No. 102055-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 56890-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ENGLISH FARM LLC and JENNIFER ENGLISH WALLENBERG,

Appellants,

vs.

CITY OF VANCOUVER,

Respondent.

JLL, HP Inc., JENNIFER BAKER, MARIAN ENGLISH-HUSE, and DON JENNINGS,

Respondents.

MEMORANDUM OF AMICUS CURIAE THE CLARK COUNTY HISTORICAL SOCIETY WASHINGTON

(Filing Party Listed on Next Page)

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I. INTRODUCTION

Properties that tell the story of Washington State's history should be preserved. Consideration of the impacts of development on them is required by law, as part of responsible, considerate, and sustainable development by private and public parties. Historic spaces are irreplaceable cultural, educational, and economic resources and assets.

Consequently, responsible, intentional development and growth projects are required by law to analyze – at the outset – whether a proposed project may cause mitigatable—or potentially irreversible—harm to an historic property.

This brief will address the statewide significance of the Petition for Review to those requirements. The current decision by the Court of Appeals in this case presents a significant risk to all properties of historic, or potentially historic, value across the State, because it conflicts with and undermines historical property protections currently recognized in state law and Supreme Court and Court of Appeals decisions.

II. FACTUAL AND PROCEDURAL BACKGROUND

This brief incorporates by reference the recitation of the facts, procedural background, and defined terms given by Appellants and provides additional information below regarding the cultural resources analyses performed regarding English Farm to date.

In 2013, the City of Vancouver prepared a historic inventory report about English Farm as part of a street improvement project. CP 1519-20. The report identified English Farm as an important resource:

> The extended period of agricultural use by one family exhibited at the English Farm makes it a unique resource in Clark County. This area of Washington was once dotted with farmsteads that, similar to the English Farm, were established during the late-nineteenth or early-twentieth centuries but have since been disappearing from the landscape due to a steady encroachment of commercial and residential development.

CP 1521. The report recommended the property as eligible for the NRHP under Criterion A. CP 1521.

Properties recommended eligible under Criterion A are significant in

> American history, architecture, archaeology, engineering, and culture . . . and that possess integrity of location, design, setting, materials, workmanship, feeling, and association and . . . [t]hat are associated with events that have made a significant contribution to the broad patterns of our history[.]

36 C.F.R. § 60.4.

HP's consultant acknowledged that English Farm "is one of the last remaining representatives of the late-nineteenth and mid-twentieth century agricultural history of the areas outlying the City of Vancouver." CP 1770. HP's consultant, though, concluded the development would have "No Effect, directly or indirectly to English Farm" because HP's buildings would sit "below the elevation of English Farm and [would] not impinge upon the viewshed of this resource." Opinion at p.4 (quoting the HP survey). HP's SEPA checklist also concludes the project will "not block views" because the "planned development is 40 to 50 feet below the adjoining properties."

Id.

English Farm later urged that HP's master plan was not consistent with its SEPA application because it illustrated buildings 90 feet tall. *Id.* at p.5. The Court of Appeals' Opinion (the "Opinion) concluded there was no inconsistency because the master plan did not include building heights and was not required to do so. *Id.* at pp.12, 13; *see also id.* at p. 4 (properties are zoned to have no height restrictions).

III. IDENTITY AND INTEREST OF AMICUS

The Clark County Historical Society Washington ("CCHS") is a 501(c)(3) nonprofit organization dedicated to responsible collections stewardship, innovative collaboration and inspiring exhibitions and programs that engage the community in an exploration of Clark County's past, present and future. CCHS utilizes its collection of 100,000+ items of local historical significance to inform people about the region's heritage and its importance in their daily lives.

CCHS's purpose and educational mission would be

extremely difficult without the powerful protections of historical assets provided in the Growth Management Act ("GMA"), the State Historical Societies Act (Chapter 27.34 RCW), the State Environmental Policy Act (Chapter 43.21C RCW, "SEPA"), and the local protections afforded by the Clark County Heritage Register and the invaluable guidance of the Clark County Historic Preservation Commission.

These statutes, regulations, and commissions ensure the long-term protection of Clark County's treasured historical sites and benefit our community's livability, by requiring all developments to consider impacts on the aesthetic, educational, and cultural value of our historical treasures. Municipalities must endeavor to promote well thought-out development.

Unfortunately, in the last three years, CCHS has seen a growing need for advocacy related to preservation. As a result, we have created an outreach program in which we help property owners list their historic sites on the Clark County Heritage Register. This work echoes the value the Washington State

Legislature has established for historic preservation. This work is so vital to the long-term success of our communities that our organization has seen it necessary to invest our own resources—including by filing this amicus brief—to ensure we help ensure a strong local presence in historic preservation.

Accordingly, CCHS is interested in Issue C.2, as presented in the Appellant's Petition for review:

> 2. When reviewing a decision by a city that is required to plan under the GMA, may a court affirm that city's land use development application decision…if the city imposes a land use condition of approval that authorizes serial SEPA reviews, which are otherwise prohibited by *King County v. Washington State Boundary Review Board*, 122 Wn.2d 648, 860 P.2d 1024 (1993)

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Washington's historic places deserve and are legally entitled to protection.

Issue C.2 presents an issue of substantial, state-wide public interest. Washington's legislature deemed historic properties across the state to be so valuable, that it designated *two* state historical societies to preserve and protect them. *See*

RCW 27.34.010. "[T]he economic, cultural, and aesthetic standing of the state can be maintained and enhanced by protecting the heritage of the state and by preventing the destruction or defacement of these assets." RCW 27.34.200. The legislature further created and funded the Department of Archaeology and Historic Preservation ("DAHP") to provide "information to state, federal, and private construction agencies regarding the possible impact of construction activities on the state's archaeological resources[.]" RCW 27.53.020. All State agencies and departments are required to fully cooperate in this endeavor because it is:

> in the public interest of the state to … preserve, protect … and perpetuate those structures, sites, districts, buildings, and objects which reflect outstanding elements of the state's historic, archaeological, architectural, or cultural heritage, for the inspiration and enrichment of the citizens of the state.

RCW 27.34.200; RCW 27.53.010 (it is in the public interest to conserve, preserve and protect these resources "and the

knowledge to be derived and gained" from them).

In the case pending review, the City of Vancouver's historic inventory report and HP's consultant both acknowledge the historic value and NHRP-eligibility of the English Farm. HP's archaeology report and SEPA checklist reassure the community the proposed development will not impact English Farm because all proposed buildings would be below grade. CP 1772. HP's master plan, though, allows buildings of unlimited height without contemplating – *now* – whether such buildings might negatively impact this NRHP-eligible resource. As discussed below, the Opinion, sanctioning this stilted analysis in favor of potential, future, serial SEPA analyses, puts all historical properties at risk.

English Farm had the foresight (and the influence) to negotiate protections for itself into a development agreement with the City of Vancouver, the City of Vancouver's code, and its comprehensive plan when the City sought to annex the farm's property. *See* Petition for Review at p. 14; Opinion at p.

A-2. That will not always be the case. Not all owners of historic properties are that influential and not all municipalities are amenable to tailoring public policy to establish such site-specific protections when annexing county land. Consequently, this Court's review is necessary to ensure *all* historic properties, regardless of size or wealth or influence, are properly considered. RAP 13.4(b)(4).

B. The Court of Appeals' decision conflicts with Supreme Court and three additional published Court of Appeals decisions.

When local governments plan for and analyze impacts of growth on historic properties, as required by the laws and regulations cited above – and current Supreme Court and Court of Appeals opinions – the pressures of economic development and historic preservation can be appropriately balanced.

The Court of Appeals' Opinion in the English Farm case is not only inconsistent with *King County v. Washington State Boundary Review Board* (as alleged in the Petition for Review) (hereinafter "*King County*"), it is also inconsistent with *Victoria*

Tower P'ship v. City of Seattle, 59 Wn. App. 592, 605, 800 P.2d 380 (1990) ("*Victoria Tower*"); *Magnolia Neighborhood Plan. Council v. City of Seattle*, 155 Wn. App. 305, 317, 230 P.3d 190, 196 (2010), *as amended on reconsideration* (May 14, 2010) ("*Magnolia*"); and *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp.*, 90 Wn. App. 225, 231 n.2, 951 P.2d 812 (1998) ("*Concerned Taxpayers*").

The City of Seattle declined to allow Victoria Tower Partnership to build a 16-story building – conditioning its approval on the building being no more than 8-stories tall – because a taller building would be aesthetically inconsistent with the surrounding neighborhood. *Victoria Tower*, 59 Wn. App. at 595. The primary issue in that appeal was whether the City used its growth policies to override specific building height provisions in the zoning code for the subject property. *Id.* at 596. The Court of Appeals, Division One, found the City did not err; it was entitled to rely on "purely aesthetic

considerations" and neighborhood impacts to impose a building height limit that was more restrictive than the zoning code. *Id.* at 598. The Court reached this conclusion because "SEPA mandates that local govermnent[s:]" (1) "identify and evaluate the adverse effects of one owner's project on his neighbor's property and the community"; (2) assure "'for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings'"; and (3) "preserve important historic cultural, and natural aspects of our national heritage." *Id.* at 598 and 605 (citing RCW 43.21C.020(2)(b), (d)). *See also* WAC 197-11-960(B)(10)(b) (requiring analysis of aesthetics and impacts on "views in the immediate vicinity" as an element of SEPA analysis). *See also Victoria Tower*, 59 Wn. App. at 604 n.21 (affirming holding that a City can impose building height limits to mitigate harms caused to neighbors).

The Opinion, in contrast, does not consider these SEPA requirements and holds, instead, that English Farm "has no right to a view conferred to it by statute, ordinance, or a

restrictive easement." *Id.* citing *Asche v. Bloomquist*, 132 Wn. App. 784, 797-98, 133 P.3d 475 (2006). The Opinion, therefore, failed to consider whether the specific zoning code at issue could be overridden by the neighborhood impact and viewshed analysis requirements of SEPA.

Because the Opinion is inconsistent with controlling law and conflicts with the plain language of *Victoria Tower* affirming SEPA requirements for municipalities to consider aesthetic impacts on neighboring properties, this Court should grant the Petition for Review.

The Opinion also conflicts with the Court of Appeals, Division One, ruling in *Magnolia*, which held the City of Seattle impermissibly delayed SEPA analysis for a redevelopment plan until the City received actual applications for a rezone and land use permits (which were contemplated under the redevelopment plan). 155 Wn.App. at 310. A full SEPA analysis upon approval of the plan was required because the plan "was very detailed and included the number of

residential units approved, the layout of the uses, and information indicating potential environmental impacts." *Id.* at 317. Redevelopment plans with this level of specificity do not "evade SEPA review simply because [their] approval does not result in immediate land use changes." *Id.* The Court concluded the city's approval of a master redevelopment plan "without conducting SEPA review is 'precisely the type of government decision that would have the 'snowballing effect'" disfavored in *King County*. *Id.* at 317.

The Opinion in this case directly conflicts with *Magnolia*. The City postponed SEPA review until an actual site plan was submitted, pursuant to the approved master plan – even though the master plan already contained detailed information about number of buildings, layout of uses, and landscaping plans. Opinion at 15.

The Opinion is also directly contrary to the Court of Appeals, Division Two, decision in *Concerned Taxpayers*. In that case, the Department of Transportation ("DOT") planned to

eventually build a four-lane road, but currently had applied to only build a two-lane road. 90 Wn.App. at 231. In response to a challenge to the SEPA analysis, the Court held a four-lane analysis was the most appropriate course of action. "[I]f the State presented two-lane alternatives and later built the four lanes contemplated [by the DOT's plans], it would be 'piecemealing,' a disfavored process." *Id.* "Piecemealing…is disfavored because the later environmental review often seems merely a formality, as the construction of the later segments of the project has already been mandated by the earlier construction." *Id.* at 231, n.2. *See also* WAC 197-11-055(2)(a)(i) (the fact that future site plan reviews are required "shall not preclude current consideration" of the developers' future plans); WAC 197-11-060(3)(3) ("parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document").

Here, the Opinion expressly acknowledges the master

plan SEPA analysis was based on an assumption that buildings would be constructed below grade. Opinion at pp. 4, 14, 15. Nevertheless, the Opinion held the SEPA analysis was sufficient to support a master plan that does not expressly include and does not restrict building heights in any way. *Id.* In fact, the Opinion expressly acknowledges the zoning code allows buildings of unlimited height. *Id.* at pp. 4. These portions of the Opinion directly conflict with *Concerned Taxpayers*, which required the developer's SEPA analysis to reflect the entire contemplated development, not just the currently known portions of it.

In short, the Opinion is not only contrary to this Court's 1993 decision in *King County* as alleged by the Petition for Review, it also conflicts with at least three published Court of Appeals decisions from Divisions One and Two. RAP 13.4(b)(1) and (2).

Requiring municipalities to consider impacts on neighboring properties does not mean development cannot

proceed. To the contrary, at least two of the developments discussed above were approved for development, with proper analyses and mitigation. *See Victoria Tower*, 59 Wn. App. at 603 (building height limitation was proper mitigation); *Concerned Taxpayers*, 90 Wn. App. at 233-234 (detailed analysis of alternative routes appropriately considered impacts on nearby historical resource).

V. CONCLUSION

CCHS respectfully requests the Court grant review of the English Farm Petition for Review to determine whether the Court of Appeals decision has improperly side-stepped this Court's opinion in *King County* and the Courts of Appeals opinions in *Victoria Tower*, *Magnolia*, and *Concerned Taxpayers* through the creative use of a land use condition of approval.

This document contains 2460 words, excluding parts of the document exempted from the word count by RAP 18.17.

Dated: August 9, 2023

By: 

WSBA #34132
On behalf of Clark County Historial Society WA

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 9th day of August, 2023 I arranged for service of the foregoing **MEMORANDUM OF AMICUS CURIAE THE CLARK COUNTY HISTORICAL SOCIETY WASHINGTON** to the parties to this action via Electronic Service:

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