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No. 74327-9-I

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

**RESPONSIVE BRIEF
OF SNOHOMISH COUNTY**

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I. INTRODUCTION

This is an appeal from an order granting summary judgment to Snohomish County (“County”) and Propeller Airports Paine Field LLC (“Propeller”).

The lower court found that the *Option to Lease Land at the Snohomish County Airport to Propeller Airports LLC Contingent on Compliance with SEPA* (“Option”) specifically provided that exercise of the Option was contingent upon and subject to compliance with RCW 43.21C, the State Environmental Policy Act (“SEPA”). The lower court concluded that compliance with SEPA constituted a condition precedent to the exercise of the Option by Propeller and that approval of the Option by the County was not a “project action.” The lower court further held that the County Council had authority to approve the Option under Snohomish County Code § 2.10.010 (12).

The appellants, City of Mukilteo and Save Our Communities (“City”), ask this Court to review the lower court’s alleged errors under SEPA and county code. The City previously challenged the decision of the Federal Aviation Administration (“FAA”) that no Environmental Impact Statement (“EIS”) was necessary to commence operating commercial passenger service at Paine Field. The FAA made that decision after preparing an Environmental Assessment considering over 900 public comments and finding no significant impact on the environment. On March 4, 2016 the United States Ninth Circuit Court of Appeals upheld

the FAA's Environmental Assessment decision that commercial air operations from a two-gate terminal at Paine Field as proposed by Propeller would have no significant impact.¹

The County's approval of the Option to Propeller is consistent with its obligations under federal law and authority under county code. The Option does not limit the County's right to full SEPA review. The lower court's decision to grant County and Propeller summary judgment was correct. An Option itself is not a lease. The City's attempts to conflate options with leases ignores the plain language of the agreement and should be rejected. The City fails to show reversible error.

Federal law requires Snohomish County to make Paine Field available to all types, kinds and classes of aeronautical activities, including commercial aeronautical services to the public. The existing terminal and terminal area have been designated for commercial air service consistent with the 2002-2021 Airport Layout Plan Update. The purpose of the Option is to provide for full environmental review by the County Director of Planning and Development Services before any commitment to lease the property for commercial air service.

Environmental review at the local level and SEPA compliance will occur if and when Propeller triggers SEPA by submitting an application for a building permit, a land disturbing activity or other action related to

¹ City of Mukilteo; Save Our Communities, et al v. U.S. Department of Transportation, ___ F.3d ___ 2016 WL 852918 (9th Cir.2016).

land use. Propeller has no authority to impact the land or the environment during the term of the Option.

Snohomish County requests that the Court reject the City's assignments of error because the Option is a preliminary document conditioned on full SEPA review, does not change the use of the property during its term, is not a project action, provides access only to inform environmental review and was approved by Snohomish County Council at an open public meeting under the authority of SCC 2.10.010(12).

II. STATEMENT OF THE CASE

A. County Has Limited Discretion to Deny a Request to Allow Scheduled Commercial Air Service under federal law

Snohomish County, as the owner and operator of the airport has limited discretion to deny a request to allow scheduled commercial air service to operate at Paine Field, assuming airport facilities can safely accommodate the commercial aircraft operations in compliance with environmental laws. The County agrees to Grant Assurances every time it accepts a grant from the FAA. There are 39 such assurances that the County has agreed to that address a variety of issues. The Assurances commit the County, as the owner of the Airport, to certain requirements. Grant Assurance 22(a) addresses Economic Nondiscrimination issues, making the airport available for commercial air service operations. The actual text of the Grant Assurance is as follows and is a requirement found in 49 U.S.C. §47107(a) (1):

22. Economic Nondiscrimination

a. It [Paine Field] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.

Paine Field has received over \$100,000,000 in grants from the federal government to pave and light its runways and taxiways as part of the national airport system. CP 72. Breach of Grant Assurance 22(a) could result in an FAA order terminating Paine Field from eligibility for future grants, suspending payments of current grant funds, and potential legal action to force the county to repay past grants. *FAA Airports Compliance Manual* 5190.6B.

Snohomish County has an obligation to make Paine Field available to commercial air service. The County has proprietary authority to grant an Option to explore air service contingent on compliance with SEPA subject to the decision-making authority of the Snohomish County Director of Planning and Development Services (PDS Director). The purpose of the Option is to obtain environmental data from and at the cost of Propeller that will inform County SEPA decisions.

The Airport Layout Plan approved by the FAA depicts the area available for passenger service at Paine Field. The existing terminal (built in 1956) is included in the area optioned to Propeller. It is unlikely the terminal can be used for anything other than offices as it would not easily

configure as a terminal under Transportation Security Administration regulations.

B. Paine Field has been Operating as an Airport for over 75 Years.

Paine Field has been operating for over 75 years accommodating aircraft take-offs and landings (aircraft operations). The land was cleared and grubbed by a Works Progress Administration Project in 1936 and by 1939 aircraft were flying from the airport. In 1941 military aircraft were flying from the airport. In the 1950's Willard Flying Service provided air taxi service. In 1956 the terminal was built. In 1966 the county entered into a joint use agreement with the Boeing Company allowing Boeing aircraft operations to start in 1969. Boeing currently operates various iterations of the Boeing 747, 767, 777 and 787 at the airport. CP 72-73.

San Juan Airlines operated scheduled commercial air service on the airport terminal ramp from December 1, 1987 to December 1, 1988. Scheduled service included nonstop flights from Everett to Portland; Portland to Everett; Everett to Vancouver, BC; and Vancouver, BC to Everett. Air service was provided by Beechcraft 995 aircraft. CP 73-74.

C. Allegiant Airlines and Horizon Airlines Request to Commence Commercial Air Service at Paine Field in 2008.

In 2008 in response to requests to commence air service by Allegiant Airlines and Horizon Airlines, the County hired Barnard Dunkleberg & Company to prepare a federal environmental assessment

for amendment of the airlines' operations specifications, amendment of the airport's FAR part 139 certificate and potential funding of the terminal building. Over 900 people participated in the process of environmental review including three (3) public hearings conducted by consultant Barnard Dunkleberg & Company. CP 74-75. The comments and responses were provided to the Federal Aviation Administration ("FAA") ultimately resulting in a Final Environmental Assessment with a Finding of No Significant Impact and a Record of Decision dated December 4, 2012 by U.S. Department of Transportation. The County negotiated with Allegiant and Horizon for the provision of air service but could not reach satisfactory agreement with either airline by the end of year 2013.

In 2014 there were 113,460 aircraft operations at the Paine Field, consisting of 106,344 operations by general aviation aircraft and 7,116 operations by other aircraft. CP 75.

D. Propeller Airports Requests a Land Lease to Commence Commercial Air Service at Paine Field

In 2014 Propeller approached the County with its request to commence air service from a two-gate passenger terminal to be financed, constructed and operated by Propeller.

The Ninth Circuit Court of Appeals dismissed the City's appeal of the FAA's Environmental Assessment and finding of no significant impact to the environment from a two-gate terminal at Paine Field on March 4, 2016. The Ninth Circuit found Propeller's proposal for a two-gate terminal

will neither exceed nor expand the level of use contemplated by Allegiant and Horizon and dismissed the challenge by the City of Mukilteo.

County review and SEPA compliance must occur prior to execution of a lease, if and when Propeller triggers SEPA by submitting by way of an application for a building permit, a land disturbing activity or other action related to land use. Propeller has no authority to impact the land or the environment during the term of the Option.

III. STATEMENT OF ISSUES

First: Whether summary judgment should be affirmed because execution the Option is categorically excluded from SEPA review by WAC 197-11-800(5)(c) where use of the property will remain essentially the same as the existing use for the term of the agreement.

Second: Whether the lower court correctly granted summary judgment for the reason that the Option does not grant a possessory interest in land, requires SEPA review before execution of a lease and therefore was not a “project action” as defined by RCW 43.21C.031(1) and WAC 197-11-704(2)(a).

Third. Whether the lower court correctly granted summary judgment ruling that the Snohomish County Council had authority to approve the

Option under Snohomish County Code SCC 2.10.010(12) without reference to SCC 15.04.040(3).

IV. ARGUMENT

A. The Option is categorically exempt from SEPA.

The option is categorically exempt from SEPA under WAC 197-11-800(5)(c).

(5) Purchase or sale of real property. The following real property transactions by an agency shall be exempt:

(c) Leasing, granting an easement for, or **otherwise authorizing the use of real property when the property use will remain essentially the same as the existing use for the term of the agreement**, or when the use under the lease, easement or other authorization is otherwise exempted by this chapter. [Emphasis added]

The Option provides no possessory interest in land and none of the rights associated with a lease. Instruments that authorize the use of real property when the property use will remain essentially as the existing use during the term of the agreement are categorically exempt from SEPA. See *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 932 P.2d 158 (1997); RCW 43.21C.031. The Option is a preliminary agreement not impacting the environment but requiring SEPA before the next step. See *International Longshore and Warehouse Union Local 19 v. City of Seattle*, 176 Wn. App. 512, 309 P.3d 654 (2013).

The Option requires Propeller to comply with the procedural and substantive provisions of SEPA under the independent substantive decision-making authority of the PDS Director. Environmental review under Chapter SCC 30.61 must be completed before a lease is signed. The draft lease has no legal effect at this time. The Option controls the extent of the SEPA review. Environmental review and SEPA compliance will occur if and when Propeller triggers SEPA by submitting an application for a building permit, a land disturbing activity or other action related to land use. At this time Propeller has no authority to impact the land or the environment.

The County's authority to conduct a full SEPA review is not limited by the Option. To the contrary, the purpose of the Option is to ensure full SEPA review prior to the execution of a lease. The PDS Director has authority to require mitigation and/or alteration of the proposal by Propeller. The Option provides in pertinent parts:

2. Term; Exercise; Termination. The term of this Option shall commence on the date first written above and shall continue for a period of thirty-six months (the "Term"). This Option may be exercised following completion of environmental review as provided in paragraph 7 herein...

7. Exercise of Option Subject to SEPA Compliance. Exercise of the Option and execution of the Lease are subject to compliance with RCW 43.21C, the State Environmental Policy Act ("SEPA"). Propeller and County agree that a SEPA process must be completed prior to exercise of the Option and execution of the Lease.

Propeller shall provide Snohomish County Planning and Development Services all information reasonably necessary to comply with SEPA and shall pay a fee in the amount of \$600.00 for threshold determinations pursuant to Snohomish County Code. Said fee must be paid prior to County undertaking a threshold determination and the time period for making a threshold determination shall not begin to run until the payment of the fee. Additional charges for mitigated threshold determinations, determinations beyond the scope of the initial review, withdrawals and new threshold determinations, and environmental impact statements shall be as set forth in Snohomish County Code. County agrees to process SEPA in a timely fashion. In the event the SEPA, process, or the decision making authority of the Director of Planning & Development Services, is not completed prior to expiration of the Term through no fault of Propeller, at Propeller's election, the Term of this Option shall be automatically extended for consecutive two (2) month periods until such SEPA review and/or decision making process has been completed.

Federal Grant Assurances, federal law 49 USC and regulations of the Federal Aviation Administration require Snohomish County to make reasonable accommodations for passenger service at Paine Field. Restricting or limiting commercial air service would be a breach of federal grant assurances by the County. 49 U.S.C. §47107(a)(1).

FAA Grant Assurance 22(a) provides:

“[The Sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.”

The County must keep the Paine Field open to all types, kinds, and classes of aeronautical use without discrimination between such types,

kinds and classes. Breach of the grant assurance could result in an FAA compliance order terminating eligibility for future grants, suspending payments of current grant funds, and legal action to force the County to repay past grants. *FAA Airports Compliance Manual* 5190.6B. The County negotiated an option when Propeller approached with the offer to rent land at fair market value for the opportunity to provide air service to Snohomish County.

An option is instrument authorizing limited use of real property (in this case suitability studies) is categorically exempt from SEPA under WAC 197-800(5)(c).

(5) Purchase or sale of real property. The following real property transactions by an agency shall be exempt:

(c) Leasing, granting an easement for, or otherwise authorizing the use of real property when the property use will remain essentially the same as the existing use for the term of the agreement, or when the use under the lease, easement or other authorization is otherwise exempted by this chapter.

An option provides no possessory interest in land and has none of the rights associated with a lease. The Option provides limited access for engineering studies. Instruments that authorize the use of real property when the property use will remain essentially as the existing use during the term of the agreement are categorically exempt from SEPA. The current use of the terminal ramp area for aircraft parking and aircraft movement will remain the same throughout the term of the Option. The

Option avoids the high transaction costs and delays of case by case review of categorically exempt actions that do not have a probable significant adverse effect on the environment. *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 932 P.2d 158 (1997).

As the Supreme Court held in *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, Id categorically exempt actions do not require SEPA review. “The great weight of the legislative history of the 1983 SEPA amendments supports the proposition that the Legislature intended to modify SEPA to preclude case by case review of categorically exempt actions. While [prior case law] required case-by-case SEPA environmental review of proposals or approvals that were asserted to be ‘major actions,’ those cases were interpretations of a prior version of SEPA, where the categorical exemptions were mere guidelines, not administrative rules.” *Dioxin* 131 Wn.2d at 359. The *Dioxin* court remarked that the 1995 amendments further demonstrated that the Legislature did not want categorically exempt actions to be blocked by case by case SEPA review, stating:

The Legislature’s 1995 amendment to SEPA forbidding the conditioning or denial of any action which is categorically exempt under SEPA rules further suggests the Legislature’s intention that specific proposals which are categorically exempt may not be blocked by case by case SEPA review.

The City's argument assumes that the County will somehow not consider the environmental impacts of commercial air service at Paine Field or seek to avoid consideration of the impacts. The PDS Director will fully consider the impacts and take appropriate action. The City alleges that the County foreclosed mitigation options under the terms of the draft. That is not the case. The draft lease attached to Option will not come into effect until all conditions of the Option are satisfied.

The draft lease provides in § 9.04 (Laws and Regulations) that Propeller must comply with all laws, ordinances, codes, rules and regulations applicable to the project. This includes SEPA compliance and compliance with all county noise ordinances.

The City mischaracterizes draft lease § 9.08 (Noise Abatement) which addresses compliance with the airport's adopted voluntary noise abatement procedures in airspace. Airspace procedures are the sole authority of federal government pursuant to 49 U.S.C. §40103(a)(1). To minimize noise impacts on surrounding communities, the County prepared a FAR Part 150 noise study and adopted voluntary procedures for noise abatement at Paine Field. The noise abatement procedures are subject to pilot discretion and air traffic control divergence for safety purposes. As the procedures are voluntary, the County has no ability to enforce noise abatement procedures for aircraft in flight. CP ___ (Exhibit A to Second Declaration of Dolan).

There is also a mischaracterization of draft lease § 4.04 which passes through requirements that Propeller accommodate air service to comply with federal grant assurances made by the County in its acceptance of over \$100,000,000.00 in grants from the FAA. § 4.04 of the draft is a prudent clause to protect the County from potential future financial loss were Propeller to fail to comply with FAA grant assurances.

The City's argument assumes that the County will not fully consider the environmental impacts of air service. The Snohomish County Director of Planning and Development Services ("PDS Director") must fully consider the impacts. If there are significant environmental impacts that cannot be mitigated, the County has no obligation to take further action under SEPA and would not enter into a lease in such circumstance. The City has no persuasive response to the plain application of the categorical exemption to the Option. The City's SEPA claims are simply premature.

B. The Option does not constitute a "project action."

County execution of the Option was not a "project action" as defined in RCW 43.21C.031 and WAC 197-11-704(2)(a). The court below correctly held that the Option was not a "project action" distinguishing *Magnolia Neighborhood Planning Council v. Seattle*, 155 Wn. App. 305, 313, 230 P.3d 190 (2010) because here the option is strictly contingent upon compliance with and completion of SEPA.

The Option is not an “action” that is subject to environmental review. SEPA review requirements only apply to specified “actions” defined in WAC 197-11-704. Preliminary activities such as securing an option contract, may occur before environmental review, provided that they do not, in and of themselves, have an adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070. In this case, SEPA review was not required prior to execution of the Option because (1) the Option was not an “action” and (2) the Option was a preliminary decision that did not impact the environment or limit the range of reasonable choices.

Preliminary steps, such as “developing plans or designs, issuing requests for proposals (RFPs), **securing options**, or performing other work necessary to develop an application for a proposal,” may occur without SEPA review as long as such activities do not result in adverse environmental impacts or limit the choice of reasonable alternatives. WAC 197-11-070(4) [emphasis added].

The Option is a preliminary step to facilitate Propeller’s formulation of a specific project proposal that will contain sufficient principal features that will allow environmental impacts to be identified and considered by the County. The Option grants Propeller a right, subject to and contingent upon compliance with SEPA, to negotiate and enter into a lease of airport property substantially in the draft form attached to the Option within a period of 36 months. The Option is not the

functional equivalent of a lease. The Option does not authorize any physical construction or alteration of the environment by Propeller or transfer any right of possession of County land.

The term “project action” is clearly defined in WAC 197-11-704(2)(a):

A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:

(i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, and applicant, or under contract.

(ii) Purchase, sell lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

The City’s argument that the Option is the functional equivalent of a lease because of the attachment of a draft lease substantially in the form of a lease that may or may not be executed in the future is without merit. The fundamental right of a lease is the right to possession. 1 M. Friedman on Leases § 4:2, at 4-12 (5th ed. 2005 & supp). “A landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property.” Restatement (Second) of Property, Land. & Ten. § 1.2 (1977). The City’s attempt to twist the Option into a lease under 197-11-704(2)(a)(ii) is folly. The County has not granted Propeller

possession of land at Paine Field. Possession will not be granted to Propeller until it has complied with SEPA and the decision-making authority of the County PDS Director under SEPA. The SEPA rules recognize that securing an option is a preliminary decision, distinct and separate from a decision to lease public property. WAC 197-11-070(4).

The City's argument assumes that the County will not fully consider the environmental impacts of commercial air service at Paine Field or seek to avoid consideration of the impacts. The PDS Director will fully consider the impacts and take appropriate action. The City alleges that the County foreclosed mitigation options under the terms of the agreement. That is not the case. The County would violate federal grant assurances if it were to seek additional fees to mitigate traffic impacts beyond the standard mitigation required by county code. The County may not economically discriminate against passenger air service. The draft lease will not come into effect until all conditions of the Option are satisfied including mitigation measures.

The Option is contingent on and subject to the decision-making authority of the PDS Director under county code including the right to condition a permit or proposal in SCC 30.61.200; the right to deny a permit or proposal in SCC 30.61.210; and the right to deny a permit or proposal without an EIS in SCC 30.61.220:

SCC 30.61.200 Authority to condition.

- (1) The county may attach conditions to a permit or approval for a proposal. The conditions shall be related to

specific adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decision maker. The decision maker shall cite the county SEPA policy that is the basis of any condition under this chapter. A written document shall state the mitigation measures, if any, that will be implemented as a part of the decision, including any monitoring of environmental impacts. The document may be the permit or approval itself, or may be combined with other agency documents, or may reference relevant portions of environmental documents.

(2) The mitigation measures included in the conditions shall be reasonable and capable of being accomplished.

(3) Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of the proposal. Voluntary additional mitigation may occur.

(4) The county, before requiring mitigation measures, shall consider whether local, state, or federal requirements and enforcement would mitigate an identified significant impact.

(5) The conditions shall be based on one or more policies in SCC 30.61.230 and cited in the permit or approval, or other decision document.

(6) If, during project review, the county determines under RCW 43.21C.240 that the requirements for environmental analysis, protection, and mitigation measures in the county's development regulations, comprehensive plan, or in other applicable local, state, or federal laws or rules, provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action, the county shall not impose additional mitigation under this chapter.

SCC 30.61.210 Authority to deny.

The county may deny a permit or approval for a proposal on the basis of SEPA if the following are met:

(1) A finding is made that approving the proposal would result in probable significant adverse environmental impacts that are identified in a final EIS or final supplemental EIS prepared pursuant to this chapter;

(2) A finding is made that there are no reasonable mitigation measures capable of being accomplished that are sufficient to mitigate the identified impact; and

(3) The denial is based on one or more policies identified in SCC 30.61.230 and identified in writing in the decision document.

SCC 30.61.220 Denial without EIS.

When denial of a non-county proposal can be based on grounds which are ascertainable without preparation of an environmental impact statement, the responsible official may deny the application and/or recommend denial thereof by other departments or agencies with jurisdiction without preparing an EIS in order to avoid incurring needless county and applicant expense, subject to the following:

(1) The proposal is one for which a DS has been issued or for which early notice of the likelihood of a DS has been given;

(2) Any such denial or recommendation of denial shall be supported by express written findings and conclusions of substantial conflict with adopted plans, ordinances, regulations or laws; and

(3) When considering a recommendation of denial made pursuant to this section, the decision-making body may take one of the following actions:

(a) Deny the application; or

(b) Find that there is reasonable doubt that the recommended grounds for denial are sufficient and

remand the application to the responsible official for compliance with the procedural requirements of this chapter.

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.

The County requires Propeller to comply with the duties the County itself would have if the County were planning to commence commercial air service. While the County will be a landlord only if this proposal proceeds, the County has a continuing duty to make the airport available to all types of aircraft including commercial air. Accordingly the lease will require Propeller to comply with federal obligations that would otherwise run only to the County, including the duty to accommodate commercial air service.

The Airport Layout Plan was approved by the Federal Aviation Administration on November 14, 2014. The Airport Layout Plan depicts the area designated to accommodate passenger service at Paine Field consistent with the 2002-2021 Airport Master Plan Update. The Airport Layout Plan depicts the existing terminal area and terminal ramp area that has been optioned to Propeller. CP ____ (Exhibit B to Second Declaration of Bill Dolan).

The Option provides Propeller the opportunity to determine the feasibility of constructing and operating a commercial passenger terminal at Paine Field. The only right granted in the Option is “an exclusive right to negotiate and enter into a lease of the Property, in substantially the form attached hereto as Exhibit B (the ‘Lease’).” CP 77. The Option, by its terms, provides no present rights to occupy or use the land. The City has not met its burden of demonstrating error in the lower court’s holding that there was no project action triggered by the terms of the Option.

Since the Option is contingent on environmental review, it has similarities to the memorandum of understanding held not to limit alternatives by this Court in *International Longshore and Warehouse Union Local 19 v. City of Seattle*, 176 Wn. App. 512, 309 P.3d 654 (2013). That case involved a memorandum of understanding, which conditioned the government’s possible expenditure of public funds to build a basketball arena upon the completion of SEPA review and determinations by the government bodies “whether it is appropriate to proceed with or without additional or revised conditions based on the SEPA review...” 176 Wn. App. at 517-18.

Similarly here the Option is conditioned on the outcome of SEPA review. The County retains full authority to change course or alter the plan with respect to the Airport if the results of SEPA review warrant such

a decision. The County retains discretion to approve, condition, or deny any land use permits thereafter. The County has authority to review and approve all design specifications throughout the permit process. The County also has the ongoing authority, after SEPA review, to require compliance with all laws, ordinances, codes, rules and regulations applicable to the project, which will be an express lease requirement, once executed. CP 128-129.

The County's decision to grant Propeller an option conditioned upon compliance with SEPA is due substantial deference pursuant to statute:

In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of a requirement, or the adequacy of a 'detailed statement', the decision of the governmental agency shall be accorded substantial weight.

RCW 43.21C.090; *see also Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447 (1990) (court gives "substantial weight" to agency in its de novo review of legal questions); *Clallam County Citizens*, 137 Wn. App. at 224-25 (determination that proposal is exempt from SEPA review is afforded substantial weight). Moreover, "[i]t is a well-established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement." *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 440, 836 P.2d 235 (1992); *see also* WAC 197-11-055(2)(b)

(Subject to WAC 197-11-070, agencies have the option of identifying, “the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis.”); *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (“Selection of environmental review process ... is left to the sound discretion of the appropriate governing agency, not this court.”). For these reasons, the Court should grant substantial weight to the County’s interpretation of SEPA.

SEPA rules allow government to take preliminary steps toward a project so long as the decision will not (1) result in a significant impact to the environment or (2) will limit the range of reasonable alternatives going forward. WAC 197-11-070(1), (4). The SEPA Rules provide:

(1) Until the responsible official issues a final determination of nonsignificance 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.

(4) This section does not preclude developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal, as long as such activities are consistent with subsection (1).

WAC 197-11-070(1), (4).

Here, the Option cannot be exercised until after completion of all SEPA requirements. The Option does not coerce or prejudice the final outcome of the SEPA process, on which the lease's effectiveness is conditioned, nor does it irretrievably dedicate public resources a passenger terminal. The County retains sufficient discretion to act in response to SEPA review, including the right to impose mitigation conditions or issue a “no action” determination. *Friends of Southeast’s Future*, 153 F.3d at 1065. Thus the Option, which preserves the County’s right to consider the “no action” alternative, does not limit the range of reasonable alternatives.

The Option is a preliminary agreement that facilitates the development of information essential to the County’s evaluation of the environmental impacts of Propeller’s proposal to lease the existing terminal and terminal ramp area. The County has not committed itself to any course of action. The option provides time for design and planning by Propeller without any impact to the land or building and without any cost to the County.

It was a wise decision by the County Council not enter into a lease, but to put the lease aside pending a full evaluation of the environmental impacts. It was a sound decision of the lower court to rule that the Option is not a “project action” subject to SEPA.

C. Snohomish County Council had authority to approve the Option under County Code § 2.10.010(12).

The Snohomish County Council accepted the written recommendation of the Snohomish County Executive and approved the Option pursuant to Motion No. 15-069 on March 2, 2015 citing its authority under SCC 2.10.010(12), CP 204. The County Council motion provided in pertinent part:

Whereas, Snohomish County (County) is required by federal Grant Assurances, federal law, 49 U.S.C. and regulations and policies of the Federal Aviation Administration to make reasonable accommodations for passenger airlines who desire to serve Paine Field; and

“Whereas, the County Council has the decision-making authority under SCC 2.10.010(12) to approve the form of the Land Lease and authorize the execution of the Option to Lease Land at the Snohomish County Airport to Propeller;

Now, Therefore, On Motion, the Snohomish County Council hereby authorizes execution of the Option to Lease with Propeller Airports Paine Field LLC and approves the form of the Land Lease in substantially the form attached to the Option to Lease.”

Interpretation of SCC 2.10.010(12) is question of law for the court. County ordinances are interpreted according to the rules of statutory interpretation. *Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). When interpreting statutory language, the goal is to carry out the intent of the legislative body. *Ellensburg Cement*, 179 Wn.2d at 743. The court must look first to the text to determine meaning. *Griffin v. Thurston County Bd. of Health*, 165

Wn.2d 50, 55, 196 P.3d 141 (2008). Where a statute is clear on its face, its plain meaning should be derived from the language of the statute alone. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41, 156 P.3 185 (2007) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)). However, plain meaning may be gleaned “from all the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn2.d 1, 11, 43 P.3d 4 (2002). Here the county code sections at play, SCC 2.10.010(12) and SCC 15.04.040(3), are related to each other and together disclose the legislative intent.

On February 11, 2015 the Executive recommended approval the Option to the Council in such detail as Council required on an Executive/Council Approval Form (“ECAAF”). CP 201-202. Council approved the Option in the detail the Executive provided by Motion No. 15-069 on March 2, 2015.

The Council did not cite SCC 15.04.040(3) in their decision. It provides:

(3) Any matter relating to management or operation of the airport that is presented to the county council for action by or through the airport manager or executive, including but not limited to individual licenses or leases of airport property or proposed rates, terms or forms of leases to be approved by the executive under SCC 2.10.010(12), 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.

Council cited the authority of SCC 2.10.010(12) which provides:

SCC 2.10.010 Executive Functions

The following functions of government not otherwise provided for in the charter are deemed executive functions and shall be performed by the county executive:

...**(12)** Approval of all licenses to occupy, use or access the Snohomish County Airport and all airport leases; PROVIDED, That in accordance with SCC 15.04.040, **the county executive** may recommend individual licenses or leases for approval by the council, and **shall recommend in such detail as the council may require** proposed rates, terms and forms of leases to be approved by the executive in which event the county council by motion will establish the rates to be charged and other terms of any such lease and approve the form of lease utilized which rates, terms and form may be changed from time to time by the county council; and PROVIDED, FURTHER, That the county executive shall submit an annual report to the county council, not later than February 15th of each year, showing the names of parties, rents, reserve, areas rented, and time period of each such lease and license. **Any lease or license executed pursuant to this section shall be deemed to be with the approval of the county council as required by chapter 15.04 SCC.**

[Emphasis added].

Any lease or license [Option] executed pursuant to this section [SCC 2.10.010(12)] shall be **deemed** to be with the approval of the county council as required by chapter 15.04 SCC.

Deem means “to hold; consider; adjudge; determine; treat as if; construe.” *Black’s Law Dictionary*, Revised Fourth Addition, West Publishing Company (1968). In the last sentence of SCC 2.10.010(12) the word “deemed” means “held, considered, adjudged, treated as if, construed” resulting in the following sentence:

Any lease or license [Option] executed pursuant to this section shall be deemed [held, considered, adjudged, treated as if, construed] to be with the approval of the county council as required by chapter 15.04 SCC.

Over the previous 18 months, Executive staff, airport staff and the prosecutor’s office provided council with various alternatives of accommodating commercial air service. Alternatives provided included a county-built terminal, an airline-built terminal, and the private 3rd party lease proposed by Propeller. The Executive and airport staff negotiated with Propeller and updated council regularly at executive sessions. CP 73.

The last sentence of SCC 2.10.010(12) does not render SCC 15.04.040(3) meaningless as contended by The City. Council maintains the power to request more details from the Executive whenever it needs more details under SCC 15.04.040(3) and the power to forego further detail when it has sufficient information to make a decision under SCC 2.10.010(12). The code sections must be read to make both sections effective as Council intended. Council adjudged the information provided by the Executive sufficient to grant the Option to Propeller, clearly within the authority of Council.

D. Compliance with County's obligations under Federal law.

Snohomish County's approval of the Option to Propeller is consistent with its grant obligations under federal law. Federal law requires the County to make the Paine Field available to all types, kinds and classes of aeronautical activities, including commercial aeronautical services to the public. The terminal and terminal area have been designated for commercial air service consistent with the 2002-2021 Airport Layout Plan Update. The federal government has invested over \$100,000,000 dollars paving and lighting Paine Field. The County has limited discretion to deny a request for air service, and if it does so without solid reasons, risks a substantial financial loss.

V. CONCLUSION

The decision of the County Council to obtain a full understanding of the environmental consequences while complying with its federal obligations is being accomplished by the Option.

The Option should be exempt from SEPA to avoid the high transaction costs and delays that would result from duplicate review of a categorically exempt, non-project action that does not have a probable significant adverse environmental impact.

The City's attempt to confuse the Option with a lease ignores the plain language of the agreement, and should be rejected. The Option

simply authorizes Propeller to explore the feasibility of passenger service at Paine Field, conduct its due diligence and formulate a specific project proposal to submit to the environmental decision-making authority of the County PDS Director.

The Legislature choose not to tie the hands of government too tightly. The opportunity to explore and perform due diligence is necessary; the Legislature did not restrict it in this circumstance. Government must be able to partner with other parties in the planning stage in order to formulate plans that are suitable and sufficiently developed to support environmental review.

This Court should affirm the lower court's decision of summary judgment in favor of Snohomish County and Propeller Airports Paine Field LLC.

RESPECTFULLY SUBMITTED this 12 day of May, 2016.

By 

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CERTIFICATE OF SERVICE AND MAILING

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I further certify that (1) the original of the foregoing brief was timely filed by Priority U.S. Mail on May 12, 2016, pursuant to RAP 18.6(c), as follows:

Richard Johnson, Clerk of the Court
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I further certify that I caused a true and correct copy of the foregoing brief to be served this date, in the manner indicated, to the parties listed below:

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