NO. 94328-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF MUKILTEO, a municipal corporation; and SAVE OUR COMMUNITIES, a Washington non-profit corporation,

Appellants,

vs.

SNOHOMISH COUNTY and
PROPELLER AIRPORTS PAINE FIELD, LLC, a Delaware LLC,

Respondents.

RESPONDENT PROPELLER AIRPORTS PAINE FIELD, LLC'S ANSWER OPPOSING DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENTS

Respondent Propeller Airports Paine Field, LLC ("Propeller Airports"), opposes discretionary review. This Answer refers jointly to Petitioners the City of Mukilteo and Save Our Communities as "the City."

II. COURT OF APPEALS DECISION

The Court of Appeals correctly applied settled Washington law to affirm the dismissal of the City's complaint attempting to raise a SEPA challenge to Snohomish County's execution of a contract for an option to lease in a January 23, 2017 unpublished opinion *City of Mukilteo v. Snohomish County*, __ Wn. App. __, __ P.3d __, 2017 WL 326241 (2015) (hereafter "the Decision") (attached as App. A to the Petition).

III. RESTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the trial court correctly grant summary judgment dismissing Petitioners' SEPA challenge because (1) the "Option to Lease Land at the Snohomish County Airport Contingent on Compliance with SEPA" is not a lease and is not, therefore, a "project action" under WAC 197-11-704. While not before the Court because a "non-action," the Option would be categorically excluded from SEPA review by WAC 197-11-800(5)(c) because use of the property "will remain essentially the same as the existing use for the term of the agreement," and could not result in a lease unless the condition for successful completion of SEPA review was satisfied?

IV. COUNTER STATEMENT OF THE CASE

To allow exploration of the feasibility of constructing and operating a commercial passenger terminal at Paine Field in Everett and to meet its obligations to the FAA, the County negotiated an option to lease with Propeller Airports.[1] CP 235. The option contains a big "out." The option terminates, and the parties will not execute the contemplated lease, if the condition for successful completion of environmental review under SEPA is not satisfied. CP 77-78.

A. Reinstitution of Commercial Air Passenger Service Is a Goal of the Paine Field Master Program.

Reinstitution of commercial air passenger service is a goal of the Paine Field Master Plan approved by the Federal Aviation Administration ("FAA") for the airport. CP 565-96, 661.[2] Pursuant to federal grants, the County must abide Assurance 22(a), which requires the County to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public as

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[1] The Option is attached hereto as **Appendix A-1**.

[2] The FAA previously considered all of the impacts alleged by the City and issued a Finding of Nonsignificance, which determination was upheld by the Ninth Circuit Court of Appeals in *City of Mukilteo v. U.S. Dep't of Transportation*, 815 F.3d 632 (9th Cir. 2016). The 2002-2021 Airport Master Plan Update is found at http://www.painefield.com/153/Airport-Master-Plan (last visited 4/22/17).

the Airport," and to make areas available for lease. CP 659; http://painefield.com/DocumentCenter/View/286 (last visited 4/22/2017).

B. The County and Propeller Air Executed the "Option to Lease Land at the Snohomish County Airport Contingent on Compliance with SEPA" To Allow Propeller Air to Conduct Due Diligence for a Possible Lease.

Snohomish County and Propeller Airports executed in March 2015 a conditional option to lease portions of Paine Field titled "Option to Lease Land at the Snohomish County Airport Contingent on Compliance with SEPA" (the "Option"). CP 77 (Appendix 1). The conditional Option established a license allowing Propeller Airports to access Paine Field to explore and conduct due diligence regarding possible use of the land for commercial passenger service. CP 236, 78 at § 4.1. During the three-year term of the Option, Propeller Airport's only right regarding use of the property is to access the property "to make engineering studies" to "determine the suitability of the Property for Propeller's proposed use." *Id.* The Option further provided that "[n]o construction may begin on the Property until the Lease has been executed and delivered by Propeller and Propeller has taken possession of the Property." CP 78 at § 6.

Implementation of any project proposal will occur via submittal of land use applications subject to both substantive SEPA review and the decision-making authority of the Director of Planning and Development Services. CP 237-38 ¶ 19. The Option is exclusive, providing Propeller

Air assurance that its investment in performing due diligence for the proposed project would not be lost. CP 77 § 1.

The Option expressly requires completion of full SEPA review prior to execution of any lease, and reserves to the County full SEPA authority, as follows:

> 2. ....This Option may be exercised following completion of environmental review as provided in paragraph 7 herein ....
>
> ***
>
> **7. Exercise of Option Subject to SEPA Compliance.** Exercise of the Option and execution of the Lease are subject to compliance with RCW 43.21C, the State Environmental Policy Act ("SEPA"). Propeller and County agree that a SEPA process must be completed prior to exercise of the Option and execution of the Lease.
>
> ***

CP 77-78. Execution of a lease is specifically conditioned on completion of SEPA review. Upon submittal of applications and permits by Propeller Air to facilitate the project, the County retains discretion through its SEPA Responsible Official to determine the type or level of SEPA review. CP 236.

Mukilteo and Save Our Communities voiced opposition to commercial service at Paine Field during the environmental review process under the National Environmental Policy Acts due to concerns including noise and traffic impacts. CP 661. Regarding reinstitution of commercial

service, the mayor of the City of Mukilteo stated in February 2009 that Mukilteo would "[m]ake it time consuming, expensive and stretch it out. We'll fight the terminal legally." Respondent's Brief at App. 3. Their legal arguments, however, failed in the Ninth Circuit, as noted in note 1.

C. Current Status of SEPA Review/Land Use Decision-Making.

Since the Option became effective in March 2015, Propeller Airports has successfully obtained a Mitigated Determination of Nonsignificance ("MDNS") dated February 26, 2017 for its proposal to construct commercial passenger facilities. The County issued a Notice of Decision ("NOD") for Land Disturbing Activity on February 26, 2017.[3] The City participated in these review processes, but the City (neither Mukilteo nor Save our Communities) did not appeal the MDNS or the NOD, and are thus foreclosed from doing so.

An administrative appeal filed by an interested citizen group was resolved and the appeal dismissed on April 17, 2017, Snohomish Hearing Examiner No. MSNS 16-109244, 16-10944 LDA, HEA-2017-01. [4] The Land Disturbing Activities approval was effective on April 26, 2017, once the administrative appeal was dismissed.

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[3] *See* http://www.heraldnet.com/news/commercial-passenger-flights-at-paine-another-step-closer/ (last visited 4/24/2017). These outcomes are consistent with the outcome of the Federal environmental review already mentioned and established by *City of Mukilteo v. U.S. Dep't of Transportation, supra*, n. 1.

[4] *See* Appendix **A-2.**

D. The Superior Court Dismissed the City's Complaint Alleging That Execution of the Option Violated Provisions of SEPA, Which Dismissal the Court of Appeals Affirmed.

The City filed a petition for judicial review, writ of review, and a declaratory judgment order asking the King County Superior Court to declare the Option void. CP 1-7. The City alleged that the County approved the Option in violation of SEPA. *Id.* The parties filed cross-motions for summary judgment. CP 439-62 (City); CP 209-31 (Propeller Airports); CP 22-74 (Snohomish County).

The Superior Court dismissed the complaint, concluding that execution of the Option was not a "'project action' as defined under RCW 43.21C.031(1) and WAC 197-11-704(2)(a)." CP 655-57.

The City appealed. CP 653-54. The Court of Appeals denied the appeal in the Decision.

V. ARGUMENT: THIS COURT SHOULD DENY THE PETITION BECAUSE THE CRITERIA ASSERTED TO JUSTIFY REVIEW—SUPPOSED "CONFLICTS" AND SUBSTANTIAL PUBLIC INTEREST—ARE NOT MET

Review is unwarranted. The Decision is not in conflict with appellate opinions in Washington. No substantial public interest is shown.

The City's repeated attempts to conflate the Option with a lease ignore the plain language of the agreement. The City refuses to acknowledge that the Option expressly conditions Propeller Air's rights to a lease on completion of a successful SEPA review. The City has

unsuccessfully attempted to have the lower courts focus on an eventual lease that might result. The courts have properly kept their eyes on the Option. Execution of the Option is, after all, the alleged "project action" that the City imprudently challenged.

A. The Decision Does Not Conflict with Any Decisions by this Court.

Addressing the City's arguments in the order presented, the Decision first does not conflict with "several opinions of this Court" regarding the nature of option contracts to warrant review under RAP 13.4(b)(1), as vaguely claimed by the City. *See* Petition V.B.1 at 11. The City fails to identify any decision in conflict. Instead, the City simply argues why other decisions would support a different conclusion. This is not demonstrating a "conflict" with other decisions, but only presenting a legal argument already rejected by the lower courts. The cases referenced by the City can be harmonized and distinguished, as the Decision demonstrates. The City does not satisfy RAP 13.4(b)(1).[5]

Contrary to the City's argument, the Decision does not conflict with Supreme Court cases "that hold that SEPA requires environmental review

[5] To qualify under RAP 13.4(b)(1), a conflict should be express or premised on contradictory holdings or legal rules. *See Grisby v. Herzog*, 190 Wn. App. 786, 808-09, 362 P.3d 763 (2015) (conflict for purposes of RAP 13.4(b)(2) means "inconsistent opinions" that only the Supreme Court can resolve). *See also* Mark DeForrest, *In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 Gonz. L. Rev. 455, 459 (2012/13) (demonstrating that a conflict is a "disagreement between divisions" that the Supreme Court has the role to resolve).

at the earliest possible state." *See* Petition V.B.2 at 13-17. This argument suffers from the same defect as the first: failure to identify an actual conflict. The City presents general briefing to argue for the outcome it seeks, but does not identify disagreements or contradictory holdings within or between the opinions cited. The City merely argues a general principle to which exceptions and statutory definitions apply. No opinion by this Court is shown to contain a conflict with the Decision. RAP 13.4(b)(1) is unsatisfied. Moreover, the legal question is much more precise than the City portrays. The City fails to identify any decision of this Court inconsistent with the conclusion of the Court of Appeals' that the Option was not a "project action" that required completion of an EIS.

This Court need not accept review to reconcile with the Decision the law's concern with "snowball" effects as expressed in *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 860 P.2d 1024 (1993). The Decision relies on *King County* to determine that there is no snowball effect. Decision 19-20. The Decision observes this area of law, correctly concluding that no snowball effect is created in these circumstances, like in *Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 309 P.3d 654 (2013), where a memorandum of understanding was at issue. In both cases the contracts at issue included agreement about how the parties would comply with SEPA

before taking actions that could have an adverse environmental impact. Decision 20.

The Decision is correct, moreover, when it concludes that the County's decision to approve the Option is not only not a "project action" under RCW 43.21C.031(1) and WAC 197-11-704(2)(a), it is categorically exempt from SEPA review under WAC 197-11-800(5)(c). Decision 15-16.[6] As the County has argued in its Answer, the City's Petition fails to address this contention which supports affirmance. Authorized use of the property will remain essentially the same as the existing use during the term of the option agreement. Agreements like the Option are exempted from environmental review "to avoid the high transaction costs and delays that would result from case by case review of categorically exempt types of actions that do not have a probable significant adverse environmental impact." *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, *supra*. The conclusion that this action is not subject to SEPA review is consistent with this Court's opinions and the statutory scheme.

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6 WAC 197-11-800(5)(c) reads:

> (5) Purchase or sale of real property. **The following real property transactions by an agency shall be exempt** [from SEPA compliance requirements]:
>
> ***
>
> (c) Leasing, granting an easement for, or **otherwise authorizing the use of real property when the property use will remain essentially the same as the existing use for the term of the agreement** ...

WAC 197-11-800(5) (emphasis added).

The Decision is not in conflict with *Columbia Riverkeeper v. Port of Vancouver*, 185 Wn.2d 1002, 366 P.3d 1243 (2016). To begin, a significant distinction exists because *Columbia Riverkeeper* involved a lease, not an option. The "action" by the County is not comparable to the action by the Port of Vancouver at issue in *Columbia Riverkeeper*. Leases are project actions (*see* WAC 197-11-704(2)(ii)) and are not exempt, unlike options. SEPA is not triggered by the action at issue in this case. *Columbia Riverkeeper*, therefore, has little relevance and creates no conflict.

Additionally, this Court denied the SEPA challenge in *Columbia Riverkeeper,* like the Court of Appeals denied the City's SEPA challenge. The City attempts to distinguish this outcome at the same time it argues the decisions conflict. The decisions are in accord. The Court should reject the City's argument that unlike the lessor the Port of Vancouver in *Columbia Riverkeeper*, here the County cannot "make alterations to the lease in response to environmental review." Petition 16. This argument is unavailing because the County would not have to alter the lease "in response to environmental review," because rejection of the lease would be self-executing. If the condition of completion of successful environmental review were not satisfied, Propeller Airports would have no right to exercise the Option. The parties could choose to negotiate a different lease and make

whatever adjustments they wished based on the outcome of the environmental review, but the Option would be defunct.

Fundamentally, the Option does not preserve a right to a lease unless the project successfully satisfies environmental review. While the Port of Vancouver had the option to "back out" of or modify its lease, here the County would not even have to "back out" because the Option would simply terminate on its terms. This Option and the lease in *Columbia Riverkeeper* accomplish the same thing: the contemplated projects will observe the outcome of an environmental review process, or they will not alter the status quo. And, in the case at bar, a party like the City can challenge the environmental review process which may serve as a prerequisite for a lease.

In sum, the outcome and rationale of the Decision is consistent with the outcome and rationale of this Court's prior decisions including *Columbia Riverkeeper*.

B. The Decision Does Not Conflict With Another Court of Appeals Decision.

The Decision also does not conflict with *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 230 P.3d 190 (2010), contrary to the City's argument. *See* Petition 17-18. In *Magnolia Neighborhood*, the City of Seattle approved a specific plan for residential development of a former military base without environmental review.

Critically, there was no mechanism to trigger or require environmental review upon any future action if the project obtained federal approval. Rather, because the approval had "binding effect," the City would be committed to pursue the project without environmental review. 155 Wn. App. at 314.

The present situation is different, as the Court of Appeals correctly concluded. *See* Decision 8, 11-12. The Option "is not 'binding' as that word is used in *Magnolia.*" Decision 8. Additionally, here the Option is conditioned on environmental review occurring. When the environmental review occurs according to the County's processes, those decisions will be subject to administrative and potentially judicial review under SEPA. *See Int'l Longshore, supra*, 176 Wn. App. at 519 (citing *State v. Grays Harbor County*, 122 Wn.2d 244, 250-51, 857 P.2d d1039 (1993)). Whereas the City bound itself with no environmental review in *Magnolia Neighborhoods*, here the Option is not binding and is expressly conditioned on environmental review occurring.

No conflict is shown.

C. A Substantial Public Interest Is Not Shown.

This appeal presents no compelling issue regarding SEPA review that other cases have not addressed. RAP 13.4(b)(4) is not met.

The issues presented are not novel. The Court of Appeals resolved them by drawing upon a developed body of case law concerning SEPA review. This Court issued the *Columbia Riverkeeper* decision only a few months ago in April 2017. The Decision is consistent with that guidance. Nothing demonstrates that this Court should so soon take up similar issues or that any clarification is needed.

As noted, *infra*, p.5, the process has moved on since this lawsuit was filed in the King County Superior Court. Propeller Airports concurs with Snohomish County that the dispute is moot. *See* County Answer.

An option is very specific to the precise facts and circumstances. The City does not explain how addressing use of an option – or reviewing the unique terms of such a device – presents a question of "substantial public interest."

The proper venue to pursue the City's substantive environmental concerns, if any, was in the adminstrative proceedings noted above. The City relinquished the opportunity to appeal the MDNS, yet continues this misguided attack on the Option through the Petition for Review filed on April 5, 2017. This weighs against a conclusion that the Petition presents issues of substantial public concern regarding the environmental impacts of the contemplated project that the City can substantiate.

VI. CONCLUSION

The City does not establish an adequate basis for review by this Court. No conflict of decisions exists, and no substantial public interest is shown that warrants review.

RESPECTFULLY submitted on this 28 day of April, 2017.

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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 28th day of April, 2017, I arranged for service *via U.S. Mail* of the foregoing RESPONDENT PROPELLER AIRPORTS PAINE FIELD, LLC'S ANSWER OPPOSING DISCRETIONARY REVIEW on the parties to this action as follows, with a courtesy copy by email:

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