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No. 1000171

IN THE WASHINTON SUPREME COURT

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

RESPONDENTS EASTSIDE RETIREMENT ASSOCIATION AND EMERALD HEIGHTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF RESPONDENT

Respondents Emerald Heights and Eastside Retirement Association ("Emerald Heights") ask this Court to deny the Petition for Review ("Petition") filed by Abbey Road Homeowners Association, John Stilin, and Sherry Stilin ("Petitioners"). Emerald Heights also joins in the arguments in the separate Answer to Petition for Review filed by Respondent City of Redmond ("City").

Petitioners strive mightily but unsuccessfully to paint a difference of opinion as a question of law that warrants review under any consideration governing acceptance of review by this Court in Rule of Appellate Procedure ("RAP") 13.4(b). They oppose Emerald Heights' proposal for a three-story assisted-living residence ("AL Residence") on its retirement campus in the Education Hill neighborhood in Redmond. They argue that the City should have deemed the AL Residence's "visual impact" to be "significant" for purposes of the State Environmental Policy Act ("SEPA"), Ch. 43.21C RCW. In challenging this decision as clear error, Petitioners effectively ask this Court to hold that the sight of a new three-story multifamily residence on a residential street constitutes a significant adverse environmental impact as a matter of law.

Petitioners seek review under RAP 13.4(b)(1) and (4). Neither consideration warrants review by this Court. Petitioners fail to establish

that the City's decision conflicts with prior decisions of this Court. *See* RAP 13.4(b)(1). To the contrary, the holding they seek would profoundly alter the scope of judicial review of SEPA determinations, replacing a largely procedural inquiry with judicial second-guessing of design decisions of local permitting officials. The Court of Appeals correctly applied the clear error standard of review by declining to substitute its judgment for that of the City's Hearing Examiner ("Examiner"). The Court of Appeals also recognized the deference due the Examiner's conclusions under SEPA, RCW 43.21C.090 (DNS afforded "substantial weight"), as well as because the Examiner made her decisions as the factfinder after an open-record hearing.

Petitioners also fail to establish that their Petition "involves an issue of substantial public interest that should be determined by the Supreme Court" as required by RAP 13.4(b)(4). They urge the Court to provide "updated guidance" regarding a range of SEPA considerations, but they identify no legal questions requiring clarification. Instead, all of their arguments are simply variations on their fact-based assertion that the Examiner was wrong to affirm the DNS. Petitioners' project-specific assertions do not constitute a question of public interest and fail to provide a basis for discretionary review. The Petition should be denied.

II. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals erred in affirming the City's issuance of a DNS for a three-story retirement residence that will be located in a developed, urban residential area and will comply with zoning and landscaping requirements.

III. COUNTERSTATEMENT OF THE CASE

A. Facts

Emerald Heights adopts the facts as stated by the Court of Appeals. Opinion at A-2–A-6. As the Opinion describes, the AL Residence is a three-story, 54-unit residence that will be between 37 and 45 feet tall and will be screened from the adjacent street by existing trees and new landscaping. Opinion at A-3; CP 10762-63. Emerald Heights applied for a Site Plan Entitlement ("SPE") and a Conditional Use Permit ("CUP"). Opinion at A-3–A-4. Emerald Heights' proposal was reviewed first by the City's Design Review Board ("DRB"), resulting in numerous changes to the project design, and next by a committee of experts in planning and engineering ("Technical Committee"), which issued the DNS and granted the permits.[1] Opinion at A-4–A-6; CP 10747-10850. The Examiner also considered these decisions during a multi-day, open-

[1] Although Petitioners previously appealed the CUP and SPE to Superior Court and to the Court of Appeals, they have abandoned these challenges in the Petition, which concerns only the DNS.

record hearing that examined compatibility, screening, and visual impact in detail. *Id*. Petitioners had multiple opportunities to make their views known. *Id.* After concluding the hearing, the Examiner acknowledged that the AL Residence "would be visible where currently no buildings are seen" and that "the record presented made amply clear that these changes are not welcome by [Petitioners]." CP 10816. Because the Examiner was "not persuaded that being able to see multifamily buildings through a vegetated buffer constitutes a significant adverse aesthetic impact," she affirmed the DNS. CP 10816.

Petitioners appealed to Superior Court pursuant to the Land Use Petition Act ("LUPA"), Ch. 36.70C RCW. The Superior Court reversed the Examiner, finding that the AL Residence's size was "incongruous" and that there was thus "a reasonable likelihood of more than a moderate adverse impact on aesthetics." Order on LUPA Appeal, attached as Appendix to Petition, at A-36–A-37. The Superior Court deemed the mitigation approved by the City "insufficient" because, in the Superior Court's view, the sight of the AL Residence would be incompatible with the "beautiful and tranquil feeling" of the neighborhood. *Id.*

A unanimous panel of Division One reversed the Superior Court, emphasizing the deference owed to the Examiner's determinations of weight and credibility. Opinion at A-10. The Opinion describes the various factors weighed by the Examiner, including evidence favoring

both parties, and concludes that Petitioners' "difference of opinion does not make the hearing examiner's decision wrong." *Id.* at A-12.

B. Petitioners' misrepresentations

Petitioners' Statement of the Case contains numerous inaccurate and irrelevant assertions. Overall, their dramatic characterizations are unsupported by the record. What they call a "massive" structure that will "dwarf" nearby homes is, in reality, a three-story building that will comply with the zoned height limit. CP 1434-35. Similarly, what Petitioners refer to as a "forested buffer" consists, in reality, of two to three rows of trees situated between an internal road on the Campus and a mature, tree-lined street separating the Campus from Abbey Road; indeed, Petitioners' own arborist witness described the "buffer" as "an unmanaged wooded lot." CP 511, 1513, 1660, 1734.

Petitioners' recitation of the regulatory history of Emerald Heights' campus, *see* Petition at 2-3, is equally unsupported by the record, which does not establish that Emerald Heights "promised" anything like what Petitioners claim. The Court should disregard these descriptions because they misrepresent the facts and are legally irrelevant. Petitioners have abandoned the claims they previously raised concerning these issues and make no attempt to tie them to SEPA. The same is true of Petitioners' unsupported, *non sequitur* contention that a project requiring a CUP must be assumed to have an "exceptional environmental impact." Petition at 4.

IV. ARGUMENT

Petitioners assert that discretionary review is merited because the Opinion conflicts with existing precedent and involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1) and (4). This case cannot satisfy these criteria. The Opinion follows precedent and does not raise issues of substantial public interest. Contrary to Petitioners' assertions, no guidance from the Court is needed; Petitioners' arguments simply reflect a site-specific difference of opinion and do not meet the standard for the Court's review.

A. The Court of Appeals applied well-established precedent governing clear error review.

Section 1 of Petitioners' argument asks this Court to grant review "to confirm the proper standard for 'clearly erroneous review.'" Petition at 7 (citing RAP 13.4(b)(1), (4)). This request must be denied.

The standard for clearly erroneous review is undisputed and was straightforwardly applied by the Court of Appeals. As this Court has repeatedly explained - and as the Court of Appeals correctly stated - a decision is clearly erroneous when the reviewing court is "left with a definite and firm conviction that a mistake has been made even if some evidence supports the hearing examiner's decision." Opinion at A-6–A-7 (citing *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 274, 552 P.2d 674, 678 (1976); *Polygon Corp. v. City of Seattle*, 90

Wn.2d 59, 69, 578 P.2d 1309 (1978)). The reviewing court must not "substitute its judgment for that of the administrative decision maker." *Id.* Accordingly, the Court of Appeals recognized the range of considerations evaluated by the Examiner and concluded that Petitioners' "difference of opinion does not make the hearing examiner's decision wrong." Opinion at A-12. There is no error to correct and no need to "confirm" a well-established rule.

In light of the Opinion's express use of clear error review, Petitioners cannot dispute that the Court of Appeals applied the correct standard. At page 6 of the Petition, Petitioners inexplicably assert that the Opinion "inquired only whether sufficient evidence supported the hearing examiner's decision." This is blatantly untrue; the very page of the Opinion that Petitioners cite expressly applies clear error review and does not contain the phrase "substantial evidence." *See* Opinion at 12. Petitioners then move to their primary argument that the Court of Appeals did not use "appropriate scrutiny," in contrast to the "critical review" that is required. Petition at 5-7. Petitioners suggest that the Court of Appeals should have ignored clear precedent and shifted the burden of proof to require the City to justify its decision instead of requiring the Petitioners to demonstrate error. They are incorrect. It is inherent in clear error review that Petitioners have the burden of proof on appeal. Opinion at A-7 (citing *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 767, 129

P.3d 300 (2006)). As the Court of Appeals recognized, SEPA also requires courts to give "substantial weight" to agency threshold determinations. RCW 43.21C.090.

Petitioners attempt to invent a conflict with the Court of Appeals' ruling by rewriting statutory provisions and past precedent to argue that SEPA inherently disfavors development. *See* Petition at 6-7. But Petitioners' misrepresentation of authority does not establish a conflict warranting review under the RAP. First, *Sisley v. San Juan Cty.*, 89 Wn.2d 78, 84, 569 P.2d 712, 716 (1977), uses the word "broad" in reference to the *scope* of appellate review, not the degree of scrutiny. Second, *Polygon*, *supra*, which Petitioners cite for the proposition that courts should employ the "clear error" standard to disfavor new development proposals, actually holds the opposite. In *Polygon*, this Court noted that a significant reason for judicial scrutiny is to "protect *property owners*" from the "potential for abuse" that arises when SEPA determinations turn on "factors, especially those involving visual considerations, [that] are not readily subject to standardization or quantification." *Polygon*, 90 Wn.2d at 69 (emphasis added); *see also Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 749, 765 P.2d 264, 268 (1988) ("SEPA should not be used to block construction of unpopular projects."). Third, RCW 43.21C.020 contains no language establishing a presumption against new development, contrary to Petitioners' suggestion. And fourth, the Court

should disregard the utterly unsupported allegations by Petitioners' counsel that courts should be skeptical of DNSs because permit reviewers supposedly fear litigation, which have no basis in the record, nothing to do with "clear error" review, and nothing to do with this case.

B. The Court of Appeals correctly reviewed the DNS.

In Section 2 of their argument, Petitioners insist that this Court must provide "guidance" regarding the standards for issuing a DNS. Petition at 8. Here, too, Petitioners fail to establish that review is merited under RAP 13.4(b)(1) or (4). The Examiner's and the Court of Appeals' straightforward application of SEPA procedure raises no conflict with precedent. Indeed, contrary to Petitioners' argument that this Court should establish an "updated" set of SEPA procedures, the decisions below demonstrate that the existing legal framework correctly ensures full environmental consideration while respecting local policy determinations.

1. The legal framework is clear.

In section 2(a), Petitioners that the Court of Appeals "did not articulate or apply a legal framework for a DNS that comports with this Court's precedents on SEPA." Petition at 10. They are incorrect. The Court of Appeals correctly determined that because the Examiner "appropriately considered the potential environmental impacts and evidence for and against the issuance of a DNS," SEPA's mandate was fulfilled. *See* Opinion at A-12. As this Court has affirmed, "SEPA is

essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision makers." *Save Our Rural Env't v. Snohomish Cty.*, 99 Wn.2d 363, 371, 662 P.2d 816, 820 (1983) (citing *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 552 P.2d 184 (1976)). "It was not designed to usurp local decisionmaking or to dictate a particular substantive result." *Id.* (citing *Norway Hill*, 87 Wn.2d at 272). Accordingly, when SEPA determinations are reviewed by courts, "[t]he pertinent question is whether environmental factors were adequately considered *before a final decision was made*," rather than whether the court agrees with the decision itself. *Hayden v. Port Townsend*, 93 Wn.2d 870, 880, 613 P.2d 1164, 1169-70 (1980) (emphasis added).

As a result, courts defer to agency determinations regarding whether a particular project's impacts are significant. *E.g.*, *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 929-30, 319 P.3d 23, 28 (2014) (affording deference to DNS when agency "considered a wealth of information," possessed "specialized expertise," and "engaged in a reasoned assessment of the environmental impacts of the proposed project."). Reversals of a DNS have nearly always occurred when there is a structural deficiency in the review process, rather than a substantive disagreement. *See, e.g., Sisley*, 89 Wn.2d at 85-87 (review board "made no attempt to synthesize or evaluate" impacts); *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 666-67, 860 P.2d 1024, 1034

(1993) (threshold determination cannot ignore the "virtually certain" consequences of action under review); *PT Air Watchers,* 179 Wn.2d at 929-30 ("Had [the agency] entirely ignored the impact of greenhouse gas emissions . . . we might reach a different result.").

Deference to a DNS is particularly appropriate where a jurisdiction has determined that a project's impacts will be mitigated below the level of significance due to compliance with local rules. *See In re Jurisdiction of Exam'r*, 135 Wn. App. 312, 325, 144 P.3d 345, 351 (2006) ("SEPA allows counties to determine that a project's environmental impact will be mitigated through its own development regulations, rather than through the EIS process, to meet SEPA requirements."); RCW 43.21C.240(4)(b) (local policies "shall be considered to adequately address an impact" if the city "has designated as acceptable certain levels of service, land use designations, development standards, or other land use planning" measures); WAC 197-11-158, 197-11-660(1)(g).

Here, the voluminous record documents the City's exhaustive analysis of the AL Residence's visual compatibility and Petitioners' numerous opportunities to present their opposing views. Petitioners cannot and do not attempt to establish that the City ignored or inadequately considered environmental factors. Instead, they dispute the City's determination regarding whether a visual change is a significant impact. Such a disagreement does not constitute a basis for reversal of a

threshold determination – particularly in light of the City's adoption of and reliance on development regulations establishing the amount of landscaped screening required for development projects. *See* WAC 197-11-158. These principles are well established and were ably applied by the Court of Appeals. There is no basis for this Court's review.

2. Petitioners fail to establish a need for guidance.

Section 2(b) of Petitioners' argument asks this Court to issue "updated guidance" regarding a range of SEPA considerations, such as the relevance of short-term impacts and the possibility of future precedent. The Court should deny Petitioners' requests, which fail to demonstrate a basis for review under RAP 13.4(b)(1) or (4).

First, Petitioners again fail to establish that the Court of Appeals' application of well-established SEPA tests conflicted with any authority, employing another specious procedural argument as a smokescreen for their disagreement with the outcome in this case. As with their argument concerning the level of scrutiny required by clear error review, Petitioners seek to create the impression that the decisions below allowed the AL Residence to "forgo environmental review." *E.g.* Petition at 16. Again, this misrepresents the nature of a DNS as well as the record of this case. An agency issues a threshold determination based on its review of the environmental checklist, which requires the provision of detailed information concerning environmental impacts. WAC 197-11-330; *see*

WAC 197-11-444; WAC 197-11-960. If the agency determines that the analysis demonstrates that a project will not cause significant adverse impacts, it issues a DNS. WAC 197-11-340(1). In other words, a DNS represents the *completion* of environmental review, not avoidance of the process. Petitioners seek to conflate the requirement for an environmental impact statement ("EIS") with the overall process of environmental review. Preparation of an EIS, however, is required only for impacts that will be *significant*; it is not the same as considering the impacts of the project as a whole. WAC 197-11-330; WAC 197-11-360.

Second, there is no issue of substantial public interest. Each of the considerations that Petitioners cite on pages 11-20 of their Petition is well understood and consistently applied. Petitioners' requests amount to asking the Court to amend SEPA so that it would require the outcome Petitioners prefer, which directly contradicts this Court's "imperative that we not rewrite statutes to express what we think the law should be." *State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240 (1997) (citations omitted).

a. The City considered short-term impacts.

First, Petitioners assert that this Court should "clarify the legal relevance of short term environmental impacts," citing the Examiner's determination that landscaped screening for the AL Residence would be sufficient even though it will take several years for new plantings to grow to the point where they completely obscure the building. Petition at 11-

13. Again, there is nothing for this Court to clarify. The record amply documents the City's consideration of the short-term impact at issue: namely, the fact that the AL Residence will be visible while the new landscaping fills in. As the Court of Appeals recognized, the Examiner was entitled to balance the relative degree of short- and long-term impacts with other factors in reaching a final decision. Opinion at A-10–A-12. The Examiner was not required to find short-term impacts *significant* simply because they will *exist*, and this Court should not grant Petitioners' request to rewrite SEPA to require such a finding.

b. The Court of Appeals properly considered alternative sites.

Petitioners next assert that the Court of Appeals inappropriately weighed the lack of other feasible locations for the AL Residence on Emerald Heights' campus and held that a project may ignore "location-driven environmental harm if the project has no other feasible location." Petition at 13. Petitioners are misrepresenting the Opinion. Contrary to Petitioners' assertion, the Court of Appeals acknowledged the lack of alternative sites but did not treat it as determinative in analyzing the significance of aesthetic impacts. Opinion at A-9. Instead, this was just one of a range of factors weighed by the Examiner, whose consideration as a whole was appropriately given substantial weight. *See* Opinion at A-12. Nor did the Court of Appeals

ignore what Petitioner calls "location-driven environmental harm" – to the contrary, it specifically mentions Petitioners' accusations of incongruity, light impacts, and visual effect. Again, the Examiner's and Court of Appeals' determinations that these factors did not establish a significant impact did not mean they were ignored. There is no conflict with precedent and no need for guidance.

c. The City correctly found aesthetic impacts to be non-significant.

Petitioners next assert that the Examiner inappropriately evaluated the "context" of the AL Residence's neighborhood. Petition at 14-15. Tellingly, Petitioners do not even attempt to argue that this issue either demonstrates a conflict with existing precedent or an issue of substantial public interest. RAP 13.4(b)(1) and (4). Yet again, it is simply presented as a disagreement with the outcome – specifically, the Examiner's interpretation of the word "significant." Petitioners fail to establish that there was any conflict. "'Significant' as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1). "Significance involves context and intensity . . . and does not lend itself to a formula or quantifiable test." WAC 197-11-794(2). Petitioners appear to argue that the "context" of a project should be limited to its immediate neighbors and that SEPA establishes a minimum setback requirement between buildings

for aesthetic impact to be deemed non-significant. Again, however, Petitioners' preferences do not establish what is significant. Their arguments contradict SEPA's express prohibition *against* determining significance according to a "formula or quantifiable test." *See id.* The arguments also, again, conflict with the standard of review and the deference owed to the City's decision. The Examiner did not "ignore" the AL Residence's visual impacts on its neighbors; instead, she exhaustively considered the arguments raised by Petitioners and determined that City-adopted land use policies (including a height limit, setback, and landscaping requirements) provided adequate mitigation to render the AL Residence's impacts non-significant. Petitioners' contrary preferences do not establish that this was clear error.

d. The Opinion did not ignore cumulative impacts or potential future precedent.

Petitioners' next two arguments both concern issues of off-site development that Petitioners did not raise below and that should not be reviewed by this Court for that reason alone. Petition at 15-18; *see State v. Arredondo*, 188 Wn.2d 244, 262, 394 P.3d 348, 358 (2017). First, Petitioners criticize the Examiner's decision as inappropriately considering "cumulative impacts," *i.e.,* impacts from the proposal under review that combine with and further existing impacts. Petition at 15-16. Petitioners did not raise this issue below, presumably because there are no

cumulative visual impacts at issue. The Examiner considered the presence of other large buildings (such as a high school and a church, *see* Opinion at A-10) as evidence of neighborhood character and context. Petitioners' own claims contradict the argument that these buildings have "visual impacts" that will combine with those of the AL Residence: the very premise of their case is that the sight of the AL Residence from their houses will be *unlike* anything in the immediate vicinity. *See* Petition at 15. Petitioners' comparison of this case to a scenario involving multiple sources of air pollution is nonsensical.

Petitioners next accuse the Court of Appeals of having "focused only on the future development potential for the proposal's specific site" rather than "the surrounding area." Petition at 17. Contrary to their suggestion, the Opinion expressly recognized and discussed the possibility of future development on Emerald Heights' campus because it was the only issue Petitioners previously raised. Opinion at A-12. The Court should disregard Petitioners' factual contentions about hypothetical future development proposals, which consist entirely of unsupported allegations by Petitioners' counsel, as well as false assertions that the AL Residence did not undergo environmental review. There is no conflict and no issue of substantial public interest here.

e. The City appropriately considered the mitigating effect of development regulations.

Finally, Petitioners ask this Court to provide "updated guidance" regarding the interpretation of WAC 197-11-158, asserting that it is the "right time" for such guidance because of the 1990 passage of the Growth Management Act ("GMA"). The Court should deny this request. As with all of their arguments, Petitioners fail to establish that SEPA's clear legal framework, which is consistently followed by local jurisdictions and applied by courts, presents an issue of substantial public interest. Instead, Petitioners once again ask this Court to issue an advisory opinion that rewrites SEPA based on policy arguments that (in addition to lacking any basis in the record) do not provide a basis for discretionary review.

Yet again, Petitioners attempt to create the impression of a controversy that does not exist. WAC 197-11-158 gives jurisdictions planning under GMA the "option" to determine that their adopted policies provide "adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of the project." Contrary to Petitioners' suggestion, this language does not purport to authorize agencies to skip environmental review simply by amending their codes. Instead, it requires a detailed, individualized review of each impact, including a determination of whether and how the impact is "adequately addressed" by a policy as

well as "additional environmental review" of "project specific impacts that have not been adequately addressed." WAC 197-11-158(2), (3).

In other words, Petitioners' assertion – that agencies must review projects on a "case-by-case basis" and attach additional conditions to address "unique" impacts that are "not addressed by general legislation" - is true. *See* Petition at 20. That is what is required by the express language of WAC 197-11-158, which has been applied in prior appellate decisions. *See Moss v. City of Bellingham*, 109 Wn. App. 6, 22, 31 P.3d 703, 712 (2001) ("WAC 197-11-158 creates a flexible process whereby SEPA officials are authorized to rely as much as possible on existing plans, rules and regulations, filling in the gaps where needed by imposing mitigation measures under SEPA. It is not an all-or-nothing proposition[.]"). There is no need for this Court to provide guidance when there is no indication that the plain meaning of the regulation is in doubt.

Moreover, although Petitioners critique (and misrepresent) arguments made by Respondents in briefing before the Court of Appeals, the Petition notably lacks any suggestion that the decision made by the Court of Appeals incorrectly applied this standard. Nor could Petitioners make such an assertion, because the Opinion expressly recognizes that the Examiner did *not* conclude that the Project's impacts were non-significant merely because it complies with applicable codes. Opinion at A-

10. There is no conflict with this Court's decisions and no basis for discretionary review.

V. CONCLUSION

Emerald Heights respectfully asks this Court to deny the Petition for Review.

DATED this 24th day of August 2021.

Respectfully submitted,

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