No. 101065-6

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PUYALLUP,

petitioner,

v.

PIERCE COUNTY, KNUTSON FARMS, INC., AND RUNNING BEAR DEVELOPMENT PARTNERS, LLC,

RESPONDENTS.

JOINT RESPONSE TO BRIEF OF *AMICUS CURIAE* BY WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

GORDON THOMAS HONEYWELL LLP
Margaret Y. Archer, WSBA No. 21224
Attorneys for Knutson Farms, Inc. and Running Bear Development, LLC

MARY ROBNETT
Pierce County Prosecuting Attorney
Cort O'Connor, WSBA No. 23439
Attorneys for Respondent Pierce County

1201 Pacific Avenue, Suite 2100
Tacoma, WA 98401-1157
(253) 620-6500

[4870-7386-6804]

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INTRODUCTION

The Washington State Association of Municipal Attorneys ("WSAMA") submitted an *amicus curiae* brief in support of the City of Puyallup's challenge to Division II of the Court of Appeals' decision in *City of Puyallup v. Pierce County,* 20 Wn. App.2d 466, 500 P.3d 216 (Wash. App. Div. 2, December 14, 2021, as amended on reconsideration in part (June 1, 2022) ("Challenged Decision").[1] Through the Challenged Decision, Division II clarified the scope of its prior opinion in *City of Puyallup v. Pierce County,* 8 Wn. App.2d 323, 438 P.3d 174 (2019) ("Lead Agency Opinion") and provided instruction to the trial court for a remand order that will comply with its Lead Agency Opinion.

WSAMA asserts that Division II misinterpreted its own decision and failed to accord "full force and effect" to the Lead

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[1] The Challenged Decision, is attached as Appendix A to the City's Petition at pages A-1 through A-9. Citations to the Challenged Decision shall be to the City's paginated Appendix as "Op. at A-___," with citations corresponding to the Appendix page number.

Agency Decision. (Amicus Brief at p. 2.) Notably, WSAMA does not present argument in support of the City's claim that the Lead Agency Decision requires that **all** prior review of the Knutson Farms project, which review was extensive, be voided *ab initio,* and that review of the project must start anew. Division II appropriately concluded that "[n]either the regulations nor the case law support the scorched earth approach Puyallup included in its proposed order." (Op. at A-7, *citing* WAC 197-11-070; WAC 197-11-600; WAC 197-11-948(2); *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 47, 873 P.2d 498(1994); *Klickitat County Citizens Against Imported Waste v. Klickitat County,*122 Wn.2d 619, 632, 647, 860 P.2d 390 (1993). WSAMA's brief does not challenge that conclusion.

WSAMA instead focuses its attention on the City's pending Land Use Petition Act ("LUPA") appeal. WSAMA asserts that "Division II's decision will embroil Washington municipalities in costly litigation and promote potentially

contradictory decision from different forums." (Amicus Brief at p. 3.)

But the Challenged Decision presents no such peril to Washington municipalities. Rather, it was carefully catered to the unique circumstance of this specific case, which includes the fact that the City could have sought a stay under RAP 8.1 and/or RAP 8.3 when it appealed the Thurston County trial court's summary judgment ruling on the Lead Agency litigation but chose not to. The City filed its appeal (and stay remedies pursuant to RAP 8.1 or RAP 8.3 were available to the City) before the Pierce County Hearing Examiner commenced its substantive review of State Environmental Policy Act ("SEPA") and non-SEPA decisions about which the City now complains.

WSAMA fails to even address this significant fact. WSAMA likewise fails to address the case law and analysis presented in the Respondents Joint Response to Petition for

Review; instead electing to repeat the arguments presented in the City's Petition.

WSAMA's Amicus Brief presents no new or additional analysis that will aid this Court in determining if review is appropriate and fails to address the important procedural history that makes this case unique. The Challenged Decision is not subject to review under RAP 13.4 and this Court should deny the City's request for review.

ARGUMENT

The Challenged Decision is catered to the unique circumstances of this case and will not open the flood gates to piecemeal litigation in multiple forums as WSAMA decries.

To begin, Division II did not direct that the LUPA appeal proceed. Rather it left the issues (whether the court has authority to proceed under the circumstances of this case and, if so, on which issues) to be decided by the Pierce County superior court, which, of course, is the court where the City filed its LUPA appeal. The Challenged Decision does not in

any way foreclose the City from presenting to the superior court the same arguments it presents in its Petition for Review regarding jurisdiction or piecemeal review (the same arguments echoed by WSAMA here). The City is free to argue to the LUPA trial court that further review of all or any portion of the Examiner's decisions under LUPA should be deferred until after the EIS is completed. Division II merely held that the issue was not properly presented in this appeal that followed the Lead Agency declaratory judgment action and, instead, should be addressed by the superior court in the LUPA appeal. (Op. at A-9.)

WSAMA asserts: "Division II erred when it declined to rule on the effect of its decision on the ongoing LUPA appeal, claiming that the subject of the LUPA action was not properly before Division II." (Amicus Brief at p. 6.) WSAMA seems to argue that because Division II was informed and aware of the pending LUPA appeal, the issue was squarely before them. (*Id.*)

But WSAMA fails to address the rationale of Division

II's decision. Regarding the issue of whether the trial court can or should proceed with review of the LUPA appeal, Division II appropriately based it decision on the narrow scope of the appeal leading to the Lead Agency Decision:

> Contrary to its claims, we are not analyzing the validity of an environmental determination or a government action. Puyallup attempts to combine this appeal with its ongoing LUPA case, but the subjects of that case – the County's reviews, decision, permits, and approvals about the project are not properly before us. This case was also not an appeal of the County's project approval, or any other government action. Rather, the issue before us is whether the superior court's order complies with our prior mandate.

(Op. at A-8 – A-9.) Again, the Challenged Decision does not foreclose the City from presenting its arguments to the superior court. It simply directs that the superior court, the court where the LUPA appeal was filed, is the appropriate forum to decide the issue.

If the superior court does, following consideration of briefing from all parties, elect to proceed on the LUPA appeal to address non-SEPA issues, such a decision would not offend

SEPA. This Court's decision *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993), for example, provides support for a trial court decision to address non-SEPA issues. There, the Court heard and decided non-SEPA issues to facilitate administrative economies. 122 Wn.2d at 668-669.

Similarly, after voiding a grading permit issued in violation of SEPA and remanding for further proceeding, the court in *Junita Bay Valley Community Ass'n v. City of Kirkland,* 9 Wn. App. 59, 74, 510 P.2d 1140 (1973), nonetheless concluded it was "necessary to resolve certain additional issues, not related to SEPA." It did so "in the interest of expediting any future litigation between the parties." *Id.* There the court determined whether certain wetlands are subject to the Shoreline Management Act and the decision provided guidance for the City of Kirkland in its permitting decision following the completion of SEPA review. The City of Puyallup's pending LUPA appeal could result in similar helpful

guidance here.

Finally, in *Weyerhaeuser, supra,* 124 Wn.2d 26, this Court decided non-SEPA related procedural issues, including the right to cross-examine witnesses in Examiner proceedings, even though it concluded that the EIS was inadequate and voided the conditional use permit based upon the inadequate EIS.

Division II appropriately left the decision on this issue to the Pierce County trial court to decide in the pending LUPA action. Review of the Challenged Decision is not warranted.

Moreover, the situation presented to the City (multiple litigation in multiple forums) is of its own making and could have been avoided had it simply sought a stay.

The Pierce County Examiner was fully aware of the City's declaratory judgment lawsuit regarding its claim for Lead Agency status. In fact, pursuant to an agreement of the parties, the Examiner initially deferred commencing administrative review of the County's SEPA and permitting

decisions until the Thurston County superior court could hear and decide competing summary judgments motions on the lead agency issue. It was after the trial court ruled that the Examiner commenced review of the City's administrative appeals. But, even then, the Examiner only proceed after the City, despite having the opportunity to do so, declined to seek a stay of the administrative appeal proceeding. The Examiner explained:

> Prior to the Examiner's involvement in this matter, the City, the County, and Knutson became involved in litigation concerning whether or not the City should assume lead agency status for SEPA review. …The parties moved for summary judgment and on October 6, 2017, the superior court granted the County's motion and denied the City's motion. The court also denied the City's motion for reconsideration. This matter is presently on appeal in Division 2 of the Washington State Court of Appeals. However, the City did not apply for a stay of the Superior Court Order. Therefore, the Examiner became involved in this matter in October, 2017.

(CP 57 ¶ 20. *See also* CP 103-04.)

After the City lost on summary judgment and filed its appeal to Division II, it was not powerless to stop the

administrative appeal from moving forward, which of course would have eliminated any need for a subsequent LUPA appeal. The City could have requested a stay of the Examiner proceeding pursuant to RAP 8.1 or RAP. 8.3 before the Examiner engaged in any substantive review. To the extent the City feels a burden by its own LUPA appeal, the burden is of its own making.

Significantly, WSAMA makes no attempt to address this issue. Like the City of Puyallup, in the unlikely event other municipalities are ever faced with the same unique situation presented here, they will have a remedy available to them to protect them from multiple litigation in multiple forums that is *potentially* presented here. They need only elect to use it.

In the absence of a stay, the Examiner proceeded with a hearing in which it heard testimony over a two-week period and decided, in addition to SEPA issues, non-SEPA related issues. Because the Examiner addressed non-SEPA related issues, it will facilitate efficiency and administrative economy if the trial

court has the option, if it deems appropriate, to proceed in the LUPA action to resolve select non-SEPA related issues in the pending LUPA appeal (e.g., such as whether the deadline to complete review of the development permit was appropriately extended, whether the flood plain boundary – which directs the potential outer limits of the development footprint – was set consistent with Pierce County Code, and whether a shoreline conditional use permit is required for the storm facility outfall). All of these issues are wholly unrelated to SEPA and they do not require environmental review to be made. But resolution of the disputes regarding the County's interpretation of its own Code will aid the County in making non-SEPA decision and potentially aid streamlining this already long process.

While RCW 43.21C.075 expressly prohibits judicial review of SEPA decisions outside of review of the permitting decision to which it is connected, the above court decision establish that courts are not so lacking in flexibility when presented with unique circumstances as are presented here.

Those unique circumstances include:

- A *bona fide* dispute regarding the perquisites to assert Lead Agency status (which dispute has now been adjudicated and resolved by the Lead Agency Decision and, thus, will not likely arise again);
- The commencement of related litigation before the *bona fide* dispute could be resolved by the courts; and
- A decision by the party filing the LUPA appeal not to invoke available remedies to obtain a stay that would have served to avoid parallel administrative proceeding.

WSAMA fails to address this court decisions that confirm that flexibility.

CONCLUSION

This Court should deny the City's request for review of Division II's Challenged Decision clarifying the scope of its own prior decision.

Dated this 23rd day of September, 2022.

We certify this response contains 2,224 words in compliance with RAP 18.17(b).

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____
Margaret Y. Archer, WSBA No. 21224
Attorneys for Knutson Farms and
Running Bear Development Partners

MARY ROBNETT
Pierce County Prosecuting Attorney

By _____
for Cort O'Connor, WSBA No. 23439
Attorneys for Pierce County - per 9/23/22
authorization

DECLARATION OF SERVICE

THIS IS TO CERTIFY under penalty of perjury under the laws of the State of Washington the following is true and correct:

That on the 23rd day of September 2022, I caused true and correct copies of the Joint Response to Brief of *Amicus Curiae* to be served on the parties listed below, via the method(s) indicated :

Peter J. Eglick Joshua A. Whited 1000 2nd Ave, Suite 3130 Seattle, WA 98104 eglick@ewlaw.net whited@ewlaw.net phelan@ewlaw.net	[ ] Via Legal Messenger [ ] Via U.S. Mail [ ] Via Facsimile: [X] Via E-filing Notification [X] Via Email
Joseph N. Beck City of Puyallup 333 S. Meridian Puyallup, WA 98371-5904 jbeck@puyallupwa.gov	[ ] Via Legal Messenger [ ] Via U.S. Mail [ ] Via Facsimile: [X] Via E-filing Notification [X] Via Email
Megan C. Clark Etter, McMahon, et al. 618 W. Riverside Ave. Suite 210 Spokane, WA 99201 mclark@ettermcmahon.com	[ ] Via Legal Messenger [ ] Via U.S. Mail [ ] Via Facsimile: [X] Via E-filing Notification [X] Via Email

carolyn@ettermcmahon.com	
Clara Park Sophia E. Amberson Van Ness Feldman LLP 1191 2nd Avenue Suite 1800 Seattle, WA 98101 cpark@vnf.com	[ ] Via Legal Messenger [ ] Via U.S. Mail [ ] Via Facsimile: [X] Via E-filing Notification [X] Via Email

DATED in Tacoma, Washington this 23rd day of September 2022.

Amy Elliott, Legal Assistant
GORDON THOMAS HONEYWELL

GORDON THOMAS HONEYWELL

September 23, 2022 - 2:50 PM

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Sender Name: Kimberly Harmon - Email: kharmon@gth-law.com
Filing on Behalf of: Margaret Yvonne Archer - Email: marcher@gth-law.com (Alternate Email: lcrane@gth-law.com)

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