74327-9

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 74327-9-I

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

Appellants,

v.

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

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Both Snohomish County and Propeller ignore the essence of the City of Mukilteo and Save our Community's (collectively, the "City") argument: The Snohomish County Council made a proprietary decision (whether to lease its land) and that proprietary decision was wholly uniformed by any environmental review. In its opening brief, the City repeatedly raised the issue that the County, acting in its proprietary capacity as the owner of Paine Field, made the decision to lease Paine Field without the benefit of environmental review. *See, e.g.,* Op. Br. at 3 (statement of issue); 16, 18-19, 37-39. Astoundingly, neither the County nor Propeller address SEPA's requirement that the County be fully informed of environmental impacts before making its proprietary decision. Instead, both parties attempt to distract with repeated references to later, regulatory decisions the County will make. But the County Council's proprietary decision to lease land is an action subject to SEPA review. Ignoring this issue will not make it go away.

The County was required to conduct SEPA review *before* it made the decision to lease, not later in the process at the permitting stage. WAC 197-11-704(2)(a)(ii); WAC 197-11-055(2). While the County's administrative departments certainly retain regulatory authority and *their* later decisions will be informed by SEPA, SEPA review must inform all

of the County's decisions advancing this project, including the legislative branch's proprietary decision to lease Paine Field. WAC 197-11-704(2)(a)(i).

The County and Propeller characterize the Option as a "preliminary step" and argue that SEPA review is not required at this preliminary stage. *See, e.g.,* Cty. Resp. at 15: Prop. Resp. at 16. The "preliminary" characterization suffers from twin flaws.

First, as it relates to the Council's proprietary decision, the "preliminary" characterization is wrong. The Option is the Council's final action and the Lease is as good as final, too. The Lease has already been written and is attached to the Option. The County has legally obligated itself to execute the Lease once Propeller exercises its option. Regardless of what information is disclosed during the subsequent SEPA review, the County cannot alter anything in the Lease. There is nothing "preliminary" about this decision as far as the Council's proprietary decision-making is concerned.

Propeller's contrary contract interpretation argument[1] ignores the legal nature of options, generally, and the terms of this Option, in particular. Generally speaking, an option is a legal commitment, enforceable by specific performance. *See* Op. Br. at 21. Specific to this

[1] Prop. Resp. at 33.

Option, the document provides the County with no escape clause from the lease terms based on subsequent SEPA review (or otherwise). *Id.* at 22. Neither respondent points to any words in the Option that provide the County with discretion to not execute the Lease as currently written, if Propeller decides to go forward. Indeed, the County concedes "the draft lease must be 'substantially in the form' approved by Council." Cty. Resp. at 20. Insofar as the proprietary decision is concerned, the Option provides the final terms of the forthcoming lease.

Second, while the Option certainly is final and binding as far as the Council's proprietary lease decision is concerned and, therefore, triggers SEPA review, we acknowledge the lease decision also is prior to subsequent permitting decisions to be made by the administrative staff and, in that sense, can be viewed as an "initial" decision (if not "preliminary"). But simply because additional decisions are to be made later does not insulate the Council's initial decision from SEPA review. WAC 197-11-310(2) ("The responsible official of the lead agency shall make the threshold determination, which shall be made as close as possible to the time an agency has developed or is presented with a proposal."). Even preliminary decisions trigger SEPA. That is the whole point of the judiciary's repeated reference to the "snowballing effect" and the SEPA rules' frequent direction to conduct SEPA review as early in the

process as possible. *See* Op. Br. at 37-42. It is exceedingly unlikely that the permitting department would deny a permit for the project in light of the County Council's approval of the lease for the project. The inertia towards completing the project would simply be too great at that point. This is precisely the sort of "unstoppable administrative inertia the Supreme Court has held violates SEPA's mandate to conduct environmental review before the first decisions in a chain of decisions are made. *King Cty v. Wash. State Bndry Rev. Bd for King Cty*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993).

Propeller begins its brief with the argument that deferring SEPA review is permissible because "[n]o dirt will be turned until environmental review occurs . . ." Prop. Br. at 2. Completing environmental review just before the bulldozers show up is clearly too late in the process. *See* Op. Br. at 5.

Finally, as to the applicability of SCC 15.04.040(3), the County ignores that the pre-decision submittal requirements imposed on the County Executive apply regardless whether the Council acts pursuant to SCC 2.10.010(12) or SCC 15.04.040(3). The former addresses the level of detail required in the Executive's written recommendation, but it does not eliminate the mandate for a "statement of options" and a "written evaluation of the merits." SCC 15.04.040(3). Thus, in addition to the

violations of SEPA, the County violated the requirements of the Snohomish County Code.

II. ARGUMENT

A. Standard of Review

Propeller incorrectly argues that the County's decision should be reviewed under the clearly erroneous standard and that the County's decision is due substantial deference. Both assertions have no basis in law.

First, this Court should engage in a *de novo* review of the County's decision to not conduct SEPA review. Propeller argues that the City's challenge "turns on the application of facts to law." Prop. Resp. at 14. However, the facts here are not disputed; the only question is a legal one: namely, whether the County is required to engage in SEPA review before entering into the Option to Lease. Because the issues are legal, not factual, the Court should engage in *de novo* review. *Island County v. State*, 135 Wn.2d 141, 160, 955 P.2d 377 (1998).

Second, the County is not due any deference in its interpretation of SEPA or its implementing regulations. Here, the interpretation of SEPA was made by a county. As one of the hundreds of counties, cities and other agencies subject to SEPA, its legal interpretation of SEPA is not accorded any deference. In *Short v. Clallam County*, 22 Wn. App. 825,

832-33, 593 P.2d 821 (1979), the court recognized that Clallam County was just one of numerous agencies and governments subject to SEPA and that giving each county deference in the legal interpretation of SEPA could result in thirty-nine different constructions of SEPA. The legal interpretation of the meaning of an "action" under SEPA is not unique to Snohomish County and, therefore, the County's interpretation should not be given any deference.

B. The County and Propeller Completely Ignore the County's Proprietary Decision-making Power.

The respondents do not dispute our characterization of the Option and Lease as proprietary decisions made by County Council, distinct from later permitting decisions to be made by administrative staff. Nor do they contest that proprietary decisions are subject to SEPA. *See, e.g.,* Op. Br. at 38-40. *See also Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 785 P.2d 447 (1990) (recognizing that City's proprietary decision to build a garbage incinerator required an EIS.) Instead, the County and Propeller focus solely on mitigation the County may impose at the subsequent permit stage. For instance, Propeller argues that "[t]he County retains discretion to approve, condition, or deny any land use permits. . ." Prop. Resp. at 27. Likewise, the County, while acknowledging that the Lease cannot be changed (and ignoring the significance of that admission),

stresses the permit writer's ability to impose mitigation measures or even deny the permit:

> While the draft lease must be "substantially in the form" approved by Council it is clearly subject to the decision-making authority of the PDS director that allows the County to require mitigation, to condition a permit or proposal on mitigation; to deny a permit or proposal; and to deny a permit or proposal without more information in an EIS.

Cty. Resp. at 20 (emphasis supplied).

Such arguments miss the point and ignore that the County's discretion is much more constrained when it exercises regulatory authority than when it acts in its proprietary capacity. SEPA review is intended to inform more than just the limited mitigation requirements that can be imposed at the permitting stage — environmental review must inform the original proprietary decision, too.

When acting in its regulatory capacity, the County's discretion is sharply limited. Permit writers cannot impose any condition that they deem appropriate. They are limited to imposing conditions authorized by the code. If they try to go beyond the minimum requirements of the code, the conditions will be struck down. *See, e.g., Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014) (recognizing the right of applicant to have project assessed for consistency with laws in effect when application filed); SCC 30.70.100; - 130.

The same is not true when the County Council was acting in its proprietary capacity. Just as private landowners are free to bargain for the best deal possible and obtain benefits beyond the minimums required by law, the County Council as owner of Paine Field is generally free to negotiate for and obtain benefits for the County that go beyond assuring that the lessee meets minimum regulatory requirements.

The vast difference between a public entity's regulatory (or "governmental") and proprietary powers has been long recognized by our Supreme Court:

> The distinction between governmental and proprietary functions is recognized in Pond on Public Utilities (4th ed.), § 5, p. 14, where the author says:
>
> 'The [regulatory] powers of the municipal corporation in its capacity as an agent of the state are well defined and strictly limited by the statutory provisions granting them. There is little or no opportunity here for invoking the doctrine of liberal construction nor for extending its sphere of activity by the doctrine of implied powers. It is the duties of the sovereign that are to be performed in the manner provided by law and its interests alone are to be considered.
>
> 'On the other hand, the municipal corporation in its private proprietary and essentially business or commercial aspect acts as a property owner and the proprietor of a business enterprise for the private advantage of the city and its citizens as a distinct legal personality and may exercise its business powers very much in the same way as a private individual or corporation. In the erection and operation of gas works, electric light plants, waterworks and the like, as well as in contracting for such service and in attending to matters of local interest merely for the special benefit and

> advantage of the city and its citizens, a municipal corporation acts as a business concern.'

Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Town of Newport, 38 Wn.2d 221, 227-28, 228 P.2d 766, 771 (1951).

The principal flaw in Snohomish County's process (and its arguments to this Court) is that the County Council exercised its broader, proprietary authority without the benefit of the information that will be generated in the forthcoming SEPA environmental review. The respondents' incessant focus on the County's regulatory process fails to address this error of law.

For instance, environmental review could have informed the County Council of the carbon emissions that will result from the construction and use of the terminal authorized by the lease, causing the Council to bargain for greater incentives for alternative transportation to and from the airport or for carbon offsets. Likewise, the project is apt to have an impact on land use in nearby adjacent jurisdictions (*e.g.*, the cities of Everett and Mukilteo). The County will have little control over those impacts in the permitting process, but the Council could have addressed them in the lease.[2]

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[2] For instance, the belated environmental review is apt to disclose that initiating commercial air service at Paine Field could lead to the type of commercial development that surrounds SeaTac airport, albeit on a smaller scale. In a lease, the County Council could have negotiated for funds to address safety and other issues that

In the permitting context, the County is limited by the constraints of its previously adopted development regulations. *Town of Woodway*, *supra* at 7-8. The permit writers may not insist on more than the minimums required by the code. But in negotiating a lease, the County Council would not be limited by those minimum regulatory requirements. The Council could have sought environmental protections and enhancements that exceed minimum regulatory requirements. The Council, not the permit writers, had that authority, but the Council made its discretionary, proprietary decision without the benefit of the yet-to-occur environmental review.[3]

C. The Option to Lease Meets the Definition of a "Project Action."

WAC 197-11-704 defines "project action" as agency decisions to "purchase, sell, **lease**, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified." WAC 197-11-704(2)(a)(ii) (emphasis supplied). Once a

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arise in that area (which includes land within the City of Mukilteo and the City of Everett). There is no corresponding authority for a permit writer to condition or deny a permit on that basis (and the County's SEPA authority is likewise limited to addressing issues within Snohomish County, not adjacent jurisdictions, *see* SCC 30.61.230).

[3] The County suggests that its hands were tied when it agreed to lease Paine Field due to grant obligations under federal law. Cty Resp. at 29. However, as Propeller notes in its brief, the County must only "make reasonable accommodations if possible." Prop. Resp. at 6, n. 9. Neither Propeller nor the County have suggested any provision under federal law which prevents the County from bargaining for reasonable mitigation measures in the lease, even if they go beyond regulatory minimums.

proposal meets the definition of an action, the SEPA process must begin. WAC 197-11-310(1). Thus, the issue is whether the County's decision to execute an option contract, in which the County decided to enter into a lease with no opportunity to alter the lease once Propeller exercises its option rights, constitutes an "action" subject to SEPA review. *See* Op. Br. at 22-31.

The County and Propeller attempt to make a distinction between an option to lease and a lease. Prop. Resp. at 20–21; Cty. Resp. at 16–17. But in the process, they ignore the definition of a project or "action" under SEPA. "Projects include and are limited to **agency decisions to** . . . purchase, sell, **lease**, transfer, or exchange natural resources, including publically owned land, whether or not the environment is directly modified." WAC 197-11-704(2)(a)(ii) (emphasis supplied). Project actions are not limited to the actual lease, but rather include *decisions* to lease.[4] This distinction is important here because the County Council made the decision to lease Paine Field when it entered into the Option — there are no more decisions regarding the Lease for the County Council to make. The County and Propeller's argument that possession of Paine Field has not yet transferred to Propeller (Prop. Resp. at 21) is simply

[4] Similarly, the County and Propeller's argument that the Option is categorically exempt fails to grasp that the Option is a decision to lease Paine Field and, therefore, it is a project action that is not categorically exempt. *See* Op. Br. at 31-35.

irrelevant because the County has already made the decision to lease Paine Field. Therefore, the County's decision to enter into a lease (*i.e.*, the Option to Lease) is a project action subject to SEPA.

D. WAC 197-11-070 Does Not Change the Result.

Both Propeller and the County point to WAC 197-11-070(4) to argue that the legal commitment the County made to lease Paine Field can escape SEPA review because a lease (or option to lease) is not an "action." Cty. Resp. at 15; Prop. Resp. at 18. But the County and Propeller fail to recognize that WAC 197-11-070(4) does not define the term "action." Furthermore, WAC 197-11-070(4) is only applicable when a proposal does not limit the choice of reasonable alternatives, which undoubtedly is not the case here.

First, WAC 197-11-070 does not define what constitutes an action subject to SEPA review. It only places limitations on actions a governmental agency may take during the SEPA process.

Second, even if WAC 197-11-070 were relevant to the Court's analysis of whether the lease decision is an "action," the Option does not comply with the requirements of WAC 197-11-070. Specifically, the Option violates the requirement that no action concerning a proposal can be taken if it would limit the choice of reasonable alternatives. WAC 197-11-070(1)(b). Here, the Option absolutely limits the choice of reasonable

alternatives available to the County Council. Upon executing the Option, the only lease the County can enter into is one that is substantially in the form of the lease attached to the Option. The respondents' argument that the Option does not limit the County's alternatives is deeply flawed.

Propeller argues that "[a]t the very least, the County will review a 'no action' alternative as part of the SEPA review." Prop. Resp. at 25-26. That is a false statement and legally irrelevant. The statement is false because, upon entering into the Option, the County no longer has the option of not entering into the Lease. If Propeller exercises its option rights, the County will be legally bound to enter into the Lease.

The statement is legally irrelevant because WAC 197-11-070 does not authorize actions in advance of SEPA compliance that "limit" the choice of reasonable options, as long as the "no action" alternative remains. Actions which exclude reasonable alternatives are barred prior to SEPA compliance, regardless whether the "no action" alternative remains.

E. The Option Builds Momentum Towards a Predetermined Outcome.

The Option triggers SEPA for two independent reasons. One, as discussed above, the Option is the County's final proprietary decision. As such, the County was required to comply with SEPA before making that decision.

Two, even if the Option did not trigger SEPA in its own right, the Option would trigger SEPA because of the Option's "snowball" or "coercive" effect on subsequent permitting decisions. *See* Op. Br. at 40-42 (discussing, *inter alia*, *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993) (county must be "apprised of the environmental consequences *before* the project picks up momentum, not after")). We discuss this second aspect here.

In our opening brief, we cited cases that apply the "snowballing" rule to assure environmental review takes place before carries a project forward regardless of the results of environmental review and cited the parallel SEPA rules, which repeatedly call for SEPA review as early in the process as possible. *See* Op. Br at 5-6 (citing, *inter alia,* WAC 197-11-055(2); WAC 197-11-310(2); WAC 197-11-406; WAC 197-11-055(4)). Propeller ignores the language of the rules we discussed but does try to distinguish the cases. In particular, Propeller argues that, unlike the facts in *King County* and *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 230 P.2d 190 (2010), here, "no final and

binding action exists to create a snowballing effect." Prop. Resp. at 33. Propeller's efforts to distinguish these cases fail.[5]

First, in *King County,* no final, binding approval had been given for the forthcoming residential development project. The only action was the preliminary decision to allow certain lands to be annexed into a city. 122 Wn.2d at 657, 860 P.2d 1024. No application had yet been filed for the contemplated development, let alone any final or binding action taken on the project. But the Supreme Court recognized the realities on the ground in the land use setting: the annexation would create institutional momentum that would ultimately lead to development of the project without the benefit of environmental review. *Id.* at 664, 860 P.2d 1024. (Indeed, the annexation led to a massive development proposal that was approved by the city years later. *See BD Lawson Partners, LP v. Central Puget Sound Gr. Mtgt. Hrngs. Bd,* 165 Wn. App. 677, 269 P.3d 300 (2011). The Supreme Court's concerns with the snowballing effect were prescient, indeed.)

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[5] Propeller also points to an irrelevant National Environmental Policy Act ("NEPA") review that the FAA has undertaken as proof that the County's approval complies with SEPA. First, FAA's NEPA review was for an unrelated proposal at Paine Field submitted by Alaska Airlines and Horizon Airlines in 2008 for commercial air service at Paine Field. The NEPA analysis does not examine Propeller's proposal or the Lease that the County has committed to entering. Second, and most importantly, if the County wished to use the existing NEPA documents prepared by the FAA, SEPA establishes a procedure for the County to adopt those NEPA documents. *See* WAC 197-11-610. The County cannot ignore SEPA's requirements and then have its attorneys belatedly point to other NEPA documents as justification for its decisions.

If an annexation (which merely serves to change a land use permitting authority from one local government to another) creates "virtually unstoppable administrative inertia" for a later development project, certainly a County Council decision to lease land at Paine Field to Propeller creates an equal or greater amount of inertia for development of a passenger terminal and commercial air service at Paine Field. It should not even be a close call.

Second, Propeller's effort to distinguish these cases on grounds that in each case "each action at issue was final and binding"[6] ignores that the Option here is "final and binding," too. As demonstrated above and in our opening brief, Snohomish County has made a final, binding action in its proprietary capacity. See *supra* at 3-4; Op. Br. at 20-22. The County Council has no further action to take. The County has no choice but to enter into the Lease if Propeller exercises its option. Propeller's efforts to distinguish the cases on the basis that there is no final, binding action here must fail, too.

Propeller argues that the Option here is more like the permit issued for an exploratory test well in *Public Utility Dist. No. 1 of Clark County v. Poll. Control Hrngs Bd.*, 137 Wn. App. 150, 151 P.3d 1067 (2007) ("*Clark PUD*"). *Clark County PUD* was not a land use case. The issue

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[6] Prop. Br. at 32.

was whether a preliminary permit for an exploratory well fell within the SEPA exemption for "information collection and research." *Id.* at 159, 151 P.3d 1067 (quoting WAC 197-11-800(1)). Because there was no dispute that the test well was only intended "to collect data" and that the well would not be used for any other purpose, the exemption clearly applied. *Id.* at 159–160, 151 P.3d 1067. There is no exemption applicable here, making the first part of the *Clark County PUD* analysis irrelevant.

After determining that the test well was exempt, the Court addressed a limitation on the exemption. If an action is exempt, but it is part of a series of related actions, some of which are not exempt, the exemption does not apply. *Id.* at 160–161, 151 P.3d 1067 (quoting WAC 197-11-070). In determining whether this limitation on the exemption applied, the Court applied a test that included assessing whether the exempt action would "limit the choice of reasonable alternatives." *Id.* at 161, 151 P.3d 1067. The Department of Ecology, which had issued the preliminary permit for the test well, "had consistently stated that issuance of a preliminary permit in no way predisposes the agency to an affirmative decision on the water right application . . . The preliminary permit does not indicate any support by Ecology of [the] proposed wellfield; the preliminary permit is solely for research/data collection." *Id.* at 162, 151 P.3d 1067. "There is nothing in the record to suggest that Ecology's

approval of the preliminary permit would coerce Ecology to grant groundwater rights at Fruit Valley simply because it issued the permit." *Id.*

Clark County PUD was not a land use case. A determination that Ecology's approval of a test well would not coerce that agency to issue a permit for withdrawal has little to do with the issue here. In land use cases, the courts have long recognized that decisions early in the permitting process can predispose the agency to issue later approvals.

> We therefore hold that **a proposed land-use related action** is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action.

King Cty. v. Washington State Boundary Review Bd. for King Cty., 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993) (emphasis supplied; footnote omitted).

Certainly, if an annexation is deemed to have a coercive, snowballing effect on later decisions, similar or greater momentum would exist where a county's legislative body approves a lease for a project and the county's permitting agency is then called on to issue permits for the project. To argue that the County Council's lease decision does not

predispose or coerce the subsequent permitting decision ignores land use permitting and political realities.

F. The County Does Not Dispute It Failed to Comply with SCC 15.04.030; and That Non-Compliance is Not Relieved by Reference to SCC 2.10.010(12).

In our opening brief, we demonstrated that the County Council acted in violation of SCC 15.040.040(3) by taking action on the Option without having the benefit of "a statement of the options that are available to the Council, a written evaluation of their relative merits, and a written recommendation by the Executive for Council action." Op. Br. At 42 (discussing SCC 15.040.040(3)).

The County does not claim compliance with SCC 15.040.040(3). It cites no evidence of the requisite "statement of options" or the "written evaluation of their merits."[7]

Instead, the County claims that it acted pursuant to SCC 2.10.010(12) and that approvals pursuant to that section are "deemed" to

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[7] The County asserts that over the prior 18 months, staff provided the Council with various alternatives, Cty. Br. at 28, but the statement is not supported by citation to the record. Regardless, even ignoring that flaw, the County does not assert that the Executive provided a "written evaluation of their relative merits." The County also asserts that the Council was briefed in executive sessions, *id.*, but again stops short of asserting (let alone providing evidence) that the briefings include a statement of options or the required written evaluation of their merits. The County cites CP 201-202 as containing the Executive's recommendation, *id.* at 26, but that document does not include the requisite "statement of options" or "written evaluation of their merits" either. Similarly, Propeller does not cite anything within the record which shows a statement of options or a written evaluation of their merits provided to the County Council in accordance with SCC 15.040.040(3). Prop. Resp. at 38.

have "the approval of the county council as required by chapter 15.04 SCC." Cty. Br. at 27 (quoting SCC 2.10.010).

Section 2.10.010 describes the Executive's powers. Subsection 12 provides that the Executive has the power to approve leases for Paine Field, "provided" that "in accordance with SCC 15.04.040, the county executive may recommend . . . leases for approval by the council, and shall recommend in such detail as the council may require proposed rates, terms and forms of leases . . ." The County argues that this provision eliminates the Executive's duty to provide the Council with the "statement of options," "the written evaluation of their merits," and the "written recommendation." The County is wrong on all three counts.

First, Section 2.10.010 says nothing about the "statement of options." Nothing in that section relieves the Executive of that mandate when seeking Council approval of a lease at Paine Field.

Second, and likewise, Section 2.10.010 says nothing about the "written evaluation of [the merits of the options]." Nothing in that section relieves the Executive of that mandate either.

Third, as to the "written recommendation," Section 2.10.010(12) authorizes the Council to specify the level of "detail," but it does not authorize dispensing with a written recommendation altogether.

The County's efforts to ignore these mandates violates the standard rule that all portions of a code should be read together and should be construed to give meaning to each part. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). The County's reading also completely ignores the mandatory nature of 15.04.040(3). "Any matter relating to management or operation of [Paine Field] that is presented to the County Council for action by or through the airport manager or executive . . . **shall** be accompanied by . . ." SCC 15.04.040(3) (emphasis supplied). It is well-established that the use of the word "shall" is presumptively mandatory, *i.e.*, courts assume that it conveys something that must be done. *Singleton v. Frost*, 108 Wn.2d 723, 728, 742 P.2d 1224 (1987).

There is nothing within the Snohomish County Code that would suggest that the requirement that any airport lease "shall be accompanied by a statement of the options that are available to the Council, a written evaluation of their relative merits, and a written recommendation by the executive for Council action" is not mandatory. In fact, SCC 2.10.010(12) specifically requires any lease executed under that section be done "in accordance with SCC 15.04.040." The County conveniently overlooks this requirement of SCC 2.10.010(12) and instead focuses on the last sentence of section, arguing that the word "deem" relieves the Council of

the requirement to comply with SCC 15.04.040(3). But that clause only addresses whether the Council's "approval" under SCC 2.10.010 also operates as the approval required by SCC 15.04.040(3). That clause does not address whether the information to be supplied to the Council in advance of the Council's action satisfy the requirements of 15.04.040(3). The County obtains no benefit from the "deeming" clause given our allegation that the Executive violated the Code when he failed to provide the required written analysis in advance of the Council's approval, not that the Council invoked the wrong code section when approving the Option.

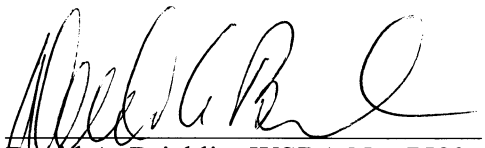
III. CONCLUSION

For the reasons explained above and in our opening brief, this Court should reverse the Superior Court's decision granting summary judgment to Snohomish County and Propeller and enter summary judgment in favor of the City of Mukilteo on its SEPA and SCC 15.04.040(3) claims.

Dated this 13th day of June, 2016.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

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IN THE COURT OF APPEALS
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CITY OF MUKILTEO, a municipal corporation; and SAVE OUR COMMUNITIES, a Washington non-profit corporation, Appellants, v. SNOHOMISH COUNTY and PROPELLER AIRPORTS PAINE FIELD, LLC, a Delaware LLC, Respondents.	NO. 74327-9-I (King County Superior Court Cause No. 15-2-06802-4 SEA) DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, ANNE BRICKLIN, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for the City of Mukilteo and Save Our Communities herein. On the date and

in the manner indicated below, I caused the Reply Brief of Appellants to be served on:

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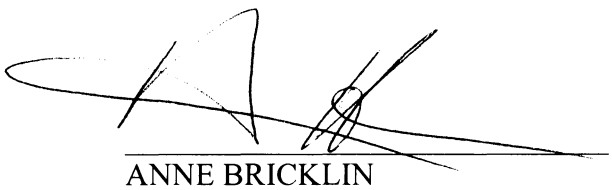
DATED this 13 day of June, 2016, at Seattle, Washington.



ANNE BRICKLIN