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.

BRIEF OF *AMICUS CURIAE* BY WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

Megan C. Clark
WSBA #46505
Etter, McMahon, Lamberson,
Van Wert & Oreskovich, P.C.
618 W. Riverside Ave.
Ste. 210
Spokane, WA 99201

Clara Park
WSBA #52255
Sophia E. Amberson
WSBA #52528
Van Ness Feldman LLP
1191 2nd Avenue, Ste. 1800
Seattle, WA 98101

Attorneys for Washington State Association of Municipal Attorneys for Amicus Curiae

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I. INTRODUCTION

The underlying litigation in this matter concerns the ability of municipalities entitled to lead agency status under the State Environmental Protection Act ("SEPA") to require void agency actions be conducted anew after a proper environmental impact statement ("EIS") has been issued, consistent with case law interpreting SEPA. Moreover, it concerns principles of judicial economy and the necessity of definitive final decisions that do not piecemeal related issues for litigation and determination.

For case background, WSAMA hereby incorporates the procedure and facts stated in Sections II and IV, respectively "Court of Appeals Decision" and "Statement of the Case," of the City of Puyallup's Petition for Review Pursuant to RAP 13.4.

II. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae, the Washington State Association of Municipal Attorneys ("WSAMA"), is a nonprofit Washington corporation lawfully organized under the laws of the State of Washington, representing the attorneys for Washington's cities

and towns. WSAMA posits a non-party, municipal perspective as to why the Court of Appeals, Division II's decision to allow piecemeal determination of the issues in the present matter will create a cumbersome and inefficient process for reviewing agency decisions, which is contrary to established SEPA practices and case law. *See also* Motion for Leave to File Amicus Brief, filed herewith.

III. ISSUE ADDRESSED

Did the Court of Appeals panel err in not according full force and effect to the earlier decision in the same matter of a different Court of Appeals panel under the State Environmental Policy Act, and, in doing so, burden the City of Puyallup and the superior court with premature and wasteful litigation?

IV. ARGUMENT

The Court of Appeals, Division II's opinion in this case, reported at *City of Puyallup v. Pierce County*, 20 Wn. App. 2d 466, 500 P.3d 216 (2021), *amended in part on reconsideration*, June 1, 2022, (Pet'r's Br. at A-10–11), allows the review of

administrative decisions to proceed where the decisions were based on subsequently voided agency actions. Consequently, Division II's decision will embroil Washington municipalities in costly litigation and promote potentially contradictory decisions from different forums, contrary to established SEPA principles and case law.

A. The voided MDNS renders the underlying decisions at issue in this case void and unreviewable under case law on SEPA and LUPA.

There is no dispute that the MDNS issued for the subject project is null and void. (Op. at 7.) There is also no dispute that, at minimum, any decisions based on the voided MDNS are null and void. (*Id.*) And there is no dispute that the decision at issue in this case is the Pierce County Hearing Examiner decision issued on the subject project. (Resp. Br. at 14, 25.) Because that decision was based on the voided MDNS, it is null and void under case law applying both SEPA and LUPA, and the Court of Appeals erred in leaving open the possibility of further review and action on that decision.

SEPA unequivocally declares that judicial review "shall without exception be of the governmental action together with its accompanying environmental determinations." RCW 43.21C.075(6)(c). Governmental actions include any decisions to "[l]icense [or] undertake any activity that will directly modify the environment," whether conducted by the agency or an applicant. WAC 197-11-704(2)(a). Preliminary plat approval is one type of decision constituting an action under SEPA that is subject to SEPA's linkage requirement and must be reviewed with the accompanying environmental determination. *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 276-78, 552 P.2d 674 (1976).

The Pierce County Hearing Examiner decision at issue here is a preliminary plat approval, combined with a decision affirming the County's MDNS and denying the City's SEPA appeal. (CP at 51-52, 83.) In issuing the decision, the Hearing Examiner relied on the MDNS, not only in resolving the City's SEPA appeal, but also in reviewing the proposed preliminary

short plat and in granting plat approval. (*See*, *e.g.*, CP 70-71, 82, 114-15.) Because the Examiner's decision was based on the void MDNS, the decision is also void, and any judicial review of any future plat proposal for the Knutson project must be linked to a valid environmental determination. RCW 43.21C.075(6)(c). No judicial review of the void Examiner's decision can occur under SEPA.

The Examiner's decision is also unreviewable under LUPA. LUPA permits review a final "land use decision" as defined under RCW 36.70C.020. RCW 36.70C.010. RCW 36.70C.020(2)(a) defines a land use decision as a "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with the authority to hear appeals on, (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used[.]" (emphases added). Because the Pierce County Hearing Examiner's decision is void under SEPA,

there is no "final determination" or "land use decision" subject to review under LUPA. *Stientjes Family Tr. v. Thurston Cty*., 152 Wn. App. 616, 621-24, 217 P.3d 379 (2009) (explaining LUPA's finality requirement and concluding that LUPA does not apply to interlocutory decisions).

This Court should accept review to provide clarity and prevent wasteful litigation contrary to established SEPA and LUPA principles. 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. (Op. at 8.) The record shows the LUPA action was not only presented to Division II and the superior court, but it was in fact presented as the heart of the parties' dispute. The facts and the Examiner's decision were part of the record, and the parties briefed the implications of Division II's previous remand on the LUPA action and the Examiner's decision. (CP at 47-48, 51-119, 159-61.) The underlying action before Division II framed the dispute as a jurisdictional dispute challenging the

County's jurisdiction to act on the proposal, including through the Hearing Examiner decision. (CP at 3 n.2; *see also City of Puyallup v. Pierce Cty.*, 8 Wn. App. 2d 323, 330, 438 P.3d 174 (2019)). Moreover, jurisdictional issues, such as whether the court has jurisdiction to review a decision under LUPA, can be raised at any time. *See* RAP 2.5(a)(1) (stating that a party may raise lack of trial court jurisdiction for the first time in the appellate court). Because Division II determined the MDNS was void, it should have ruled on whether the trial court had jurisdiction to review the LUPA claims.

In side-stepping the LUPA issue, Division II left open the door for further piecemeal litigation based on a void MDNS. While the County attempts to argue that there are some issues unrelated to SEPA (CP 50-61, CP 78-80; Resp. Br. at 8-9), even assuming any such issues exist and are not void, those issues cannot be reviewed under LUPA because the underlying land use decision is void. While the County claims that the superior court may choose to decline review of some or all parts of the LUPA

action (Resp. Br. at 14), the superior court may also choose to allow the LUPA action to proceed in full or in part, forcing the parties to engage in wasteful, unnecessary litigation. Forcing the parties to litigate at all in the superior court on issues that should be litigated under LUPA is itself entirely wasteful when there is no final land use decision and no valid underlying environmental determination.

This Court should accept review because the question of the reviewability of the Pierce County Hearing Examiner's decision was appropriately presented to but not addressed by Division II, and allowing review of the Examiner's decision is contrary to established case law on SEPA and LUPA. As this Court has repeatedly emphasized, both SEPA and LUPA promote finality, predictability, and efficiency. *See Durland v. San Juan Cty*., 182 Wn.2d 55, 67, 340 P.3d 191 (2014). SEPA's linkage requirement "foreclose[s] multiple lawsuits challenging a single agency action," *State ex rel. Friend & Rikalo Contractor v. Grays Harbor Cty*., 122 Wn.2d 244, 251, 857 P.2d 1039

(1993), while LUPA's requirements are "consistent with this state's strong public policy favoring administrative finality in land use decisions." *Samuel's Furniture, Inc. v. State, Dep't of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002) (internal quotation marks and citation omitted). This Court should accept review to provide clarity to the parties and to promote consistency with SEPA and LUPA's principles.

B. Division II's decision presents issues of substantial public interest which impact municipalities across the State of Washington.

As previously noted *supra* herein, it is undisputed that the Hearing Examiner's decisions on the project proposal were based on the now voided MDNS issued by the County. Allowing the related sub-issues to proceed to LUPA review before the Pierce County Superior Court on the underlying voided MDNS further delays and piecemeals the litigation, contrary to SEPA principles. *See Grays Harbor Cty*., 122 Wn.2d at 251.

In its decision, Division II acknowledged "[a] DNS or MDNS that fails to comply with SEPA is also void, and the lead

agency that issued it must revisit the determination." (Op. at 5 (citing *Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 42, 873 P.2d 498 (1994)).) Furthermore, Division II's decision acknowledged that "[d]ecisions based on a void determination are also void." (*Id.* (citing *King Cty. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 667, 860 P.2d 1024 (1993)).) However, Division II proceeded to find that "regulations and case law do not envision the application process starting over completely."[1] (*Id.* (citing *Weyerhaeuser*, 124 Wn.2d at 47).)

In *Weyerhaeuser*, this Court held that an EIS failed as a matter of law and had to be revised. 124 Wn.2d at 42. Accordingly, the *Weyerhaeuser* Court upheld the trial court's invalidation of a permit that had been granted by the county. *Id.* Consequently, Division II's decision overlooks the fact that this

[1] Requiring that the County review the applications in light of an adequate EIS and that litigation not be allowed to ensue until final decisions informed by appropriate environmental review are made on the proposal is not, in any event, "starting over completely."

Court invalidated the underlying permit that had been granted because of the inadequate EIS that did not comply with SEPA.

Additionally, Division II's reliance on WAC 197-11-948(2) and 197-11-070 is insufficient to make the determination that "[t]he regulations similarly do not envision voiding all prior work conducted on a SEPA evaluation that has been voided." (Op. at 5.) WAC 197-11-948(2) merely states:

> The DS by the new lead agency shall be based only upon information contained in the environmental checklist attached to the DNS transmitted by the first agency or the notice of application . . . and any other information the new lead agency has on the matters contained in the environmental checklist.

(emphasis added). The WAC, however, provides no guidance as to *decisions made* based upon a prior DNS that was subsequently determined void. In turn, WAC 197-11-70 provides:

> (1) Until the responsible official issues a final determination of non significance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would:
> (a) Have an adverse environmental impact; or
> (b) Limit the choice of reasonable alternatives.

WAC 197-11-070(1)(a)-(b) (emphasis added). Here, no EIS has been issued, so allowing the LUPA appeal to move forward to decide "non-SEPA" issues would further convolute the review process.

Requiring the Pierce County Superior Court to determine which issues related to the proposed project are SEPA versus non-SEPA in light of the voided MDNS could foreseeably result in allowing an action that has an adverse environmental impact. *See* WAC 197-11-070(1)(b). Moreover, even to the extent certain actions might be taken that do not have adverse environmental effects, it does not follow that such actions should be litigated ahead of final decisions on the proposal. Such a course would require unnecessary piecemealing of portions of proposals to determine which are environmentally related. As such, this Court should grant review to determine whether all issues arising from the voided MDNS should be considered together, to avoid piecemeal litigation and review.

As a result of Division II's decision, municipal litigants will be required to argue issues that are interrelated before multiple forums. *See Grays Harbor Cty.*, 122 Wn.2d at 254 (judicial review and administrative review "would create parallel, simultaneous judicial and administrative review" which "violates the SEPA appeal statute linkage requirement"); *accord* RCW 43.21C.075(6)(c) ("Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.") (emphasis added). It similarly imposes a burden on courts to proceed line-by-line to determine which issues are properly SEPA issues versus non-SEPA issues, then have those issues considered separately. Judicial economy and the expeditious review of environmental matters favors consolidation of the issues to be determined together.

Therefore, Division II's decision, allowing the LUPA appeal to proceed and determine interrelated sub-issues absent an EIS and final decisions on the proposal, has costly

implications for municipalities as well as the superior courts across the state. Allowing the review of administrative decisions to proceed where the decisions were based on subsequently voided agency actions will embroil Washington municipalities in costly litigation and promote potentially contradictory decisions from different forums. As such, review by this Court is warranted.

V. CONCLUSION

The Court of Appeals, Division II's decision will prove costly for Washington municipalities seeking expeditious resolution of agency issues by allowing the piecemeal review of related issues. Thus, to promote finality and consistency in agency decisions concerning related SEPA and non-SEPA issues, WSAMA respectfully requests this Court grant review of Division II's decision in Case No. 544741-II.

VI. CERTIFICATION

I certify that this Motion contains 2,276 words in compliance with RAP 18.17(b).

RESPECTFULLY SUBMITTED this 30th day of August, 2022.

ETTER, MCMAHON,
LAMBERSON, VAN
WERT & ORESKOVICH, P.C.

/s/ *Megan Clark*
Megan C. Clark, WSBA No. 46505
Washington State Association of
Municipal Attorneys - *Amicus Curiae*
Committee

VAN NESS FELDMAN LLP

s/ Clara Park
Clara Park, WSBA No. 52255
Sophia E. Amberson, WSBA No.
52528
Washington State Association of
Municipal Attorneys - *Amicus Curiae*
Committee

CERTIFICATE OF SERVICE

I certify that I e-filed the aforementioned through Washington State Court's Secure Access web portal to be served on all parties or their counsel of record on the date below as indicated.

Margaret Y. Archer William T. Lynn Gordon Thomas Honeywell LLP 1201 Pacific Avenue, Suite 2100 Tacoma, WA 98402 marcher@gth-law.com wlynn@gth-law.com *Via Email,* *Via Web Portal*	Todd A. Campbell Cort O'Connor Pierce County Prosecuting Attorney's Office 955 Tacoma Avenue S., Suite 301 Tacoma, WA 98402-2160 Todd.campbell@piercecountywa.gov Cort.oconnor@piercecountywa.gov pcpatvecf@piercecountywa.gov *Via Email,* *Via Web Portal*
Peter J. Eglick Joshua W. Whited 1000 2nd Avenue, Suite 3130 Seattle, WA 98104 eglick@ewlaw.net whited@ewlaw.net phelan@ewlaw.net *Via Email,* *Via Web Portal*	Joseph N. Beck City of Puyallup 333 S. Meridian, 4th Floor Puyallup, WA 98371 jbeck@puyallupwa.gov *Via Email,* *Via Web Portal*

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this this 30th day of August, 2022, at Spokane, WA.

s/Carolyn Lutzenhiser
Carolyn Lutzenhiser Legal Assistant

ETTER, MCMAHON, LAMBERSON, VAN WERT & ORESKOVICH, P.C.

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