HONORABLE RICHARD EADIE

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

SEATTLE CITIZENS AGAINST THE TUNNEL and ELIZABETH CAMPBELL, Plaintiffs/Petitioners, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; PAULA HAMMOND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Defendants/Respondents.	NO. 09-2-36276-9SEA DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION
ELIZABETH A. CAMPBELL, Plaintiff/Petitioner, v. CITY OF SEATTLE, a municipal corporation, Defendant/Respondent.	(CONSOLIDATED WITH NO. 09-2-40939-1SEA)

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I. RELIEF REQUESTED

The Defendants Washington State Department of Transportation (WSDOT) and City of Seattle (City) ask the Court to deny Plaintiffs' Motion for Reconsideration. The Court's Order granting the Defendants' Motion to Dismiss is legally correct and consistent with established precedent. The Court should decline to vacate or reconsider it.

II. STATEMENT OF FACTS

The facts are largely uncontested in this matter, and were set out in detail in WSDOT's and the City's motion to dismiss. It is undisputed that in July 2006, WSDOT issued a supplemental draft environmental impact statement (SDEIS) that evaluated the cut-and-cover tunnel and elevated structure alternatives to replacing the Alaskan Way Viaduct. Environmental review of the bored tunnel alternative is underway, and WSDOT will issue a second SDEIS in 2010. It is also undisputed that a final environmental impact statement will review all of those alternatives—the cut-and-cover tunnel, the elevated structure, and the bored tunnel. The Federal Highway Administration (FHWA) will issue a Record of Decision (ROD) in 2011.

III. STATEMENT OF ISSUES

1. Does a Court of Appeals opinion issued one month before the hearing on Defendants' motion to dismiss constitute newly discovered evidence for purposes of CR 59(a)(4)?

2. Did the Court commit an error of law or act contrary to law when it entered an order dismissing the instant action against the City of Seattle?

3. Did the Court commit an error of law or act contrary to law when it entered an order dismissing the instant action against the WSDOT?

4. Did entry of an order dismissing this case result in substantial justice not being done when Plaintiffs can re-file the same action, raising the exact same issues, after issuance of the Record of Decision in 2011?

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IV. AUTHORITY/ARGUMENT

A. Plaintiffs Are Not Entitled to Reconsideration Based on Newly Discovered Evidence

The newly discovered evidence cited to by Plaintiffs in this case is an opinion handed down by the Court of Appeals on March 29, 2010. Court opinions are not evidence. Rather, evidence is something that tends to prove or disprove the existence of an alleged fact. *Black's Law Dictionary* 635 (9th ed. 2009). Accordingly, Plaintiffs are not entitled to relief pursuant to CR 59(a)(4).

B. The Court Did Not Err When it Dismissed the Action Against the City of Seattle

Plaintiffs request the Court to reconsider its Order, which dismissed the instant action against the City of Seattle. Their request is based on the holding of *Magnolia Neighborhood Planning Council v. City of Seattle*, No. 63466-6-I, 2010 WL 1191000 (Wash. Ct. App. Mar. 29, 2010), a decision recently issued by the Court of Appeals.[1] Plaintiffs claim *Magnolia Neighborhood* supports their position that the City violated the State Environmental Policy Act (SEPA) when it enacted Ordinance No. 123133 and Resolution No. 31174. Their argument fails for two reasons. First, the City of Seattle is not the lead agency charged with complying with SEPA. Second, *Magnolia Neighborhood*, which held that the approval of a plan for a specific construction project in a defined geographic area that also involves a decision to purchase, see, lease, or transfer publicly owned land triggers compliance with SEPA, does not apply to the facts of this case.

Although the City of Seattle and WSDOT are co-lead agencies for SEPA, WSDOT is designated as the nominal lead. The responsible SEPA official is Megan White, Director of WSDOT's Environmental Services Office. As the nominal lead agency, WSDOT has the

[1] On March 29, 2010, the Court of Appeals issued an opinion in *Magnolia Neighborhood Planning Council v. City of Seattle*, No. 63466-6-I, 2010 WL 1191000 (Wash. Ct. App. Mar. 29, 2010). The City of Seattle filed a motion for reconsideration on April 14, 2010, in which it asked the Court to modify some of its findings of fact. On May 14, 2010, the Court issued an order granting the City's motion for reconsideration. The deadline for filing a petition for review is June 14, 2010.

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main responsibility for complying with SEPA's procedural requirements and is the only agency responsible for the threshold determination and the preparation of environmental impact statements. WAC 197-11-050. Further, WSDOT is the state agency charged by statute with design, construction, and operation of the state highway system. RCW 47.01.260. State Route 99, which includes the Alaskan Way Viaduct, is part of that highway system. RCW 47.17.160. Therefore, WSDOT is responsible for constructing whichever alternative to replace the Viaduct is selected after environmental review is complete. Since the City is responsible for neither the environmental documents nor construction of whatever alternative replaces the Viaduct, they can not be found to be in violation of SEPA.

That being said, enactment of the Ordinance and passage of the Resolution are not actions subject to SEPA review. *Magnolia Neighborhood*, which held that the approval of a plan for a specific construction project in a defined geographic area that involves a decision to purchase, see, lease, or transfer publicly owned land triggers compliance with SEPA, does not apply to the facts of this case. Ordinance No. 123133 merely expresses the City's preference of the bored tunnel alternative to replacing the Viaduct. The Ordinance itself commits to nothing. The Memorandum of Agreement (MOA), which was signed by the Mayor and Governor, does not bind or commit WSDOT to construct a bored tunnel. It only sets forth the anticipated responsibilities of the City and the State in the event that the bored tunnel alternative is selected as the preferred alternative.[2] The MOA also addresses issues unrelated to the Central Waterfront Project, such as the Moving Forward Projects, the seawall replacement, and transit. Since neither the Ordinance nor the MOA approves a plan for a specific construction project in a defined geographic area that involves a decision to purchase, see, lease, or transfer publicly owned land, it is not an action that requires SEPA review under the *Magnolia Neighborhood* case.

[2] The MOA directs the State to complete the environmental review process for the Bored Tunnel Alternative, as required by federal and state law.

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Resolution 31174 was adopted by the City Council on December 14, 2009, and signed by former Mayor Nickels on December 22, 2009. It set forth the 2010 State Legislative Agenda of the City of Seattle. It states, in part, that:

> 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 Memorandum of Agreement (Seattle Ord. 123133). As the project manager for the deep-bore tunnel, the State has the role to implement the project on time and on budget. We will continue to work with the State on design and cost estimation of the tunnel to assist in this effort.

The Legislative Agenda is merely a tool the City will use when and if it decides to request funding from the State Legislature. Like the Ordinance and MOA, it does not approve a plan for a specific construction project in a defined geographic area that involves a decision to purchase, see, lease, or transfer publicly owned land. Therefore, the *Magnolia Neighborhood* decision does not require that the Legislative Agenda go through SEPA review prior to its passage.

C. The Court Did Not Err When it Dismissed the Action Against WSDOT

Plaintiffs request the Court to reconsider its Order, which dismissed the action against WSDOT. They claim that a decision recently issued by the Court of Appeals, *Magnolia Neighborhood Planning Council v. City of Seattle*, supports their position that WSDOT violated SEPA. Plaintiffs claim that WSDOT violated SEPA when:

- WSDOT issued a Request for Qualifications (RFQ) for contractors interested in submitting proposals for a bored tunnel project;
- The City issued the "Alaskan Way Viaduct and Seawall Replacement Program Schedule" on April 14, 2010;
- Governor Gregoire, King County Executive Sims, and former Seattle Mayor Nickels issued a letter of agreement on January 13, 2009;
- Seattle Mayor Michael McGinn sent a letter to Governor Gregoire on April 7, 2010;
- Governor Gregoire sent a letter to Mayor McGinn on April 23, 2010; and

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- The Central Waterfront Planning Committee met on April 19 and May 3, 2010.[3]

It should be noted at the outset that only one of the items listed—issuance of the RFQ—was undertaken by WSDOT. WSDOT issued the RFQ pursuant to federal regulations that allow solicitation of design-build contractors prior to completion of the National Environmental Policy Act (NEPA) process. Declaration of Ron Paananen (Paananen Decl.) ¶ 13 (attached without exhibits); 23 C.F.R. § 636.109. WSDOT will issue the request for proposals (RFP) next year, and plans to select a design-build contractor in early 2011. The RFP will include the final contract language. The terms of the contract will preclude the contractor from performing final design or beginning construction until after the ROD is issued. After the ROD is issued, then the contractor will be notified by WSDOT that it may proceed with development of final designs and plans as well as construction. This final notification to the design-build contractor will be WSDOT's final action that commits the agency to actually building the project. The contract will also provide that if an alternative other than a bored tunnel is selected, then WSDOT will terminate the contract. Paananen Decl. ¶ 14.

The *Magnolia Neighborhood* opinion does not support the Plaintiffs' position that issuance of the RFQ triggered SEPA review. As stated earlier, the Court's ruling in *Magnolia Neighborhood* only held that approval of a plan for a specific construction project in a defined geographic area that involves a decision to purchase, see, lease, or transfer publicly owned land triggers compliance with SEPA. The RFQ did not approve such a plan; all it does is request that companies interested in submitting proposals to WSDOT for the Central Waterfront project submit a statement of their qualifications. The type of plan contemplated by *Magnolia Neighborhood* will not be approved until WSDOT publishes a Notice of Action

[3] The Central Waterfront Planning Committee is a Special Committee of Seattle City Council. It is comprised of the members of City Council.

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after the FHWA issues the ROD in 2011. It is from the Notice of Action that a SEPA appeal may be taken. Further, the *Magnolia Neighborhood* court based its decision on its finding that approval of the plan binds the City as to its use of the property in question. This finding was critical to the court's decision. Issuance of the RFQ or the RFP does not bind or otherwise commit WSDOT to construct the bored tunnel alternative. Rather, the RFP and the contract specifically states that WSDOT and the FHWA may select a different alternative after the NEPA process is complete, and if that alternative is not what the design-builder proposed, the contract will be terminated.

Plaintiffs' argument also ignores the fact that agencies are permitted to undertake work during SEPA review. Government agencies may take action prior to the issuance of the final environmental impact statement so long as those actions do not have an adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070(1). Issuance of the RFQ did not have an adverse environmental impact because there is as yet no contract, and even when there is a contract, it will preclude final design or construction until after the NEPA and SEPA processes are complete. It does not limit the choice of reasonable alternatives because when there is a contract, it will specifically state that a different alternative may be chosen and the contract may be terminated. Nothing in the RFQ commits WSDOT to constructing a bored tunnel.

The SEPA rules specifically allow the issuance of requests for proposals prior to the completion of SEPA review:

> 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(4). Subsection (1) is the requirement discussed above that action taken prior to completion of SEPA not have an adverse environmental impact and not limit the

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choice of reasonable alternatives. WSDOT's issuance of the request for qualifications is in compliance with this section.

Plaintiffs also rely on *King County v. Washington State Boundary Review Board for King County and City of Black Diamond*, 122 Wn.2d 648, 860 P.2d 1024 (1993). That case does not support their position. The issue before the court in *Black Diamond* was not whether an action triggering SEPA review took place. Rather, the issue was whether the City of Black Diamond properly issued a Determination of Nonsignificance (DNS) rather than preparing an EIS. Although this case does not apply to the facts of the instant action, it is interesting to note that the *Black Diamond* court, after finding that SEPA review was required prior to approval of the proposed annexations, remanded the matter back to Black Diamond for the preparation of an EIS. In the instant action, WSDOT is preparing an EIS.

D. The Court's Order is Based on the Proper Standard

Plaintiffs state at paragraph 5.12 of their motion that the Court based its ruling in granting Defendants' motion to dismiss solely on the NEPA standard that a NEPA claim is not ripe for review until a final EIS has been issued. The order entered after the hearing on the motion to dismiss does not support that assertion.

Regardless, like a NEPA claim, a SEPA claim is not ripe for review until a final EIS has been issued. SEPA plainly requires that a challenge brought under SEPA be of the underlying governmental action together with its environmental determinations. RCW 43.21C.075(6)(c). "Environmental determinations" include the final EIS. RCW 43.21C.075(8). The court's job is to review the EIS for legal adequacy. Whether brought under NEPA or SEPA, if the project is preparing an EIS, the NEPA or SEPA claim is not ripe for review at least until there is a final EIS for the court to review.

E. Substantial Justice Has Been Done

Plaintiffs also claim that the Court should reconsider its decision and vacate the Order dismissing this case because substantial justice has not been done. A court may grant a

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motion for reconsideration when important rights of the moving party are materially affected because substantial justice has not been done. *Ramey v. Knorr*, 130 Wn. App. 672, 124 P.3d 314 (2005). Granting a motion for reconsideration for lack of substantial justice should be rare, given the other broad grounds available under CR 59. *Lian v. Stalick*, 106 Wn. App. 811, 25 P.3d 467 (2001). Plaintiffs have not explained in their Motion for Reconsideration how an important right of theirs was materially affected by the dismissal of this action. Plaintiffs are not prejudiced by the dismissal of this action. After WSDOT publishes a Notice of Action, they can re-file the action and raise all of the same issues.

V. CONCLUSION

In sum, this Court's April 30, 2010 Order is legally correct and consistent with established precedent. The Court should deny Plaintiffs' Motion for Reconsideration.

DATED this 20th day of May, 2010.

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RON PAANANEN, P.E. declares as follows:

1. I am the Administrator of the Alaskan Way Viaduct Replacement Project and have held that position since December 2005. My responsibilities include supervising the various program managers that are responsible for design of alternatives being considered for the project, environmental review, and development of contracts. I have worked for the

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Washington State Department of Transportation (WSDOT) for 26 years. I am a professional engineer registered in the State of Washington (Certificate # 21532).

2. The Viaduct was built in the mid-1950s. WSDOT determined in the mid-1990s that the Viaduct was vulnerable to earthquake damage and that it was nearing the end of its useful life. In early 2001, WSDOT began planning for replacement of the Viaduct. While this work was ongoing, the Nisqually earthquake occurred in February 2001 and damaged to the Viaduct. Immediately after the earthquake, WSDOT closed the Viaduct a couple of days in order to perform a complete inspection of the structure and repair the damage. Over the next month, WSDOT closed the Viaduct on several nights and weekends for inspection and repairs.

3. WSDOT now closes the Viaduct twice annually for inspection. These inspections have revealed damage that resulted from the 2001 earthquake, including settlement in some areas, in addition to increased potential for failure in any future significant earthquake.

4. Attached as Exhibit 1 is a true and correct copy of the Alaskan Way Viaduct Seismic Vulnerability Analysis Report prepared in November 2007. The report looked at the seismic risks to the Viaduct and the Alaskan Way Seawall. Engineers concluded that the risk of damage or seismic failure is about twice what it was earlier considered to be. This means there is a one-in-ten chance that an earthquake will occur in the next ten years of sufficient severity to damage or collapse the Viaduct. Because design and construction of a replacement facility was anticipated to take about ten years, engineers reported a significant risk to public safety.

5. WSDOT continues to repair the Viaduct and perform regular maintenance, along with repair of damage that occurred during the 2001 earthquake. This work has included shoring up four columns that were found to have settled since the earthquake.

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6. Because the project is likely to use federal highway funds, WSDOT is working with the Federal Highway Administration (FHWA) in conducting an environmental review of the Viaduct replacement project pursuant to the National Environmental Policy Act (NEPA). FHWA published a notice of intent to prepare an EIS in June 2001. WSDOT began looking at a long list of potential alternatives for replacing the vulnerable sections of SR 99, primarily the Viaduct. These were narrowed to five reasonable alternatives. WSDOT and FHWA issued a Draft Environmental Impact Statement (DEIS) for public comment in 2004. FHWA, WSDOT, and the City of Seattle selected the cut and cover tunnel as the preferred alternative in December 2005.

7. In order to analyze project changes in addition to further studying the impacts of the long construction process, WSDOT and FHWA issued a Supplemental Draft EIS (SDEIS) in July 2006. The SDEIS further narrowed the reasonable alternatives to two: a "cut and cover" tunnel that would be constructed by excavating a deep trench along the waterfront, and a new elevated structure similar to the current Viaduct.

8. Late in 2006, Governor Christine Gregoire asked the City of Seattle to hold an advisory election on the voters' preference for either the cut and cover tunnel or the elevated structure. The election occurred in March 2007. Both alternatives received a majority "no" vote.

9. WSDOT, Seattle, and King County then conducted a new collaborative process throughout 2008 to identify other possible alternatives for the Viaduct replacement. With the help of a citizen advisory committee, they identified eight possible solutions that included efforts by all three agencies to address mobility through Seattle. These eight scenarios included "surface" options that involved removing the Viaduct and making improvements to

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city streets; "elevated structure" options that included replacement of the Viaduct with another elevated highway; and tunnel alternatives, including a cut and cover tunnel and a side-by-side dual-bore tunnel. These eight scenarios were evaluated under several criteria, including whether the project could be built with WSDOT's $2.8 billion legislative allocation.

10. The agencies and the advisory committee next developed three "hybrid solutions" that included elements of the original eight scenarios. These included a surface option, an elevated structure option, and a twin-bore tunnel option. Because of concern that the twin-bore tunnel (or a larger single bore tunnel) could not be built with available funds, the agencies then settled on recommending a surface option and an elevated structure option.

11. In early 2009, WSDOT determined that with additional funding support from the Port of Seattle, the single bore tunnel project could be built with available funds. Governor Gregoire, Mayor Greg Nickels, and County Executive Ron Sims then recommended to their respective agencies that the Viaduct be replaced with a four-lane single bore tunnel.

12. WSDOT and FHWA then began a second supplemental DEIS to analyze the impacts of a bored tunnel and to compare the impacts of that alternative with the impacts of alternatives that were previously studied. The second SDEIS will be released for public comment in 2010. A final EIS (FEIS) will be published in 2011. The federal lead agency, FHWA, will issue a Record of Decision (ROD) some time after the FEIS is published.

13. Pursuant to federal transportation regulations that allow solicitation of design-build contractors prior to completion of the NEPA process, WSDOT has issued a request for qualifications for contractors interested in submitting proposals for a bored tunnel project.

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WSDOT will issue the request for proposals (RFP) next year, and plans to select a design-build contractor in 2010.

14. The RFP will include the final contract language. The terms of the contract will preclude the contractor from performing final design activities or beginning construction until after the Record of Decision is issued by FHWA. After the contract is executed, WSDOT will notify the contractor that it may begin work only on preliminary design. After the ROD is issued, then the contractor will be notified by WSDOT that it may develop final designs and plans and then proceed with construction. This second notification to the design-build contractor will be WSDOT's final action that commits WSDOT to building the project. The contract will also provide that if an alternative other than a single bore tunnel is selected, then WSDOT will terminate the contract.

15. Attached as Exhibit 2 is a true and correct copy of the Alaskan Way Viaduct Project History Report that was prepared by the Alaskan Way Viaduct Replacement published in September 2009.

16. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED November 24, 2009 at Seattle, Washington

RON PAANANEN, P.E.