No. 1000171

SUPREME COURT
OF THE STATE OF WASHINGTON

ABBEY ROAD HOMEOWNERS ASSOCIATION; JOHN STILIN; and SHERRY STILIN,

Petitioners,

and

NEIL BARNETT and MANAJI SUZUKI,

Plaintiffs,

v.

CITY OF REDMOND; EASTSIDE RETIREMENT ASSOCIATION; and EMERALD HEIGHTS

Respondents.

MEMORANDUM OF *AMICI CURIAE*

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I. INTRODUCTION

Local governments face significant risks if they do not approve development projects. In that climate, local governments often ignore the voices of ordinary citizens who ask that their "fundamental and inalienable right to a healthful environment," RCW 43.21C.020(3), receive due consideration in the approval process. Judicial review is an important check, ensuring that the state's environmental policies and citizens' environmental rights remain central in municipalities' decision-making. This Court should grant review to decide two critical aspects of judicial review of development projects under the State Environmental Policy Act ("SEPA"), RCW 43.21C. Otherwise, the forces for unreviewed development will continue to sideline citizens and their environmental concerns.

II. IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The identities and interests of *amici curiae* are set out in the motion for leave to file this memorandum. We are citizens'

groups that have raised concerns about the environmental impacts of development projects in our communities.

III. ISSUES PRESENTED FOR REVIEW

We re-state the issues presented for review:

1. Does SEPA require a more searching standard of judicial review that requires courts to scrutinize local governments' SEPA decisions for compatibility with SEPA's policies and values?

2. When a local government determines if a development project will have no significant environmental impacts triggering environmental review, does SEPA permit or require the decision-maker weigh (i) the feasibility of other building sites, (ii) the proposal's short-term environmental impacts, (iii) the precedent for future development in the surrounding community, (iv) pre-existing environmental impacts, and (v) compliance with other land use regulations?

IV. STATEMENT OF THE CASE

As a condition of the City of Redmond's ("City") approval for its original construction decades ago, the Emerald Heights development preserved forested land 50–80 feet wide along the property's perimeter. CP 517, 1660, 11199. This greenbelt created a buffer between, on one side, large buildings and parking lots, and on the other side, a boulevard and the Abbey

Road neighborhood. CP 1660. This greenbelt creates a forest-like environment for the boundary with Abbey Road. CP 1655.

In 2011, Emerald Heights asked the City Council to approve a spot rezone of its property to allow it to build 50% more residential units. CP 1529, 3051–60. When neighbors and City Councilmembers expressed concern, Emerald Heights promised that it would preserve the forested buffer. CP 2185, 3056–59, 3062, 3065, 3071, 3077, 11576–79, 11193–94. With those assurances, the Council approved the spot rezone. CP 11188–91.

But then, reneging on its promises, Emerald Heights applied for City approval of a large new institutional facility to be constructed in that greenbelt. CP 10747. City employees issued a "determination of [environmental] non-significance," or "DNS," allowing the proposal to move forward without an environmental impact statement ("EIS") under SEPA. CP 2224.

The superior court reversed. CP 1363–79. The court ruled it was clear error to conclude that "the proposal will not have

significant adverse aesthetic, views, privacy, lighting, trees (screening) and land use impacts to [Abbey Road] under SEPA." CP 1377.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Standards for Judicial Review of SEPA Determinations Protect Citizens' Ability to Voice Their Concerns About Infringements on Their Right to a Healthful Environment

This Court should grant review under RAP 13.4(b)(4). Citizens' voices like ours often become drowned out when developers try to profit off projects without having to undergo full environmental review. This case provides a prime example: the developer here broke its promises to the City Council and to the neighbors who lived nearby. But neither City employees nor the hearing examiner pumped the brakes, instead allowing the project to bulldoze ahead without full environmental review. And at the hearing examiner's hearing, the Abbey Road Homeowners Association ("HOA") found itself dramatically outspent. The developer called several expert witnesses,

including one who discussed a lengthy feasibility analysis describing other building sites. CP 2163–79, 10750, 10772–81. The City also called witnesses. CP 10750. As this case shows, and as our experience confirms, citizens who advocate for their environmental rights often confront the vast resources of real estate developers that can pay for armies of attorneys and consultants who can paper over environmental concerns.

Two legal dynamics have created incentives for local governments to approve development proposals without full environmental review. First, local governments face legal risk that a developer will sue them for damages and attorney fees under RCW 64.40.020 if a court strikes down a SEPA determination. No law similarly compensates citizens and community groups. So the incentives are stacked in favor of developers. Second, under the Growth Management Act, RCW 36.70A ("GMA"), local governments must meet population growth targets for their cities. RCW 36.70A.020(1).

Amidst these pro-development pressures at the local level, "clear error" judicial review safeguards the state's environmental policies and ensures citizens' concerns are addressed in EISs when appropriate. *See Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 271–72, 552 P.2d 674 (1976). Judicial review of SEPA decisions also protects against "an atmosphere of intense political pressure." *Cougar Mountain Assocs. v. King Cty.*, 111 Wn.2d 742, 749, 765 P.2d 264, 268 (1988). In the past, of course, judicial review protected *developers*, not *citizens*, against these pressures as well as the "subjective discretion of the decisionmaker." *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 67, 578 P.2d 1309 (1978). But in our experience, the pendulum has swung the other way, and this Court should grant review to decide whether the "clearly erroneous" standard of judicial scrutiny provides more protection for citizens' environmental rights than the lesser standards for reviewing administrative agency action. *See* RAP 13.4(b)(4).

Besides "clear error" review, the petition for review also raises a broadly important question about the substantive framework for local governments' determinations of non-significance ("DNSs"). SEPA is essentially "an environmental full disclosure law," ensuring that "environmental values" live at the center of government decisions that "significantly affect[] the quality of the environment." *Id.* at 272 (quotations omitted). But a DNS "ends the environmental review" prematurely without an EIS. *Cornelius v. Wash. Dep't of Ecology*, 182 Wn.2d 574, 598, 344 P.3d 199 (2015); *see also* RCW 43.21C.031(1); WAC 197-11-340(1). While SEPA allows decision-makers to approve projects despite environmental harm, an EIS makes the decision an informed one and notifies the public of the environmental stakes. *See* WAC 197-11-400(2). But with a DNS, neither decision-makers nor the public will receive this "impartial discussion of significant environmental impacts" or information about "reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance

environmental quality." *Id.* Because a DNS allows a project to bypass full environmental review, judicial review of these SEPA decisions is a crucial failsafe.

And the legal framework for judges to apply to DNS decisions has consequences that reach far beyond the petitioners' individual case. Every year, state agencies and local governments issue thousands of DNSs. *See* Wash. State Dep't of Ecology, *State Environmental Policy Act (SEPA) Register*, https://apps.ecology.wa.gov/separ/Main/SEPA/Search.aspx (last accessed Sep. 9, 2021). And a large chunk of these DNSs are for land use decisions approving developments in the state's urban growth areas. *See id.* Thus, clarity on the legal standard for this "very important" SEPA procedure, *Norway Hill*, 87 Wn.2d at 273, has broad significance for the public. *See* RAP 13.4(b)(4).

B. The "Clear Error" Standard of Review Requires Courts to Scrutinize Decision-Makers' Actions for Compliance with SEPA Policies Rather than to Apply Merely "Substantial Evidence" and "Arbitrary and Capricious" Review

For most administrative actions, the standard of review calls upon a court to check only for "arbitrary and capricious" decisions and "substantive evidence" in the record. But for SEPA decisions, the "clear error" standard demands (despite its misleading name) "critical" scrutiny. *Swinomish Indian Tribal Cnty. v. W. Wash. Growth Mgmt. Hearings Bd.,* 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007) (quotation omitted). Clear error review is a "more intense" standard than the "arbitrary and capricious" standard for other agency decision-making. *Id.* (quotation omitted).

Division I's opinion conflicts with "clear error" review in two ways. *See* RAP 13.4(b)(1). First, it merely searched the record to determine whether the hearing examiner's findings were supported by the record. For example, the opinion says that the court "accept[s] the hearing examiner's finding that certain

other areas of the campus are unbuildable." Op. at 9. Elsewhere, the court upheld the hearing examiner's "finding" about the view and aesthetic impacts. Op. at 12. As these examples show, the court limited its task to searching the record for substantial evidence to support the hearing examiner's decision.

Second, Division I's opinion mistakenly believed that the clear error standard requires the reviewing court to simply check whether the hearing examiner addressed all the arguments. *See* Op. at 9–12. As though courts are like a baseball umpire, making sure that a base-runner touches all the bases, Division I repeatedly rejected the petitioners' arguments because the hearing examiner had "considered" their environmental concerns. *See id.* at 9 ("The hearing examiner considered this argument."); *id.* at 10 ("The hearing examiner considered this argument."); *id.* at 11 ("considered," twice); *id.* at 12 (once). This sort of check-the-box review is not what "clear error" review requires.

This Court should accept review to clarify that "clear error" review requires a court to do more than check the record for substantial evidence and for indicators that the decision-maker considered all the citizens' concerns. Division I's approach conflicts with this Court's longstanding precedent that "in addition to the 'arbitrary or capricious' standard, the broader 'clearly erroneous' standard of review is appropriate" for courts scrutinizing DNSs. *Norway Hill*, 87 Wn.2d at 271.

In the City's view, however "clear error" review does not require a court to conduct "a separate examination of economic, social, and environmental values in every case." City's Ans. at 10. That is the crux of the question presented to the Court. By rejecting the relevance of SEPA's policies, the City defends Division I's opinion by focusing solely on the "substantial evidence" and on whether the City acted arbitrarily and capriciously. City's Ans. at 8, 10. But that understanding of "clear error" review is wrong. *See* RAP 13.4(b)(1). This Court has long made clear that "[a] 'negative threshold determination'

is more than a simple finding of fact because the correctness of a no significant impact determination is integrally linked to [SEPA's] mandated public policy of environmental consideration." *Norway Hill*, 87 Wn.2d at 273. This Court should grant review to confirm that "clear error" review requires courts to independently, though with some deference, scrutinize government actions for compatibility with SEPA's environmental policies and values.

C. This Court Should Take This Case to Decide What Is the Legal Framework Under SEPA for Determining the Environmental Significance of Development Proposals Subject to Growth Management Act Regulations

We agree with petitioners that this Court should provide updated guidance on the legal framework for a threshold determination under SEPA of whether a site-specific land use decision will have significant enough environmental impacts to require an EIS. Decades have passed since this Court last discussed the legal framework for land use decisions under SEPA. *See King Cty. v. Wash. State Boundary Review Bd. for*

King Cty., 122 Wn.2d 648, 661–63, 860 P.2d 1024 (1993). Since then, this Court has not addressed the topic, while development has exploded in Washington. *Amici* agree with the petitioners that several legal facets of DNS analysis require this Court's clarification—and went unappreciated by the Court of Appeals. We highlight two here.

First, the Court should grant review and hold that the availability of an alternative site for a development proposal is legally irrelevant to the question of whether the proposal will have "a probable significant, adverse impact." RCW 43.21C.031(1). The Court of Appeals' decision to uphold the hearing examiner's permit on that ground was legal error. *See* Op. 9. The analysis and consideration of reasonable alternatives belongs in an EIS, not in the threshold determination of whether an EIS is necessary. SEPA requires every EIS to discuss "alternatives to the proposed action." RCW 41.21C.030(c)(iii); *see also* WAC 197-11-402(1) ("reasonable alternatives"). If no reasonable alternatives exist, an EIS still must evaluate a "'no-

action' alternative." WAC 197-11-440(5)(b)(ii). But in contrast to the SEPA rules for an EIS, nowhere do the SEPA rules mention alternatives as relevant to a threshold DNS. *See* WAC 197-11-330(3). Like Division I, the City incorrectly argues that the availability of an alternative building site is a matter for fact finding. City Ans. at 17–18. But under SEPA, no findings of that sort should be made or considered at the DNS threshold stage because the availability of alternatives is a topic for discussion in the EIS, not a basis for forgoing an EIS altogether.

While the availability of a feasible alternative site should be legally irrelevant at the DNS stage, *amici* have seen such considerations persuade local decision-makers to issue DNSs for proposed developments. Developers often produce evidence that any alternatives to their proposals (such as smaller building scales, larger setbacks, or different siting) will make the proposal less profitable. Hearing officers often find themselves swayed by these arguments about cost-effectiveness. Meanwhile, environmental groups and neighborhood organizations usually

lack the money to hire architects and engineers who could refute the developer's claims about infeasibility. Thus, when local governments consider the feasibility of alternatives at this threshold DNS stage, permitting agencies not only short-circuit the informed decision-making process that EISs are meant to facilitate, but also they put citizens at a disadvantage.

In short, the time for developers to address the feasibility of alternatives must be later—at the EIS stage. Legal clarity on this point is incredibly important. *See* RAP 13.4(b)(4).

Second, Division I erred by determining that a local government may ignore a project's environmental impacts on its immediate surroundings just because projects of similar scale exist further away. Op. at 10. Division I's reasoning conflicts with *Norway Hill*, 87 Wn.2d at 277, which explained that a SEPA determination must account for "the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area." That reasoning also conflicts with the SEPA rule requiring a threshold determination

to account for the project's "physical setting." WAC 197-11-794(2). In this case, the physical setting was the forest-like environment created by the greenbelt—an inherently valuable environment in its own right that also shielded against the environmental impacts of a large, busy campus in the middle of a residential neighborhood:

CP 1685. But to be clear, this legal issue does not turn on this case's particular facts, contrary to the City's argument. Rather, this issue concerns what facts are legally relevant to determining

a project's environmental impacts. The hearing examiner and Division I were wrong. *See* RAP 13.4(b)(1).

We also support the petitioners' request for review of the other aspects of the legal standard for DNSs.

VI. CONCLUSION

This Court should grant review to address these recurring obstacles to full environmental disclosure and protection.

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