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 PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

LOCAL CODES

RULES

TREATISES AND SECONDARY SOURCES

INTRODUCTION

The City of Puyallup seeks review of Division II of the Court of Appeals' decision in *City of Puyallup v. Pierce County,* 20 Wn. App.2d 466 (Wash. App. Div. 2, December 14, 2021, as amended on reconsideration in part (June 1, 2022) ("Challenged Decision").[1] In the Challenged Decision, Division II clarifies 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 provides instruction to the trial court for a remand order that will comply with its Lead Agency Opinion.

The Challenged Decision is consistent with decisions of this Court and the Court of Appeals and does not present issues of substantial public interest or importance. To the contrary, the Challenged Decision is catered to the unique circumstance of

[1] The Challenged Decision, is attached as Appendix A to the City's Petition. 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.

this case, including the indisputable fact that the extensive Hearing Examiner review of State Environmental Policy Act ("SEPA") and non-SEPA decisions about which the City now complains occurred because of the City's voluntary choice not to seek a stay under either RAP 8.1 or RAP 8.3.

The Challenged Decision is not subject to review under RAP 13.4 and this Court should deny the City's Petition.

STATEMENT OF THE CASE

The City filed this appeal challenging the trial court's order on remand from Division II's Lead Agency Opinion. 8 Wn. App.2d 323. That prior appeal presented a jurisdictional dispute between Pierce County and the City for exclusive authority to conduct the required SEPA[2] review of and require an Environmental Impact Statement ("EIS") for a commercial warehouse development proposed by respondents Knutson Farms, Inc. and Running Bear Development Partners, LLC (collectively "Knutson"). The proposed development, known as

[2] Chapter 43.21C RCW.

the Knutson Farms Industrial Park, is wholly located within unincorporated Pierce County, and the County is the permitting authority for the proposed development.

More specifically, the questions previously presented were whether the City qualified as an "agency with jurisdiction" as defined by SEPA, and if so, whether the City could only assume the status of Lead Agency under WAC 197-11-948 and require an EIS after a Determination of Nonsignificance ("DNS") as opposed to a Mitigated Determination of Nonsignificance ("MDNS"). In October 2016, Thurston County Superior Court Judge Lanese ruled on summary judgment that the City did not qualify as an "agency with jurisdiction" and, thus, could not assume the status of Lead Agency under WAC 197-11-148. As a result, the trial court ruled that the City's attempt to assume Lead Agency status was void, and it dismissed the City's lawsuit. 8 Wn. App. 2d at 326, 330.

Division II disagreed, holding that the City did qualify as

an agency with jurisdiction because of its approval authority over the roads and sewer and water services that will serve the proposed industrial park. Division II further held that, under the plain meaning of WAC 197-11-948 and related regulations, the City, as an agency with jurisdiction, could assume Lead Agency status following issuance of an MDNS and require an EIS. 8 Wn. App at 351-52. Accordingly, in its Lead Agency Opinion, Division II reversed the trial court's summary judgment and remanded "for action consistent with this opinion." *Id*. at 352.

Separate from the City's lawsuit seeking declaratory judgment that it was qualified to assert Lead Agency status for the SEPA review of this project, the City also filed administrative appeals with the Pierce County Hearing Examiner challenging the County's MDNS, as well as the County's decision to provide preliminary approval the Knutson's short plat application. (*See* CP 55, 103. *See also* CP 45-46.)

The Examiner was made aware of the City's lawsuit, and

pursuant to the parties' agreement, the Examiner initially deferred commencing it administrative review until the Thurston County Superior Court could hear and decide competing summary judgments motions on the lead agency issue. But after the trial court ruled, the Examiner commenced review of the City's administrative appeals. At page 3 of its Petition, the City chastises the County for proceeding forward on the City's administrative appeals:

> The City explicitly warned the County that, unless and until the [trial] Court was upheld on appeal, it should not defy the City's lead agency assumption and proceed without preparation of an EIS. Pierce County nonetheless processed the project proposal without an EIS and placed it before its Hearing Examiner for decision.

But the City neglects to inform this Court that the Examiner proceeded forward with its review because the City elected not to seek a stay of the trial court's ruling pending appellate review. The City's choice clearly informed the Examiner's decision:

> 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.)

The City's administrative appeals culminated in an extensive public hearing that commenced on July 16, 2018 and concluded on July 26, 2018. (CP 58.) After considering the substantial testimony, which included County reviewing staff and expert testimony presented by both the City and Knutson, as well as more than 450 exhibits (CP 58), the Examiner issued

decisions on the City's appeals on November 21, 2018.[3] (*See* CP 51-86, 87-98, 99-115.) The Examiner affirmed the County's MDNS, but imposed additional traffic mitigation as well as other mitigation measures. (CP 114-15.) The Examiner also affirmed the County's preliminary approval of Knutson's proposed commercial short plat, but subject to the Examiner's additional conditions to mitigate project impacts. (CP 81-83.) The City appealed the Examiner's decisions denying the City's appeals under the Land Use Petition Act, chapter 36.70C RCW.[4] (CP 141-57.)

Notably, Knutson's proposed industrial park had been subject to review for a substantial period of time before the County issued the MDNS in April 2017 and the City first asserted Lead Agency status in May 2017. 8 Wn. App.2d at

[3] The Examiner also issued a decision approving a shoreline substantial development permit for the proposed stormwater outfall for the Knutson Farms project. (CP 121-39.) The required public hearing for this permit was consolidated with the City's appeals.

[4] The City's subsequent LUPA appeal was filed under Pierce County Superior Court cause no. 19-2-06362-4.

326-29. The original complete application was submitted to the County in November 2014. *Id.* at 326. In 2016, after receiving critical comments from multiple commenting agencies, Knutson submitted a revised application reducing the size of its project and moving it further away from the Puyallup River. *Id* at 328, n. 3. Division II noted in its Lead Agency Opinion:

> As required by the Pierce County Code and the County's environmental review under SEPA, the Applicants obtained and submitted professionally prepared studies analyzing the potential impacts and mitigation measures including a traffic impact analysis; a critical areas assessment report; flood surveys and studies including a flood boundary delineation survey, conceptual flood plain compensatory storage plan, compensatory flood plain volume table, and flood plain cross sections; a preliminary storm drainage report; and a geotechnical engineering report.

8 Wn. App. at 328.

In the course of the review leading up to the MDNS, the preliminary short plat approval and the City's administrative appeals, the County made important decisions regarding the project that were not SEPA-related or SEPA dependent. The

City challenged some of those non-SEPA decisions in their administrative appeal. For example, the County decided that Knutson's application qualified for an extension under Title 18F, Pierce County Code ("PCC"). The City challenged that decision, albeit unsuccessfully, asserting that the application did not qualify for extension, and had thus expired. (CP 59-61.) The City also claimed that Pierce County improperly interpreted and applied its own local code as set forth in Title 18E PCC that governs the location of and development allowed in the channel migration zone ("CMZ") and/or flood zones.[5] (CP 78-80.)

The County decisions regarding the CMZ were purely questions of code interpretation and unrelated to SEPA review, but nonetheless important to determining the scope and location of the project. The decision regarding extension of the application was also strictly a matter of interpretation of the Pierce County Code and, of course, determined whether review

[5] Another decision unrelated to SEPA was the County's decision that the Knutson Farm stormwater outfall does not require a shoreline conditional use permit. (*See* CP 127.)

of the project would even continue. The City continues to challenge the County's decisions on these non-SEPA issues in their pending LUPA appeal. (*See* CP 154-55.)

Division II's Lead Agency Opinion on the SEPA jurisdictional dispute was issued in April 2019, after the Examiner issued its decisions on the City's administrative appeals. After the Supreme Court rejected respondents' petition for review and a mandate was issued, the parties returned to the Thurston County Superior Court for entry of an order consistent with Division II's Lead Agency Opinion. Unfortunately, another dispute arose regarding the terms of the order.

Respondents accepted the majority of the City's proposed Order on Remand. Respondents agreed to the provision acknowledging and confirming the City's status as lead agency, and likewise agreed to the provision requiring preparation of an EIS before further review of and decisions on the project may proceed. (*See* CP 43, 158.) Respondents objected, however, to the following language proposed by the City:

> 3. All County reviews, decisions, permits, and approvals related to the Knutson Farms project are null and void *ab initio*. The underlying review processes may be recommenced once the Final EIS is issued by the City of Puyallup. Until then, all County reviews, decisions, permits, and approvals for the Knutson Farms warehouse project are on hold.

(CP 43.)

Respondents challenged the above language is overly broad. Respondents proposed the following alternate language:

> 3. Decisions by Pierce County based upon the MDNS issued for the Knutson Farms warehouse project are null and void, and the applications are returned to the status of pending applications. Pierce County shall issue no final decisions on the Knutson Farms warehouse project until an EIS is completed.

(CP 159, 184.) Respondents offered *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993), in support of their position. (CP 161, 163-83.)

The trial court accepted respondents' proposed alternative order (CP 196-99), and this appeal followed (CP 200-205).[6]

Division II issued the Challenged Decision on the City's appeal of the remand order on December 14, 2021, modifying the Challenged Decision, specifically footnote 2, on June 1, 2022. (Appendix A to Petition for Review.) Division II largely affirmed the trial court's remand order, except the court noted that, while the remand order correctly provided that Pierce County decisions based upon the MDNS were void, the remand order erroneously failed to specifically state the MDNS itself is void. (Op. at A-7.) Thus, the Challenged Decision directs that clarifying modification of the remand order is required. (Op. at A-9.)

In the Challenged Decision, Division II clearly ruled that the exercise of the lead agency status and corresponding DS

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[6] Thurston County Local Rule LR 7(b)(6) confers the trial court discretion to rule without oral argument. Local Rule 7(b)(6).

rendered the County's previously issued MDNS, as well as decisions based on the MDNS, void, thus confirming prior rulings of this Court and the Court of Appeals. But Division II also held that its decision that the MDNS is void does not necessarily dictate that the SEPA review process must start anew and does not necessarily render decisions unrelated to SEPA void. (Op. at A-5 – A-6.) The court explained:

> By its nature, a DS overrides a prior MDNS and necessitates completing and EIS. Therefore, when an agency assumes lead agency status and issues a DS, the prior agency's determination and decisions made in reliance on it are voided. But the regulations do not require courts to void non-SEPA related decisions, even if a court determines and EIS violates SEPA. Nor does it prevent reliance on information gathered or reviews generated during the prior process. (Citations omitted.)

(Op. at A-7.)

Regarding the pending LUPA appeal, Division II ruled:

> 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.)

Notably, the Challenged Decision did not foreclose the City from presenting the same arguments it presents here regarding piecemeal review to the Pierce County Superior Court for decision in the LUPA action. 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. Rather, the court simply held that the issue was not properly presented in this appeal and should be addressed by the superior court in the LUPA appeal. (Op. at A-9.)

ARGUMENT

A. The Challenged Decision Does Not Conflict with Decisions of This Court or the Court of Appeals.

1. No prior decision directs entry of a remand order that voids all prior review of the Knutson Farms project.

The City first asserts, without analysis, that the Challenged Decision conflicts with this Court's decisions in *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 42, 873 P.2d 498 (1994) and *Noel v. Cole,* 98 Wn.2d 375, 378-80, 655 P.2d 245 (1982) and the Court of Appeals decision in *Junita Bay Valley Community Ass'n v. City of Kirkland,* 9 Wn. App. 59, 73-74, 510 P.2d 1140 (1973). (Petition at p. 13.) But these cases do not support the City's position that a violation of SEPA renders all prior environmental review and all non-SEPA related decisions void. Rather, each of the cases cited merely stand for the same proposition embraced by the court appeals: "Decisions based on a void [SEPA] determination are also void." (Op. at A-5.)

In *Weyerhaeuser*, this Court affirmed the trial court's decision to void a conditional use permit founded on an inadequate EIS, but it did not direct that the SEPA review start anew. Instead the Court directed the County to correct the deficiency in the previously prepared EIS. 124 Wn.2d at 42.

In *Noel*, this Court held that a sale of timber on public lands without first conducting SEPA review was *ultra vires*, holding that that DNR improperly exempted the sale from SEPA review. 98 Wn.2d at 380. Since the action was deemed (albeit erroneously) exempt, no other environmental review was conducted. Accordingly, *Noel* does not discuss the validity or use of other environmental review in the face of a SEPA violation or non-SEPA related decisions, much less make any holdings that conflict with the Challenged Decision.

Finally, in *Juanita Bay,* the Court of Appeals addressed a grading permit that was issued shortly after SEPA was enacted without any SEPA review. The court held that the grading permit, despite being a ministerial permit, was subject to the

newly enacted environmental review requirements. It thus "remand[ed] this case to the City to determine whether it is necessary to prepare and Environmental Impact Statement before making a decision on the question of whether or not to issue KSG a grading permit." 9 Wn. App at 73-74. Like in *Noel*, there was no other environmental review, and the *Juanita Bay* court did not discuss or make rulings on a SEPA violation's impact on the validity other environmental review.

Wholly consistent with the above decisions, the Challenged Decision holds: "Decisions based on a void [SEPA] determination are also void." (Op. at A-5.) If SEPA review is a prerequisite to a government decision or action, decisions made without the requisite SEPA review are void. But the well-reasoned Challenged Decision also explains the scope and boundaries of this uncontested legal principal:

> However, the regulations and case law do not envision the application process starting over completely. *See Weyerhaeuser,* 124 Wn.2d at 42, 47; *Klickitat County Citizens Against Imported Waste v. Klickitat County,* 122

Wn.2d 619, 647, 632, 860 P.2d 390 (1993). In *Weyerhaeuser,* the court merely ruled that the inadequate EIS "must be revised." 124 Wn.2d 47. The court did not hold or even imply that the existing reviews conducted as part of an inadequate SEPA process are also void.

Similarly, in *Klickitat County*, the court evaluated whether the lead agency violated SEPA when, per a court order invalidating the prior SEPA determination, it completed so quickly. 122 Wn.2d at 646-47. The court reasoned that the EIS was completed so quickly because the agency relied on information gathered in a prior process. *Id.* at 647. The court went on to conclude that the agency's use of such documents was "logical." *Id.* at 647.

The regulations similarly do not envision voiding all prior work conducted on a SEPA evaluation that has been voided. *See* WAC 197-11-948(2); WAC 197-11-070. Under WAC 197-11-948-2, upon an agency with jurisdiction assuming lead agency status, the regulation instructs that the new DS "shall be based only upon information contained in the environmental checklist attached to the DNS transmitted by the first lead agency." The entity empowered to issue a permit may make decision through the application process so long as they do not "(a) Have an adverse environmental impact; or (b) Limit the choice of reasonable alternatives." WAC 197-11-070-(1)(a)-(b).

> By its nature, a DS overrides a prior MDNS and necessitates completing and EIS. *See* WAC 197-11-948(2). Therefore, when an agency assumes lead agency status and issues a DS, the prior agency's determination and decisions made in reliance on it are voided. But the regulations do not require courts to void non-SEPA related decisions, even if a court determines and EIS violates SEPA. *See Klickitat County,* 122 Wn.2d at 646-47. Nor does it prevent reliance on information gathered or reviews generated during the prior process. *Id.*

(Op. at A-6 – A-7.)

The City attempts to distinguish the cases Division II cites, but does not address the court's analysis. Moreover, the City completely ignores the cited SEPA regulations, especially WAC 197-11-070, which expressly authorize certain decision making while SEPA review is pending.

As authorized by WAC 197-11-070, the County made decisions in the course of its normal permit review process that neither adversely impacted the environment nor limited the alternatives that the City may consider in preparation of the EIS. Those decisions would not have been barred pending

completion of an EIS, and cannot, therefore be deemed *ultra virus*. *See Columbia Riverkeeper v. Port of Vancouver USA,* 188 Wn.2d 80, 392 P.3d 1025 (2017). The remand order, as revised and authorized by Division II, exclusively and appropriately voids only those decisions that were SEPA dependent.

To support its position, the City accurately quotes at page 13 of its Petition a passage from Professor Richard Settle's treatise *The Washington State Environmental Policy Act: A Legal and Policy Analysis*.[7] The City seizes upon a phrase stating "action which was not preceded by a proper threshold determination process is invalid and the agency must begin the decision-making process anew," and argues that the remedies available to a court are without nuance or consideration of the circumstances presented in the case. The treatise does not support the City's expansive position.

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[7] Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis,* Ch.20, § 20.09[1] at 20-38 (Matthew Bender 2019).

Notably, as it did in its brief to Division II, the City omits the sentence preceding the quoted passage from Professor Settle's treatise, which states: "Neither the statute nor Rules address legal remedies for SEPA noncompliance." More significantly, the City omits the sentences immediately following the quoted passage that supports the trial court's order. Professor Settle continued:

> In *King County v. Boundary Review Board,*[8] the court emphasized that action on the proposed annexation was enjoined until an EIS had been prepared. However, the Board was not required to revisit the entire annexation process. The court held it would be "sufficient for the Board to reopen its hearing for consideration of the EIS" after which the Board could reverse or affirm or modify the previous decision.[9] In several cases, the courts have held that minor violations of SEPA were inconsequential and, thus, did not justify a remedy.[10]

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[8] 122 Wn.2d 648, 860 P.2d 1024 (1993).

[9] 122 Wn.2d at 653.

[10] Respondents do not claim that this is a case of harmless error. Respondents rely on the analysis set forth in *King County v. Boundary Review Board's* and considerations of efficiency and economy.

Knutson is aware of no case law that provides that all prior permit review and interim review decisions must be abandoned following a reversal of a DNS. *King County v. Washington State Boundary Review Bd.* supports a contrary conclusion. The additional environmental review through the contemplated EIS must be appropriately considered in the County's final decision-making process. But the County is not required ignore or repeat all prior permit review.

The Challenged Decision is consistent with prior decisions of this Court, the Court of Appeals and applicable SEPA regulations.

2. The Challenged Decision does not burden the City with premature and wasteful litigation, but is specific to the unique circumstances of this case and appropriately leaves the procedural decisions to the LUPA trial court.

The City next argues that the Challenged Decision violates RCW 43.21C.075, which provides that any appeal under SEPA must be linked to a specific government action. RCW 43.21C.075(1). This statutory provision prohibits orphan

SEPA appeals. There is no independent cause of action under SEPA, but appeals must be tied to with a governmnent action or permit decision based upon the challenged SEPA review. *See State v. Grays Harbor County,* 122 Wn.2d 244, 251, 875 P.3d 1039 (1983). The City argues that the Challenged Decision will "burden" the City with "premature and wasteful litigation." (Petition at p. 2.)

The Challenged Decision does not violate RCW 43.21C.075 or the court decisions applying this provision. The City relies heavily on *State v. Grays Harbor County, supra,* 122 Wn.2d 244. But that case does did not address the situation presented here. In *Grays Harbor County,* the question presented was whether the County, by ordinance, could force neighboring property owners to seek judicial review, contrary to RCW 43.21C.075, before they could complete the requisite appeal process of the associated surface mining permit. The question was whether the County could force project opponents to *initiate* premature judicial review.

Here, the City was not forced to initiate the LUPA appeal. 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. 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 review. This option was brought to the City's attention well before the hearings commenced and, as expressly noted by the Examiner, "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.)

The reasons for the City's choice are unknown. Perhaps, the City was concerned that it could be exposed to liability if it obtained a stay but was unsuccessful on appeal. *See Holmquist v. King County*, 192 Wn. App. 551, 556-58, 368 P.3d 234 (2016). Regardless, to the extent the City feels a burden by its own LUPA appeal, the burden is of its own making.

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 was set consistent with Pierce County Code. and whether a shoreline conditional use permit is required for the storm facility outfall).

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 courts are not so lacking in flexibility when presented with unique circumstances as are presented here.

Again, the Challenged Decision did not foreclose the City from presenting arguments to the LUPA trial court as it

does here. Just as they do here, the City may argue to the LUPA trial court that it should decline further review of all or any portion of the Examiner's decisions under LUPA. The Challenged Decision simply held that the issue was not properly presented in this appeal and should be addressed by the superior court in the LUPA appeal. (Op. at A-9.) The remand order as affirmed by the Challenged Decision allows the LUPA trial court the opportunity, upon submission of appropriate briefing, to address whether it should or should not proceed with the pending LUPA appeal challenging the Examiner's non-SEPA related decisions to facilitate administrative economies. There is certainly precedent to support such action.

For example, the Challenged Decision is consistent with this Court's decision *King County v. Washington State Boundary Review Board, supra.* 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 *Juanita Bay*, *supra,* nonetheless concluded it was "necessary to resolve certain additional issues, not related to SEPA." 9 Wn. App. at 74. It did so "in the interest of expediting any future litigation between the parties." *Id.* There the court determined whether certain wetland are subject to the Shoreline Management Act. Finally, in *Weyerhaeuser,* 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.

B. The Challenged Decision Does Not Present Issues of Substantial Public Interest and Importance that Warrant Supreme Court Review.

The Challenged Decision is not only consistent with prior court decisions and SEPA statutory and regulatory provisions, but also with SEPA's purpose. The purpose of SEPA is to ensure that environmental considerations are efficiently integrated into the permit decision-making process such that permitting decisions are environmentally informed. *Save Our Rural Environment (SORE) v. Snohomish County,* 99 Wn.2d 363, 371, 662 P.2d 816 (1983). But SEPA is not intended or "designed to usurp local decision making or to dictate a particular substantive result." *Id. See also, Moss v. City of Bellingham,* 109 Wn. App. 6, 14, 31 P.3d 703 (2001). Likewise, it is not intended to duplicate review that already occurs through application of local regulations designed to protect the environment. *Moss,* 109 Wn. App. at 15. Thus, SEPA authorizes use and incorporation by reference of existing studies. *See* WAC 197-11-600, 197-11-635. Where efficiencies

can be achieved they are encouraged under SEPA. Finally, it is not appropriate for SEPA to be employed simply as a tool to obstruct unpopular projects. *See Cougar Mountain Associate v. King County,* 111 Wn.2d 742, 749, 753-54, 765 P.2d 264 (1988); *Parkridge v. City of Seattle*, 89 Wn.2d 454, 466 (1978).

If accepted, the City's proposed order would void not only those County decisions, but would void any and all prior decisions related to the permit applications, regardless of whether these interim decisions customarily made in permit review were SEPA related or otherwise dependent upon SEPA review. Moreover, the City's proposed order would also void and exclude from consideration all prior review of the permit applications. It would reset all review of the project at the beginning and would effectively **require** disregard of substantial, informative environmental study, which was tested through an extensive contested process.

The Examiner decisions in the record describe some of the relevant procedural history for the permitting process that

includes the extensive evidentiary hearing before the Examiner. Only one of the decisions addressed SEPA issues. (CP 99-115.) Two of the Examiner Decisions also addressed non-SEPA related issues, including interpretation of both procedural and substantive provisions of the Pierce County Code. (*See* CP 51-86, 121-36.) Under the City's proposed language, procedural decisions such as whether the permit application review period was extended consistent with the Pierce County Code would be void. Substantive decisions regarding the location and boundary of the CMZ and flood plain pursuant to the Pierce County Code, or regarding the interpretation and application of Pierce County shoreline regulations and building codes as they apply to the Knutson project would likewise all be voided.

While it is appropriate for the Court to void final permit decisions (e.g. issuance of building permits, short plat approval) and to enjoin such action on such decisions until proper SEPA review is completed, none of the cases the City cites support the proposition that an improper SEPA decision should serve to

erase all project review and all interim County decisions regarding application of its own Code.

The City of Puyallup is now the lead agency for the SEPA review by virtue of its Notice of Assumption of Lead Agency Status and will be the lead in preparing the required EIS. But the City has not assumed the status of the permitting jurisdiction and it is not empowered to enjoin other processes and reviews pending its completion of the EIS, which to date, the City has yet to even commence.

The remand order authorized by the Challenged Decision appropriately voids the permit approvals that cannot be made until completion of the SEPA review and ensures that the EIS is infused into the County's permitting process without creating unnecessary inefficiencies. The City's proposed remand order, however, would foster inefficiency and potentially authorize use of the SEPA process for obstructive purposes.

CONCLUSION

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

Dated this 8th day of August, 2022.

We certify this response contains 4,959 words in compliance with RAP 18.17(b).

Respectfully submitted,

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petitioner,

v.

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

RESPONDENTS.

DECLARATION OF SERVICE

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DECLARATION OF SERVICE

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

That on the 8th day of August, 2022, I caused true and correct copies of the Joint Response to Petition for Review 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
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DATED at Tacoma, Washington this 8th day of August 2022.

Julia Alexander

GORDON THOMAS HONEYWELL LLP

August 08, 2022 - 4:40 PM

Transmittal Information

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