldman Declaration, Ex. K, Section 5. The City is diligently proceeding with SEPA review. Hill Declaration, Ex. U. An EIS will be issued prior to any final City or County action on the proposal. Goldman Declaration, Ex. K, Section 5. Allowing judicial review now, prior to an "action" by the City or County, will subject the project to multiple appeals and add cost. Such a result runs contrary to SEPA's authorization for judicial review. ILWU's action is not ripe. RCW 43.21C.075(6)(c); *Grays Harbor County*, 122 Wn.2d at 250.

Accordingly, ILWU's action is not ripe for judicial review.

C. ArenaCo is entitled to summary judgment on the merits of ILWU's claims.

In this case, ILWU claims that the City and County were required to complete SEPA review before approving the MOU. As discussed in ArenaCo's response to ILWU's motion for summary judgment, this claim is utterly without merit. The approval of the MOU is not an "action" under SEPA. Further, the approval of the MOU will not result in adverse environmental impacts or limit the choice of reasonable alternatives. *See* Section III.D, supra.

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The remaining issues raised by IWLU do not support invalidation of the MOU and are premature. *See* Section III.E-G. Accordingly, the City and County were not required to complete SEPA review before approving the MOU.

There is no genuine issue of material fact. The MOU and other documents in this case speak for themselves. ArenaCo is entitled to judgment as a matter of law. Under the provisions of SEPA, the City and County were not required to complete SEPA review prior to approving the MOU. To the contrary, the City is conducting SEPA review at the appropriate time. ILWU is participating in the SEPA review process and must first raise its issues during the administrative process. Hill Declaration, Ex. W-Y. Ultimately, at the conclusion of this process, when SEPA is complete and any City and County decisions on the Arena rendered, ILWU will have the full opportunity to bring any claims that remain to court. RCW 43.21C.075(6)(c).

For these reasons, ArenaCo is entitled to summary judgment on the merits of this action.

V. CONCLUSION

ILWU lacks standing, its claims are not ripe for review, and the adoption of the MOU was not an action requiring SEPA review. For these reasons, the Court must grant summary judgment in favor of ArenaCo.

DATED this 23rd day of January, 2013.

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