

1 against the City of Seattle and the Washington State Department of Transportation. This Motion is
2 brought pursuant to CR 59(a)(4), (7), (8), and (9) and KCLCR 59.

3 II. STATEMENT OF FACTS

4 2.1. Defendants brought before this Court a Motion to Dismiss, which came before the
5 Court for a hearing on April 30, 2010. The Court received the Motion, Plaintiffs' Response,
6 Defendants' Reply, and Plaintiff's Strict Reply. See pleadings on file in the record.

7 2.2. The Court granted Defendants' Motion to Dismiss on the day of the hearing, and
8 specifically suggested that the Court would review a Motion for Reconsideration by Plaintiffs. April
9 30, 2010 Order attached as **Exhibit A**.

10 2.3. Plaintiffs presented evidence on the record in these two consolidated cases, one
11 against the City of Seattle, and one against WSDOT, which supported their claims that both
12 Defendants violated SEPA. See attachments to Plaintiffs' pleadings in the record.

13 2.4. Plaintiffs' Complaint against the City alleged violations of SEPA based on the fact
14 that Ordinance 123133 had been passed by the City Council and signed by the Mayor that authorized
15 the deep bored tunnel option, and no other option concerning the Alaskan Way Viaduct Seawall
16 Replacement Project. See Plaintiffs' Complaint in *SCAT et al., v. City of Seattle*, 09-2-40939-1
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18 2.5 Plaintiffs' Complaint against WSDOT alleged violations of SEPA based on the fact
19 that WSDOT had taken numerous actions that pre-judge the outcome of the EIS by taking so many
20 actions that support the tunnel alternative that no other option could be chosen, making this issue ripe
21 for review under SEPA. See Plaintiffs' Complaint in *SCAT et al. v. WSDOT et al.*, 09-2-36276-9-
22 SEA.
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24 2.6 The Court consolidated Plaintiffs' two cases into one case, however separate claims
25 are still before the court against the City and against WSDOT.

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III. STATEMENT OF ISSUES

3.1 Whether this Court should Reconsider its Order Granting Defendants' Motion to Dismiss.

IV. EVIDENCE RELIED UPON

4.1 Evidence and Exhibits A-I attached herein to this pleading, and the pleadings and papers on file in this case.

V. ARGUMENT AND AUTHORITY

A. Plaintiffs' Motion for Reconsideration Falls Within Several Subsections of CR59(a) Allowing for Reconsideration of a Decision or Order

5.1. CR 59(a) allows for Reconsideration of "any other decision or order" on any of the following grounds:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence

1 to justify the verdict or the decision, or that it is contrary to law;

2 (8) Error in law occurring at the trial and objected to at the time by
3 the party making the application; or

4 (9) That substantial justice has not been done.

5 5.2 Because of the case consolidation, Defendants have attempted to conflate the
6 issues between the two defendants, characterizing the entire consolidated case as a “ripeness” issue
7 simply because the final EIS is not proposed to be issued until 2011. This confuses the facts and the
8 law, and collapses the separate causes of action against each individual entity into an artificial issue.
9 The substantive and separate issues between the two separate entities should be reviewed and
10 analyzed separately, and the temptation should be avoided to impute the claims and issues against
11 one entity to the other entity, as Plaintiffs argue below.

12 5.3 Plaintiffs specifically request the Court to Reconsider its decision based on
13 subsections 4, 7, 8 and 9. Counsel for Plaintiffs argued both in pleadings and in oral arguments that
14 substantial justice has not been done by allowing Plaintiffs’ cases to be dismissed.
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16 **B. CLAIMS AGAINST THE CITY OF SEATTLE: SEPA Applies to a City Decision on a**
17 **Specific Construction Project and Was Therefore Ripe for Review When the City Passed**
18 **Ordinance 123133**

19 5.4 The State Environmental Policy Act (SEPA), RCW 43.21C *et seq.*, applies to the actions
20 of the City as defined in WAC 197-11-704, which provides:

21 (1) “Actions” include, as further specified below:

- 22 (a) New and continuing activities (including projects and programs) entirely or
23 partly financed, assisted, conducted, regulated, licensed, or approved by agencies;
24 (b) New or revised agency rules, regulations, plans, policies, or procedures; and
25 (c) Legislative proposals.

(2) Actions fall within one of two categories:

- (a) **Project 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:

1 (i) License, fund, or undertake any activity that will directly modify the
2 environment, whether the activity will be conducted by the agency, an
3 applicant, or under contract.

4 (ii) purchase, sell lease, transfer, or exchange natural resources,
5 including publicly owned land, whether or not the environment is
6 directly modified.

7 (b) **Nonproject actions.** Nonproject actions involve decisions on policies, plans,
8 or programs.

9 (i) The Adoption or amendment of legislation, ordinances, rules, or
10 regulations that contain standards controlling use or modification of the
11 environment;

12 (ii) The adoption or amendment of comprehensive land use plans or
13 zoning ordinances;

14 (iii) The adoption of any policy, plan, or program that will govern the
15 development of a series of connected actions (WAC 197-11-060), but
16 not including any policy, plan, or program for which approval must be
17 obtained from any federal agency prior to implementation;

18 (iv) Creation of a district or annexations to any city, town or district;

19 (v) Capital budgets; and

20 (vi) Road street, and highway plans.¹

21 5.5 The Court of Appeals in Magnolia Neighborhood affirmed the trial court's
22 decision that a decision on a specific construction project, such as the passing of an ordinance
23 (Ordinance 30186) which adopted the Fort Lawton Redevelopment Plan, is a "project action" as set
24 forth in subsection (2)(a)(ii), and therefore falls under the requirements of SEPA. Magnolia
25 Neighborhood, Court of Appeals No. 63466-6-I at 8. "As discussed above, the City's approval of the
26 FLRP fits squarely within this category." *Id.*

27 5.6 The Court in Magnolia Neighborhood also found that "our courts have recognized
28 that environmental review can be required even when the government has not made a definite
29 proposal for actual development of the property at issue." *Id.* At 9-10, citing King County v.

30 ¹ Cited in Magnolia Neighborhood Planning Council v. City of Seattle, Washington Court of Appeals No. 63466-I, Division One,
31 Published Opinion, March 29, 2010, pp. 6-7. This Court of Appeals decision appears to have been issued (unclear on the date of
32 publication) on March 29, 2010. Counsel for Plaintiff was hired only two weeks later, and this case was inaccessible to her at the time
33 for submission of Plaintiffs' strict reply (the last possible pleading opportunity available prior to the pre-scheduled hearing date), so the
34 ruling in this case should be considered under *inter alia*, CR 59(a)(4).

1 Washington State Boundary Review Board for King County and City of Black Diamond, 122 Wn.2d
2 648, 663, 860 P.2d 1024 (1973).

3 5.7 In Black Diamond, the court held that the City's annexation decision was subject
4 to SEPA requirements even though there was not definite proposal for actual development of the
5 annexed property, recognizing that "the absence of specific development plans should not be
6 conclusive of whether an adverse environmental impact is likely. *Id.* at 663.

7 5.8 The view of the court in Black Diamond is particularly instructive in the case at
8 bar:

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10 One of SEPA's purposes is to provide consideration of environmental impact
11 factors at the earliest possible stage to allow decisions to be based on complete disclosure of
12 environmental consequences . . . Even if adverse environmental effects are discovered later,
13 the inertia generated by the initial government decisions (made without environmental
14 impact statements) may carry the project forward regardless. When government decisions
15 may have such snowballing effect, decisionmakers need to be apprised of the environmental
16 consequences *before* the project picks up momentum, not after.

17 Black Diamond, 122 Wn.2d at 663-664.

18 5.9 On October 27, 2009, The City of Seattle enacted City Ordinance No. 123133.
19 This ordinance specifically stated the City's policy that "the Alaskan Way Viaduct and Seawall
20 Replacement Program Bored Tunnel Alternative, as described in the Memorandum of Agreement
21 attached hereto as Attachment 1, is the preferred solution for replacing the existing Alaskan Way
22 Viaduct." See Ordinance 123133 and attached referenced MOA attached here as **Exhibit B**.

23 5.10 On December 14, 2009, the City of Seattle adopted Resolution No. 31174 setting
24 forth the 2010 State Legislative Agenda of the City of Seattle. The Legislative Agenda included the
25 statement, "We support moving forward on the deep bore tunnel as the preferred alternative for
replacement of the Alaskan Way Viaduct and upholding the responsibilities set forth in the Viaduct

1 Memorandum of Agreement (Seattle Ord. 123133)...We will continue to work with the State on
2 design and cost estimation of the tunnel to assist in this effort.” Legislative Agenda p. 3, Resolution
3 No. 31174, attached to this Motion as **Exhibit C**.

4 5.11 On November 6, 2009, SCAT and Ms. Campbell filed this action against the City
5 on the grounds that the enactment of Ordinance 123133 made the issue ripe for review under SEPA
6 pursuant to SEPA, RCW 43.21C.010 et seq. and WAC 197-11-704.

7 5.12 This Court based its ruling in granting Defendants’ motion to dismiss solely on the
8 NEPA standard that a NEPA claim is not ripe for review until a final EIS has been issued. This
9 analysis and conclusion is inapposite and reversible error *vis a vis* the claim against the City of
10 Seattle, because Plaintiffs’ claims became ripe for review under SEPA the moment the City enacted
11 Ordinance 123133 without engaging in SEPA review of that ordinance.

12 5.13 Each and every action presented above taken by defendant City of Seattle is an
13 action that falls under the WAC definition of a “project action” as defined in WAC 197-11-
14 704(2)(a)(i). The Ordinance and Resolution referenced in this case are no different than the
15 Ordinance in Magnolia Neighborhood, which was found void, and thus should be found to fall under
16 the requirements of SEPA as a “project action” and also be found void.

17 5.14 Environmental review can be required even when the government has not made a
18 definite proposal for redevelopment of the property at issue. Magnolia Neighborhood, at 10, citing
19 Black Diamond, 122 Wn.2d at 663.

20 5.15 The law is clear on this point, that SEPA review must be performed when the City
21 enacts an ordinance that issues a final decision on a specific construction project.² It was error for the
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² Magnolia Neighborhood, *Id.* at 8.
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1 court to conclude that the issue is not ripe for review because *no final EIS under NEPA* has been
2 issued. CR59(a)(4), (7).

3 5.16 Plaintiffs specifically pled these facts in the Complaint filed on November 6, 2009
4 under paragraphs 2.1.3 and 2.1.4, however, legal research by Plaintiff's current counsel was
5 incomplete, and counsel was at the time unaware of the Magnolia Neighborhood decision prior to the
6 hearing on Defendants' Motion to Dismiss on April 30, 2010. See Plaintiffs' Complaint in *SCAT v.*
7 *City of Seattle*, No. 09-2-40939-1, p. 5.

8 5.17 Counsel for Plaintiff moved for a continuance of the hearing on Defendants'
9 Motion to Dismiss so she could be allowed additional time to provide further analysis to the court in
10 order to adequately represent Plaintiffs' clear interests in this case, but the Motion for Continuance
11 was denied at the hearing on April 30.

12 5.18 Plaintiffs hereby request the Court reverse its decision to grant Defendants'
13 Motion to Dismiss, and deny their Motion pursuant to CR59(a) and on the grounds that the City's
14 action of enacting Ordinance 123133 required SEPA analysis and none was done.
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17 **C. CLAIMS AGAINST WSDOT: WSDOT Violated NEPA When it Entered Into**
18 **Numerous Actions With the Ring of Finality That Pre-Judge the Outcome of the**
19 **Environmental Impact Statement**

20 5.19 SEPA prohibits agencies from taking actions that prejudice the outcome of the
21 environmental impact statement. When SEPA's requirements are observed, governmental decisions
22 are made "by deliberation, not default." Stempel v. Board of Water Resources, 82 Wn.2d 109
23 (1973).
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1 5.20 The Complaint against the State, which is currently before this court, alleged the fact
2 that WSDOT has taken numerous steps that so significantly tip the scales among alternatives towards
3 the tunnel that it is clear that the deep bored tunnel is the substantially favored alternative.

4 5.21 The Complaint against the State also averred that until the final Environmental Impact
5 Statement is complete, neither WSDOT nor any of the other state or local agencies may lawfully
6 make a final decision or take other steps that would prejudice or pre-judge the outcome.

7 5.22 The Complaint set forth the following fact:
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9 “WSDOT’s schedule calls for it to announce the apparent “best value proposal” by
10 December 23, 2010 and to enter into a contract with the winning company in January 2011.
11 Thus, by January 2011, the tunnel contractor will have been selected, making the tunnel the
12 *de facto* choice. Also in January 2011, the Final EIS is scheduled to be published. *After the*
13 *Final EIS is published*, WSDOT and other decision makers are supposed to undertake a good
14 faith evaluation of the various alternatives and make a decision as to which alternative will be
15 pursued. But the various alternatives will not be competing on an even playing field as of that
16 date. One alternative, the deep bore tunnel, will be “ready to go.” The contractor will have
17 been selected and a detailed proposal from that contractor will already be in hand. In effect,
18 the deep bore tunnel will have an 18-month head start on the competing alternatives.”
19 (emphasis in original). Complaint, paras. 33-34, pp. 7-8, Case No. 09-2-36276-9 SEA.

20 5.23 These actions constitute a violation of SEPA, RCW 43.21C et seq., and its
21 implementing regulations, WAC 197-11.

22 5.24 The Court in Magnolia Neighborhood upheld the very broad standard established by
23 the Court in Black Diamond, when it held that “a proposed land use related action is not insulated
24 from full environmental review simply because there are no existing specific proposals to develop the
25 land in question or because there are no immediate land use changes which flow from the proposed
26 action.” Magnolia Neighborhood at 9, *citing* Black Diamond, 122 Wn.2d at 664.

27 5.25 The plans and project commitments made by the WSDOT are far more precise,
28 definite, specific and detailed than the plan at issue in Black Diamond. In Black Diamond, there was

1 no pending development proposal other than a preferred use as “[s]ingle family residential” or
2 “Residential/Golf Courts Community.” *Id* at 656.

3 5.26 In the case before this court the myriad actions, decisions, plans and project
4 commitments, several of which are described below, are very detailed and have a far more binding
5 effect than the annexation decision in Black Diamond. Defendant WSDOT is clearly intending to be
6 bound by all the contracts and other commitments made in furtherance of the deep bored tunnel
7 project, and is making haste to assure that all the pieces are put in place before their 2011 EIS can be
8 rubber stamped by Defendant Paula Hammond.

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10 5.27 On September 12, 2009, a “Requests for Qualifications” packet was issued that
11 requested applications for the “SR99 Bored Tunnel Design-Build Project.” Upon information and
12 belief, and after Plaintiffs’ requests for documents over the last six months, there has been no
13 equivalent RFQ packet issued for any other potential alternative that might be or have been included
14 in the environmental impact study. **RFQ for SR99 Bored Tunnel Design-Build Project attached**
15 **as Exhibit D.**

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17 5.28 On April 14, 2010, 2010 the City of Seattle issued the “Alaskan Way Viaduct and
18 Seawall Replacement Program Schedule” showing the timeline of actions on the tunnel project
19 already taking place. Although the purple graph bars are not defined in the key, it is obvious from the
20 timeline that AWVSRP tunnel bore design and construction actions are already taking place since the
21 chart begins with January 2010. **AWVSRP Program Schedule Attached as Exhibit E.**

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23 5.29 On January 13, 2009, Governor Gregoire, King County Executive Ron Sims, and
24 then-Seattle Mayor Greg Nickles issued a letter of agreement that announced a “Consensus on the
25 Recommended Alternative for Replacing the Alaskan Way Viaduct and Seawall.” The letter of

1 agreement signed by the three highest ranking elected officials for the three jurisdictions affected by
2 the AWVSRP is a very influential document that gives great weight to one alternative over any of the
3 others, to the extent that, combined with the other concrete steps taken to ensure that the bored tunnel
4 option is the selected one, pre-judges the outcome of the EIS. **Letter of Agreement attached as**
5 **Exhibit F.**

6 5.30 On April 7, 2010, Mayor McGinn sent a letter to Governor Gregoire stating that
7 while he would have preferred the I-5/transit/surface street solution, the City is committed to carrying
8 out the contracts approved by the Seattle City Council in furtherance of the deep bored tunnel project.
9 **Letter to Governor Gregoire attached at Exhibit G.**

10 5.31 On April 23, 2010, Governor Gregoire sent a letter to Mayor McGinn affirming
11 their joint commitment to the deep bored tunnel project. **Letter to Mayor McGinn attached as**
12 **Exhibit H.**

13 5.32 On April 19 and again on May 3, 2010, the Central Waterfront Planning
14 Committee on the Alaskan Way Viaduct and Seawall Replacement Project met to discuss *deep bored*
15 *tunnel project* updates. **April 19 and May 3 Agendas attached as Exhibit I.**

16 5.33 There is a long list of actions that can be presented, and these are just a few
17 examples of evidence that demonstrate the Defendants' WSDOT and City of Seattle's foregone
18 conclusions that the deep bored tunnel project is the selected (not just "preferred") project that will be
19 chosen in the Final EIS. This is in violation of the SEPA requirement that "decisionmakers need to
20 be apprised of the environmental consequences *before* the project picks up momentum, not after."³
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³ Black Diamond, 122 Wn.2d at 663.
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