No. 102055-4

(Court of Appeals No. 56890-0-II)

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

English Farm LLC and Jennifer English Wallenberg,

Appellants,

v.

City of Vancouver, JLL, HP Inc., Jennifer Baker, Marian English-Huse, and Don Jennings,

Respondents.

RESPONDENTS CITY OF VANCOUVER'S AND HP INC.'S JOINT ANSWER TO CLARK COUNTY HISTORICAL SOCIETY WASHINGTON'S AMICUS CURIAE MEMORANDUM

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I. IDENTITY OF ANSWERING PARTIES

Respondents HP Inc. ("HP") and the City of Vancouver ("City") (collectively referred to as "Respondents") answer the Memorandum of Amicus Curiae (the "Memorandum") filed by the Clark County Historical Society Washington ("CCHS") seeking review of only a portion of the Court of Appeals' holdings in *English Farm v. City of Vancouver*, 56890-0-II, Wash. Ct. App. May 2, 2023 (the "Opinion").

II. INTRODUCTION

CCHS's Memorandum should be disregarded because its SEPA position is taken in a case where Petitioners waived their SEPA challenge. *English Farm*, slip op. 16; Respondents Joint Answer to the Petition for Review ("Respondents' Joint Answer"), pp 22-27. Notwithstanding this barrier to entry, CCHS attempts to cite to the same or similar cases as the Petitioners English Farm LLC and Jennifer English Wallenberg (collectively "Petitioners") but adds no new substance or value to the arguments made to date. As discussed below, these

referenced cases are inapplicable to the factual and legal issues that were addressed by the Court of Appeals in this case.

In a misguided attempt to bolster Petitioners' position, CCHS argues, in the same vein as Petitioners, that *King County v. Washington State Boundary Review Board*, 122 Wn.2d 648, 860 P.2d 1024 (1993) ("*King County*") conflicts with the Court of Appeals Opinion in this case. As is well-established, amici curiae must avoid repetition of matters in other briefs, and, as such, the Court should disregard CCHS's analysis of *King County* for adding nothing further to the petition. Respondents rely on and incorporate here by reference their discussion of *King County* in Respondents' Joint Answer.

The Opinion reflects a local decision for one site specific master plan, and does not expand or conflict with existing precedent. CCHS fails to adequately explain how the decision in this case rises to a matter of substantial public interest. RAP 13.4(b)(4). A review of the cases cited by CCHS confirms that the City acted within its authority and that continued SEPA

requirements reinforced by conditions of approval will address potential, future impacts from the development contemplated in the HP Master Plan, including those potentially associated with historical resources. CCHS fails in its attempt to establish a conflict in existing case law, where none exists. RAP 13.4(b)(1) and (2).

III. ARGUMENT

A. The Court of Appeals decision does not conflict with prior opinions.

CCHS's argument echoes Petitioners' incorrect assertion that Master Plan Condition of Approval 2 results in serial SEPA review prohibited by *King County*. See Petitioners' Amended Petition for Review, pp. 20-24. Nothing in CCHS's Memorandum identifies precedent that conflicts with the Opinion. *See* RAP 13.4(b)(1)-(2). Instead, a careful reading of the precedent identified by CCHS supports the veracity of the Opinion and highlights the discretion the courts afford a local jurisdiction making a land use decision that is subject to SEPA.

As Respondents explained in their response to Petitioners' identical argument, Respondents utilized a sanctioned land use process, where the future site plan review process is subject to compliance with SEPA. *KS Tacoma Holdings, LLC v. Shorelines Hearings Board*, 166 Wn.App. 117, 134, 272 P.3d 876 (2012), *rev den,* 174 Wn.2d 1007, 278 P.3d 1112 (2012).

1. In accord with *Victoria Tower*, the City considered testimony regarding historic resources and found no substantial impact requiring mitigation.

CCHS asserts that the Opinion conflicts with *Victoria Tower Partnership v. City of Seattle*, 59 Wn.App. 592, 595-596, 800 P.2d 380 (1990) ("*Victoria Tower*") because in that decision, the elected Seattle City Council chose to limit height in favor of protection of neighborhood character under its subjective comprehensive plan's growth policy.

In *Victoria Tower*, the court analyzed the appropriateness of a municipality's considerable discretionary authority to choose whether to impose limits on height during SEPA review of the project's aesthetic impacts. *Id.* at 596. The petitioner in that case,

the project developer, argued that the municipality could not consider aesthetics and restrict building height. The Court ruled that the municipality was not clearly erroneous in considering the aesthetic impacts and requiring mitigation. *Id.* at 603.

The facts in this case are completely opposite. Here, the City of Vancouver followed its zoning code, and undertook full SEPA analysis. Yet, CCHS is demanding that the municipality change its SEPA analysis to protect CCHS's (and Petitioners') perception of aesthetics related to historic resources located on Petitioners' property that will remain untouched by HP's future development. In essence, Petitioners and CCHS propose an unsupported rule that would strip municipalities of their discretionary authority. The Court should decline their invitation.

The *Victoria Tower* decision is consistent with the Opinion because it confirms the discretionary authority of the local jurisdiction over land use matters, "The City Council's responsibility is to strike a proper balance between these

conflicting rights in light of SEPA policies." *Id*. at 605. That is exactly what happened in this matter as the City considered significant testimony regarding views and location of historic resources on Petitioners' property.

The record is replete with information responsive to view and historic resource concerns raised by Petitioners. CP-795 (a heritage monument marker will be installed describing the history of the property), 1435-1437, 1476-1477, 1946-1947 (note 7), 2753-2756 referencing slides at CP-1419-1428, 1739-1751 (Petitioners' historic report as a whole takes into account onsite qualities of four contributing structures eligible for listing[1] as historic resources that are located internal to Petitioners' property, but does not mention surrounding views, or the mine site that was located on what is now the HP Property); and the courts similarly considered the same e.g. CP-2030-2031, and

[1] The eligible structures are comprised of a 2-story house, a barn, a chicken coop, and another house. Petitioners have not undertaken official listing of any of the four eligible structures located on their property.

English Farm, at 5-7, 14-15. Without saying so directly, CCHS suggests expanding the holding in *Victoria Tower* to create an affirmative right to views that is unsupported in existing law and that case.

CCHS's proposed interpretation would significantly expand the scope of rights for neighbors far beyond what case law and the legislature have indicated. CCHS's argued expansion of *Victoria Tower* would itself create a much greater conflict with existing law. *English Farm*, at 12-13 (citing *Asche v. Bloomquist*, 132 Wn.App. 784, 797, 133 P.3d 475 (2006)).

2. Consistent with *Magnolia*, SEPA review of the HP Master Plan occurred at the earliest possible opportunity.

CCHS next argues that the Opinion conflicts with *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn.App. 305, 230 P.3d 190 (2010) ("*Magnolia*") because the Opinion allows for local jurisdictions to postpone SEPA review until the site plan stage even though the master plan already contained information about number of buildings, layout of uses,

and landscaping plans. Memorandum, p. 13.

The Opinion does not conflict with *Magnolia*. The ruling in *Magnolia* that the municipal action is a project action subject to SEPA is not at issue here. *Id*. at 316. Further, the factual scenario in *Magnolia* is distinguishable from the facts in this case.

The *Magnolia* decision examined whether the City of Seattle evaded SEPA review during approval of a redevelopment plan by delaying SEPA compliance until the city applied for rezoning or land use permits when the threshold determination identified possible environmental impacts. *Id.* at 310-311. At issue in *Magnolia* was whether the city's redevelopment plan, which was part of an acquisition of federal government property, was excluded from the definition of action as defined under SEPA. *Id*. at 314. The City of Seattle argued that its approval was not an action because it was adopted by resolution, not by ordinance, and there was a possibility that the city might not follow through with the redevelopment if the federal government

did not approve. *Id*. The court held that the redevelopment plan could not evade SEPA review even if the approval of the plan did not result in immediate land use changes. *Id*. at 317.

Here, the City of Vancouver completed SEPA review and analyzed the impacts based on HP's Master Plan documentation. In contrast, in *Magnolia*, the municipality deferred all analysis even though its early determinations showed possible environmental impacts. *Id*. In this case, consistent with SEPA requirements, the City of Vancouver continued to require SEPA review for those aspects of the HP Master Plan that had not yet been selected as choices remaining in HP's sole discretion, such as the design, materials, heights, and other aspects where review would occur during the site plan process through Condition of Approval 2.

Notably, the potential impact from the building heights was one such characteristic that could not be accurately analyzed in the HP Master Plan because no height choices had been made. *English Farm*, at 14-15. The HP Master Plan did not change

existing building height standards (which prohibits height limitations under VMC 20.690.040(B)) and did not propose a specific height for a building. If CCHS's true concern is with the code provision of unlimited height on its interest in particular historic resources, CCHS should have timely challenged the building height standards adopted in 2009 (and its SEPA related analysis). CP-1430-1431; *see also* Respondents' Joint Answer, pp 10-11, n. 37.

As explained in the Respondents' Joint Answer, SEPA analysis of the HP Master Plan and imposition of Condition of Approval 2 complies with the law and is a sanctioned land use process. *KS Tacoma Holdings,* 166 Wn.App. at 134. *Magnolia* forbids the delay of all SEPA review even when a plan may be uncertain. *Magnolia*, 155 Wn.App. at 316-317. The Opinion is not in conflict with *Magnolia*, as SEPA review of the HP Master Plan occurred and will continue to site plan review.

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3. The City correctly decided that the HP Master Plan, as conditioned, qualified for a SEPA Determination of Nonsignificance.

Last, CCHS asserts that, despite clear factual differences, this case conflicts with *Concerned Taxpayers v. Department of Transportation*, 90 Wn.App. 225, 951 P.2d 812 (1998) ("*Concerned Taxpayers*"). CCHS argues that the City of Vancouver's SEPA analysis of the HP Master Plan that acknowledges the existing zoning code but does not include any proposed building heights or change the code restrictions is inadequate because it must analyze building heights and some ambiguous "entire contemplated development." Memorandum, pp. 13-15.

In *Concerned Taxpayers*, the Department of Transportation ("DOT") prepared an Environmental Impact Statement ("EIS") for a highway bypass on State Route 101. *Concerned Taxpayers*, 90 Wn. App at 228. The project was only funded for a two lane highway, but the EIS stated that the expansion to four lanes would be constructed as money became

available. *Id.* The EIS examined alternatives for a four lane bypass. *Id.* The petitioners challenged the EIS on the grounds that DOT failed to consider two lane alternatives. *Id.* at 230. The court, affording the City's decision substantial weight, held that the EIS was proper. *Id.* at 229-231. The court held the flexible cost effective standard authorized the City's review of just four lane alternatives and prevented piecemeal SEPA review and delay. *Id.* at 231.

The facts of *Concerned Taxpayers* are not analogous to the facts underlying this Opinion. First, *Concerned Taxpayers* reflects a ruling about the more rigorous review of an EIS rather than a Determination on Nonsignificance. In that case, three of the four alternatives would have required demolition or relocation of the historic resource, qualifying the SEPA review for a full EIS. *Id.* at 233. Here, the four eligible, contributing but not listed historic structures, will not be touched by development occurring outside of Petitioners' property boundaries (i.e. on HP's property). As the eligible historic

structures remain intact on Petitioners' property; and the City and HP have no control over choices to retain, maintain, or utilize such structures (including any potential public access to the structures), this case does not involve a significant environmental impact, or matter of substantial public interest. RAP 13.4(b)(4).

Second, the court in *Concerned Taxpayers* was not being asked to overrule a land use approval based on deferral of analysis of the four lane highway. In contrast, here Petitioners and CCHS suggest the City's Determination of Nonsignificance should be overruled because future SEPA review is somehow not enough to ensure that changed circumstances will be addressed if HP's choice of building height could have future impacts. But, *Concerned Taxpayers*, does not justify this outcome when HP retains in its sole discretion, building height and other aesthetic choices and SEPA review is required under Condition of Approval 2. *KS Tacoma Holdings*, 166 Wn.App. at 134.

Third, the court in *Concerned Taxpayers* affirmed DOT's review. The case does not stand for a rule that SEPA must

consider all potentially contemplated development as CCHS suggests. In fact, in a portion of the case not cited by CCHS, the court explains, "'an EIS is not a compendium of every conceivable effect or alternative to a proposed project, but is simply an aid to the decision making process.'" *Concerned Taxpayers*, 90 Wn. App. at 230-231, (citing Richard L. Settle, The Washington State Environmental Policy Act: A Legal And Policy Analysis § 14(A)(i), at 157). CCHS's interpretation that a municipality must consider potential building heights not included in building plans or in the zoning code would significantly expand the *Concerned Taxpayers* holding far beyond its scope.

Contrary to CCHS's erroneous assertions, the Opinion is consistent with *Concerned Taxpayers*. Similar to *Concerned Taxpayers*, this case affirmed an agency's approval of a SEPA document, after a reasonably thorough discussion of the significant aspects of the SEPA checklist, while affording the local jurisdiction appropriate discretion, including its decision to

impose Condition of Approval 2 to require future SEPA review of site plan applications. CCHS's assertion that this case is contrary to *Concerned Taxpayers* is without merit.

IV. CONCLUSION

There are times in which amicus curiae can provide new insight and highlight conflicting precedent, which certainly assists the Court in resolving difficult questions. Here, however, CCHS's Memorandum merely repeats Petitioners' erroneous arguments while failing to identify precedent with applicable rules or analogous facts. As set forth above and in Respondents' Joint Answer, the Opinion here does not conflict with existing precedent under RAP 13.4(b)(1)-(2).

Established SEPA authority remains intact and CCHS fails to explain how the Opinion affects a substantial public interest under RAP 13.4(b)(4). This case remains a dispute between an applicant and its disgruntled neighbor, nothing more. This dispute is best resolved, consistent with SEPA and LUPA, by the political body analyzing the application. The Court of

Appeals' Opinion here reinforces the discretion of the Vancouver City Council to weigh those issues. Meanwhile, CCHS proposes limiting that discretion in favor of a neighbor's view that is not protected by statute, ordinance. The position is unsupported by law or the record in this case.

For all the reasons listed above, the Court should decline to consider any portion of the analysis contained in CCHS's Memorandum and deny review of the petition.

DATED this 28th day of August, 2023

Certificate of Compliance: I certify that this response contains 2,467 words, in compliance with RAP 18.17.

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CERTIFICATE OF SERVICE

I certify that on August 28, 2023, I served a copy of the foregoing document, described as **RESPONDENTS CITY OF VANCOUVER'S AND HP INC.'S JOINT ANSWER TO CLARK COUNTY HISTORICAL SOCIETY WASHINGTON'S AMICUS CURIAE BRIEF** on the following persons by electronic service by electronic service:

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I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct, and that this Declaration was executed in Portland, Oregon.

Dated: August 28, 2023.

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