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WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 94328-1

Court of Appeals 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.

PETITION FOR REVIEW

David A. Bricklin, WSBA No. 7583
Jacob Brooks, WSBA No. 48720
Bryan Telegin, WSBA No. 46686
BRICKLIN & NEWMAN, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
(206) 264-8600
Attorneys for Appellants

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I. IDENTITY OF THE PETITIONERS

The City of Mukilteo and Save Our Communities (collectively, “Mukilteo”), appellants below, hereby petition for review of the Court of Appeals decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Mukilteo seeks review of the unpublished opinion issued by the Court of Appeals for Division I in the case of *City of Mukilteo v. Snohomish County*, (January 23, 2017) (2017 WL 326241) (App. A hereto). The Court of Appeals denied Mukilteo’s motion for reconsideration on February 27, 2017 (App. B hereto).

III. ISSUES PRESENTED FOR REVIEW

1. Does a county’s decision to enter into an option contract which legally obligates the county to lease land constitute a “project action” under SEPA, as defined at WAC 197-11-704?
2. Does entering into an option contract for the lease of land effectively constitute a decision to lease land by the optionor?

IV. STATEMENT OF THE CASE

This Court has observed that “the risk of postponing environmental review is ‘a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds.’” *King County v.*

Boundary Review Bd., 122 Wn.2d 648, 664, 860 P.2d 1024 (1993) (quoting William H. Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L.Rev. 33, 54 (1984)).” In turn, this “may begin a process of government action which can ‘snowball’ and acquire virtually unstoppable administrative inertia.” *Id.* To avoid this, “decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.” *Id.*

The Court of Appeals decision serves to undermine SEPA, instead of embracing it. Snohomish County entered into a legally binding option contract to lease Paine Field to Propeller Airport Paine Field, LLC (“Propeller”) without the benefit of environmental review required by Paine Field. The Court of Appeals’ decision is inconsistent with the Supreme Court’s decisions on the critical importance of early SEPA review and the legal effect of option contracts. Review by this Court is necessary to redress Snohomish County’s violation of SEPA and to assure environmental review is done in a timely manner, not as a perfunctory exercise after critical decisions are made.

A. Facts Giving Rise to the Dispute

Propeller Airports Paine Field, LLC approached Snohomish County in 2014 to discuss the possibility of constructing and operating a commercial passenger terminal at Paine Field. CP 235. On March 11, 2015, Snohomish County entered into the option contract to lease Paine Field to Propeller. CP 80.

Paine Field has been in operation since the late 1930s. CP 202. It primarily serves aircraft maintenance businesses; small, private planes; and Boeing service and test flights. CP 202-203. Paine Field serves a wide variety of aircraft, but it does not provide commercial passenger service. CP 93. It lacks facilities to serve commercial airline passengers, such as car rental fleets, efficient transportation access, and, most importantly, a passenger airline terminal. CP 111.

Snohomish County is the operator and owner of the airport at Paine Field. CP 93. As the owner of Paine Field, Snohomish County acts in a proprietary capacity. As such, it has a broad discretion to bargain for lease terms and conditions (in the same way that a private individual can), unconstrained by the limits on its regulatory powers.

On February 11, 2015, the County Executive presented the proposed option to lease between Snohomish County and Propeller to the

County Council. CP 752. In Motion 15-069 dated March 2, 2015, the County Council made the final real estate decision on behalf of the County acting as the landowner of Paine Field, approving a three-year exclusive option to lease land to Propeller at Paine Field. CP 204. At the time that the County Council made the decision, the County had not undertaken any environmental review as required by SEPA. CP 236.

The lease is attached to the option as Exhibit B. CP 77. The option commits the County to lease Paine Field under the terms of that lease. *Id.* The lease allows Propeller to use County property to construct and operate a passenger terminal complex and related support facilities such as baggage claim buildings, security buildings, auto parking, inside and outside terminal concessions (including access for rental cars, taxis, and ground transportation), and various other support activities as determined necessary by Propeller. CP 94, 111-113. The term of the lease is thirty years, with two ten-year extensions at Propeller's option. CP 106-107.

The option does not include a clawback provision that allows the County Council to choose not to enter into the lease or to alter the terms of the lease based upon the information developed during any subsequent SEPA environmental review.

The title of the option to lease states that it is “Contingent on Compliance with SEPA.” CP 77. A provision in the option states that “a SEPA process must be completed prior to exercise of the Option and execution of the Lease.” CP 78. But the Council cannot cancel the lease or alter the terms of the lease based on what it learns from that environmental review. When it executed the option to lease, the County locked itself into the lease attached to the option. (The Court of Appeals decision seemingly ignores this fundamental aspect of contract law.)

Entering the lease as written will have very real impacts to the surrounding environment. First, the four parcels of land that are the subject of the lease will be transformed from empty stretches of pavement that are used for vehicle or aircraft parking into a 25,000-square foot terminal building with various accessory structures necessary to serve the terminal. CP 529. Second, the change in use of the land to a commercial passenger terminal, along with the increased air and ground vehicle traffic, will cause significant adverse impacts to the surrounding community. Commercial passenger service at Paine Field would result in increased commercial aircraft operations, increased traffic to and from the terminal, and increased noise impacts from commercial aircraft. Paine Field already receives numerous complaints from surrounding residents. CP 164. With

the increased air traffic resulting from commercial passenger service, the noise impacts will increase.

The County Council made its decision to lease Paine Field without being informed of any of these impacts because it did not conduct environmental review beforehand. The findings of an environmental review could have altered the County's ultimate decision. In its proprietary capacity, the County was free to bargain for environmental benefits, such as limitations on single occupancy vehicle usage to offset traffic impacts and to limit greenhouse gas emissions. The County Council could not give any of these issues adequate consideration in its decision-making process because the County did not conduct environmental review beforehand.

B. Proceedings Below

On March 22, 2015, the City of Mukilteo and Save Our Communities filed a petition for judicial review in King County Superior Court of Snohomish County's decision to enter into the option contract without environment review. CP 1-7. Mukilteo alleged that Snohomish County violated SEPA by failing to conduct environmental review before entering into the lease option and also alleged that Snohomish County violated the Snohomish County Code by not providing the County Council

with a written assessment of alternatives. CP 6. Propeller was named as a defendant, also. CP 2.

The superior court granted Snohomish County and Propeller's motions for summary judgment, finding that the option to lease did not constitute a "project action" as defined by the SEPA regulations. CP 650-652. The Court of Appeals affirmed the superior court's decision (attached as Appendix A). Mukilteo filed a motion for reconsideration with the Court of Appeals. The Court of Appeals denied the motion for reconsideration on February 27, 2017 (attached as Appendix B). This petition for review followed.

V. ARGUMENT

The timing of SEPA review is a crucial question and one that this Court and the Court of Appeals have addressed on more than one occasion. Previous decisions can be distilled down to the principle that SEPA review must occur as early in the process as possible and must be completed in time to inform any decision that has a binding effect upon the decision-maker. This case presents a perfect example of such a decision requiring SEPA review: Snohomish County entered into a legally binding option contract that obligates it to lease Paine Field when Propeller exercises that option. Unfortunately, the Court of Appeals

issued an opinion that directly contradicts previous decisions on the timing of SEPA review. Furthermore, the Court of Appeals misstates the black letter law of option contracts by ignoring the legally binding nature of an option contract and its requirement that the optionor hold open an offer for a specified period of time. This Court should grant review to clarify the timing of SEPA review and ensure that the legal effect of option contracts is not muddled or entirely abrogated.

A. The Court of Appeals' Decision

SEPA requires preparation of an environmental impact statement for any “major actions significantly affecting the quality of the environment.” RCW 43.21C.030(c). Thus, whether the option to lease is an “action” is critical to determining if SEPA review was required before entering into the lease.¹ Project actions include “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).

In affirming the superior court, the Court of Appeals focused on the nature of an option contract and whether the option contract constituted a project action. The Court of Appeals determined that the

¹ Actions are divided into “project actions” and “nonproject actions.” WAC 197-11-704. Only project actions are relevant here.

option to lease did not constitute a project action and, therefore, did not require environmental review beforehand.

In assessing the nature of an option contract to determine if it constituted a project action, the Court of Appeals stated that “[a]n option conveys no legal or equitable interest in the real property that is the subject of the option prior to its exercise. It is merely a contractual right to be exercised in accordance with its terms.” Op. at 10. This legal formalism obscures the reality of the “virtually unstoppable administrative inertia” this Court warned about in *King County*. And even in the world of legal formalism, the Court of Appeals did not address the contractual duties imposed on the County by the option contract—namely, that it legally obligates the optionor (Snohomish County) to lease Paine Field to the optionee (Propeller) under the terms of the lease attached to the option and does not allow the County to alter the terms of the lease in response to environmental review.

The Court of Appeals also did not address the full definition of a project action. Specifically, project actions are “**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). The

definition of a project action is not limited to whether an ownership or equitable interest has been transferred in publicly-owned land. The trigger for a project action is whether a *decision* to lease has been made. But the Court of Appeals specifically rejected this reading of the regulation:

Accordingly, Mukilteo's contention that the option is a decision to enter into a lease is not helpful to a proper analysis of whether approval of the option is a project action.

Op. at 11. The Court of Appeals did not address the decision-making aspect of the option contract, instead focusing on whether an interest in the land had been transferred. Op. at 12.

Finally, the Court of Appeals treated the option to lease and the lease as two distinct actions rather than intertwined decisions. *See* Op. at 15 ("What happens after Propeller exercises the option upon completion of the 'SEPA process' is immaterial to what is presently before this court."). The Court rejected that this case bore any similarities to cases where preliminary actions had a "binding effect" or created "virtually unstoppable administrative inertia" on the agency's eventual decision-making power. Op. at 12.

In essence, the Court of Appeals held that despite the option contract's imposition of an absolute legal obligation for Snohomish

County to lease Paine Field to Propeller under the terms of the lease currently written, the option contract did not represent a decision to lease publicly owned land, it did not have a “binding effect,” and it did not create “administrative inertia” in favor of the new commercial air passenger terminal.

B. The Decision Below is in Conflict with Decisions of this Court.

The Court of Appeals’ decision conflicts with several opinions of this Court and, therefore, review is warranted. RAP 13.4(b)(1). The lower court’s decision not only conflicts with this Court’s previous decisions on the timing of environmental review under SEPA, but it also is in conflict with this Court’s decision describing the nature and effect of option contracts.

1. The decision conflicts with cases that hold that option contracts are legally binding decisions to hold an offer open.

The Court of Appeals decision regarding the legal effect of an option contract conflicts with numerous reported cases of this Court and the courts of appeal. An option contract is “a complete, valid, and binding agreement by the terms of which a collateral offer is kept open for a specified period of time.” *Bennett Veneer Factors, Inc. v. Brewer*, 73

Wn.2d 849, 853, 441 P.2d 128 (1968). “Importantly, an option contract is binding upon the offeror and actually becomes a contract *before* the option holder decides whether or not to exercise the power.” *Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Inv'rs L.P.*, 176 Wn. App. 244, 263, 310 P.3d 814, 824 (2013) (internal citations omitted; emphasis in the original).

The requirement for the optionor to keep the offer open for real property is a hard and fast rule. “If the optionee unconditionally exercises the option in accordance with the terms of the contract, the optionor must sell the property in accordance with the terms of the option.” *Pardee v. Jolly*, 163 Wn.2d 558, 568, 182 P.3d 967 (2008). If the optionor attempts to withdraw the offer, the terms of an option contract are to be strictly construed. *Id.* Specific performance is the only adequate remedy for the breach of an option contract regarding real property because land is unique and difficult to value. *Id.*

The Court of Appeals misunderstood the effect of an option contract when it asserted that “the lease has no . . . present effect.” Op. at 11. The option contract legally obligates the County to lease Paine Field when Propeller exercises its option, thereby giving the lease a very real “present effect.” The option agreement “becomes a contract *before* the option holder decides whether or not to exercise the power.” *Mukilteo*

Ret. Apartments, supra, 163 Wn.2d at 568. The Court of Appeals' reasoning conflicts with black-letter case law regarding option contracts.

2. The decision conflicts with cases that hold that SEPA requires environmental review at the earliest possible stage.

The Court of Appeals decision contradicts this Court's unequivocal direction that environmental review must be completed as early as possible, so that decisions are made "by deliberation, not default." *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973). "The point of an [environmental impact statement] is not to evaluate agency decisions after they are made, but rather to provide environmental information to assist with making those decisions." *King County v. Washington State Boundary Review Board for King County, supra*, 122 Wn.2d at 666.

In *King County*, this Court warned of the "snowball effect" of decisions made in the early phases of a lengthy administrative process. This court recognized that "[e]ven if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless." *Id.* at 664. In *King County*, the government decision at issue was the annexation of land to the City of Black Diamond. This

Court held that even though there were no specific land use proposals included in the land annexation decision, the decision was not insulated from environmental review because there were probable adverse environmental impacts that could flow from that early, general annexation decision. *Id.*

Here, Snohomish County's decision is much more specific and binding than the decision at issue in *King County*. Whereas there was no specific land use proposal on the table in *King County*, there is a very specific proposal for a new commercial air terminal here. If Propeller exercises its option, Snohomish County is legally obligated to enter into the lease attached to the option. Entering into the option to lease goes well beyond the "virtually unstoppable administrative inertia"² that this Court warned of—it is a legally enforceable requirement.

The Court of Appeals' decision also summarily dismissed the idea that there might be a snowballing effect here:

Similarly, we conclude "there is no snowball [effect]" in this case. All that has happened is the County's decision to execute an option, which may result in a lease. The option specifically provides that a SEPA process must be completed prior to the exercise of the option and execution of the lease that may follow.

Op. at 20.

² *King County, supra*, 122 Wn.2d at 664.

The Court of Appeals' reasoning ignores the binding effect of the option; this Court has held that SEPA requires environmental review to assist in agency's decision-making, not provide review of decisions after they are made. *King County*, 122 Wn.2d at 666, 860 P.2d 1024. The County Council has no further decisions to make. Any environmental review conducted later will be absolutely useless in terms of allowing the members of the County Council to make their decision based on the information developed during environmental review, *i.e.*, to make their decision based "on deliberation, not default." *Stempel, supra*, 82 Wn.2d at 118. Any environmental review conducted later by the permitting department will merely review a decision that has already been made. The so-called "snowball effect" is more akin to a runaway train here.

The Court of Appeals' decision is also in conflict with an opinion recently issued by this Court, *Columbia Riverkeeper v. Port of Vancouver*, --- Wn.2d --- (2017).³ In *Columbia Riverkeeper*, this Court evaluated whether a lease agreement which was subject to final approval by the governor and the Energy Facility Site Evaluation Council ("EFSEC") constituted a project action under SEPA. This Court focused on two

³ The Court of Appeals decision in our case made reference to the lower court's decision in *Columbia Riverkeeper v. Port of Vancouver*, 189 Wn. App. 800, 357 P.3d 710 (2015). Decision at 11. This Court issued its decision in *Columbia Riverkeeper* after the Court of Appeals issued its opinion in this matter.

aspects of the lease agreement in holding that environmental review was not required before entering into the lease: 1) EFSEC and the governor hold the ultimate authority to either approve the lease or grant approval contingent on changes to the lease, and 2) the Port retained authority to modify the development, construction, and operation plans of the facility.

Slip op. at 23. Because of this, this Court reasoned:

The lease language plainly preserves the Port's ability to shape the final project in response to environmental review, for example by adopting additional mitigation measures, heightened insurance requirements, or modifying project specifications. This preserves reasonable alternatives.

Slip op. at 23-24.

Here, it is precisely because Snohomish County lacks the ability to “shape the final project in response to environmental review” that the option contract is subject to SEPA review. Unlike the Port of Vancouver lease agreement, the option contract contains no provisions which allow Snohomish County to make alterations to the lease in response to environmental review. The Court of Appeals did not address this aspect of the lease. It dismissed exactly this point by treating the option to lease and lease as if they were two unrelated actions, stating “the issue is whether the County improperly executed the option without first preparing

an EIS, *not whether the County retains authority after Propeller exercises the option and executes the lease.*” Op. at 14-15 (emphasis supplied).⁴

C. The Decision Below is in Conflict with Published Decisions of the Court of Appeals.

The Court of Appeals’ decision in this case is in conflict with previously published opinions of the Court of Appeals on the timing of SEPA review and, therefore, review by this Court is warranted. RAP 13.4(b)(2).

In *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 230 P.3d 190 (2010), the Court of Appeals was presented with a similar situation as the present one. The City of Seattle sought to acquire federal real property pursuant to a development plan, but Seattle wanted to delay SEPA review until later, when it applied for rezoning or land use permits. *Id.* at 311, 230 P.3d 190. The Court of Appeals rejected this argument, determining that the plan submitted to the federal government with the proposal to acquire the property was a project action because it was “a decision on a specific construction project, located in a defined geographic area.” *Id.* at 314, 230 P.3d 190. The

⁴ The county and Propeller may argue that the permitting staff has the authority to add some conditions to permits issued for the project. But the permitting department’s authority is limited by the terms of the regulations they enforce. The County Council, in contrast, was acting in a proprietary capacity and was not similarly limited. *See* Appellants’ Opening Brief at 37-42.

Court of Appeals also held that the development plan was a project action because it had a “binding effect” that would bind Seattle to the specific use of the property outlined in the plan, even though the city had not yet applied for a rezone or other land use approvals. *Id.*

The Court of Appeals largely acknowledges that the *Magnolia Neighborhood* decision holds that if a decision has a “binding effect,” it is a “project action” subject to SEPA review. *See Op.* at 5-6; 12. But the Court summarily concluded that the option contract was not the same type of decision with a “binding effect” as the decision in *Magnolia Neighborhood*. *Op.* at 12. Yet the option contract here is much more binding than the development plan at issue in *Magnolia Neighborhood*.

In *Magnolia Neighborhood*, the city controlled the next steps of the process; it had the option to forego the acquisition, in which case no development would occur (but if it did pursue the acquisition, it was bound to follow through with the stated development plan). Here, it is Propeller, not the county, which holds the option rights. Snohomish County does not have the discretion the City of Seattle retained in *Magnolia Neighborhood* to pull the plug on the project. Thus, the decision here is far more binding on the local government than the decision found to be a “project action” in *Magnolia Neighborhood*.

D. This Case Involves an Issue of Substantial Public Interest.

This case involves an issue of substantial public interest and, therefore, review is warranted by this Court. RAP 13.4(b)(4). First, the introduction of commercial air service to Paine Field will significantly affect the residents of the City of Mukilteo and the members of Save Our Communities who live in the surrounding area, due to noise, additional traffic, and other disruptions to daily life. Second, the public at large has a significant interest in assuring that SEPA's mandate is faithfully implemented. As this Court's recent opinion in *Columbia Riverkeeper v. Port of Vancouver* demonstrates, the timing of SEPA review is not always clear, but it can have significant effects on agency decisions. It is in the public's interest to have environmental review completed as early as possible in the local government's decision-making process. This Court should accept review to address that important public interest issue.

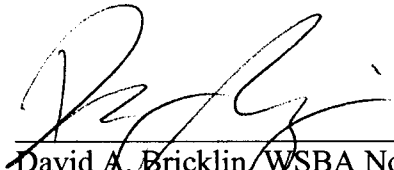
VI. CONCLUSION

For the reasons above, the City of Mukilteo and Save Our Communities respectfully request that this Court grant review of the Court of Appeals decision under RAP 13.4(b)(1), (2), and (4) .

Dated this 29 day of March, 2017

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

David A. Bricklin, WSBA No. 7583
Jacob Brooks, WSBA No. 48720
Bryan Telegin, WSBA No. 46686
Attorneys for Petitioners

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF MUKILTEO and SAVE OUR
COMMUNITIES,

Appellants,

v.

SNOHOMISH COUNTY and
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No. 74327-9-1

DIVISION ONE

UNPUBLISHED

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Cox, J. — The City of Mukilteo and Save Our Communities (collectively “Mukilteo”) appeal the order granting summary judgment to Propeller Airports Paine Field LLC (Propeller) and Snohomish County.¹ We hold that there are no genuine issues of material fact for trial. The County and Propeller are entitled to judgment as a matter of law. We affirm.

Snohomish County owns and operates Paine Field, an airport. Paine Field does not currently provide scheduled commercial passenger air service. Propeller seeks to develop commercial airline service facilities at Paine Field,

¹ We adopt the naming conventions of the parties.

consisting of a two-gate terminal. Propeller sought an option to lease a portion of airport property to conduct feasibility studies for this development.

In February 2015, the County executive submitted to the County council an Executive/Council Approval Form, recommending the approval of an option to lease agreement. The option grants Propeller the contractual right to enter certain airport property to conduct engineering studies, subject to the terms and conditions of the option. One of these express conditions to the option is that its exercise is “subject to compliance with RCW 43.21C, the State Environmental Policy Act (‘SEPA’).”²

Exhibit B to the option is the proposed lease form to be executed should the option be exercised. Pursuant to the express terms of the option, “execution of [this] Lease [is] subject to compliance with RCW 43.21C, the State Environmental Policy Act (‘SEPA’).”³

In March 2015, the County authorized the execution of the option. Soon after, Mukilteo sought judicial review of this decision and declaratory relief. Specifically, Mukilteo sought an order declaring the option void. It also sought to enjoin the County from entering into a binding option or lease for commercial air service facilities at Paine Filed before completing an adequate environmental impact statement (EIS).

Mukilteo also argued that the County violated Snohomish County Code (SCC) 15.04.040(3). This claim is based on the County executive’s alleged

² Clerk’s Papers at 78.

³ Id.

failure to include with his recommendation a statement evaluating the relative merits of available options to the proposed option to lease.

The trial court granted summary judgment to the County and Propeller, rejecting Mukilteo's claims.

Mukilteo appeals.

OPTION TO LEASE

Mukilteo first argues that the County's execution of the option is subject to SEPA and that the County was required to complete a SEPA review before executing the option to lease. We disagree.

A threshold issue, over which the parties differ, is the standard of review that we must apply. Mukilteo contends that the de novo standard of review applies. Propeller argues that the clearly erroneous standard controls. We hold that under either standard of review, the questions before us are legal in nature. There simply are no material disputed facts. De novo review controls.⁴

Here, the County approved an option to lease airport property to Propeller. If and only if Propeller exercises the option in accordance with its terms does Propeller's ability to lease the property arise. A condition precedent to both the exercise of the option and the execution of the lease is "compliance with RCW 43.21C, the State Environmental Policy Act ('SEPA')." ⁵ In the absence of this compliance, there can be no exercise of the option and no lease. Thus, the legal

⁴ Blackburn v. Dep't of Social and Health Services, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016).

⁵ Clerk's Papers at 78.

question is whether SEPA bars the approval of the option to lease on the basis of these undisputed facts.

Project Action

Mukilteo next argues that SEPA requires the County to complete an EIS prior to executing the option because it is a “project action.” Because execution of the option to lease is not a project action, we reject this argument.

SEPA requires the preparation of an EIS for any “major actions significantly affecting the quality of the environment.”⁶ “SEPA and its implementing regulations require that the government conduct environmental review, through at least a threshold determination, for any proposal that meets the definition of an action.”⁷

Under SEPA, we review “the governmental action together with its accompanying environmental determinations.’ This means that until an agency has taken final action on a proposal, judicial review of an agency’s compliance with SEPA may not occur.”⁸

Whether we may invalidate the option to lease depends on whether this option meets the definition of government “action.” Such action is reviewable as a project action, which is defined as:

⁶ RCW 43.21C.030(c); Int’l Longshore & Warehouse Union, Local 19 v. City of Seattle, 176 Wn. App. 512, 519, 309 P.3d 654 (2013).

⁷ Int’l Longshore & Warehouse Union, Local 19, 176 Wn. App. at 519 (quoting Pub. Util. Dist. No. 1 of Clark County v. Pollution Control Hr’gs Bd., 137 Wn. App. 150, 158, 151 P.3d 1067 (2007)).

⁸ Id. (citations omitted) (quoting RCW 43.21C.075(6)(c)).

[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:

.....
(ii) **Purchase, sell, lease, transfer, or exchange** natural resources, including publicly owned land, whether or not the environment is directly modified.^[9]

Two cases are instructive in determining whether the option is a project action. In Magnolia Neighborhood Planning Council v. City of Seattle, the City of Seattle sought to acquire federal real property and began the approval process for residential development of the property.¹⁰ The City approved this plan, but it indicated that it would delay SEPA compliance until it actually applied for rezoning or land use permits.¹¹ The Magnolia Neighborhood Planning Council sued the City, arguing that it violated SEPA.¹²

This court affirmed the trial court's conclusion that the City's plan constituted a project action under WAC 197-11-704(2)(a)(ii) because it constituted an agency decision to purchase, sell, lease, transfer, or exchange publicly owned land.¹³ This court also determined that the plan is "a decision on a specific construction project, located in a defined geographic area."¹⁴

⁹ WAC 197-11-704(2)(a) (emphasis added).

¹⁰ Magnolia Neighborhood Planning Council v. City of Seattle, 155 Wn. App. 305, 308-10, 230 P.3d 190 (2010).

¹¹ Id. at 311.

¹² Id.

¹³ Id. at 309, 314.

¹⁴ Id. at 314.

Additionally, this court determined that the City's approval of the plan had a "binding effect" because it required that the City make a specific use of the property once the federal government adopted the plan as a condition of transfer of the property.¹⁵ Lastly, this court concluded that the plan constituted a project action under WAC 197-11-704(1)(a), which is not at issue here.¹⁶

Although the City argued that it might not follow through with the intended usage envisioned in the plan, we concluded that "environmental review can be required even when the government has not made a definite proposal for actual development of the property at issue."¹⁷ Thus, "the proposed land use related action approved in the [plan] does not evade SEPA review simply because the approval of the [plan] does not result in immediate land use changes."¹⁸

Conversely, in International Longshore & Warehouse Union, Local 19 v. City of Seattle, this court determined that a memorandum of understanding did not constitute a project action.¹⁹ There, King County and the City of Seattle signed a memorandum of understanding that contemplated the use of public funds for an arena on certain property.²⁰ The memorandum remained "good" for five years and provided the particulars of how the venture would be financed and

¹⁵ Id. at 317.

¹⁶ Id. at 318.

¹⁷ Id. at 316.

¹⁸ Id. at 317.

¹⁹ 176 Wn. App. 512, 520, 309 P.3d 654 (2013).

²⁰ Id. at 514.

operated if King County and Seattle ultimately decide to participate in it.²¹ Many of the terms became the parties' obligations only after several contingencies occurred, including the completion of SEPA review through the issuance of a final EIS.²² Specifically, the memorandum provided that "after the SEPA review, the city and county w[ould] decide whether to invest public funds in an arena on [the] proposed site. If they decide to proceed, they will commit up to \$200 million total, subject to various contingencies."²³

The International Longshore and Warehouse Union, Local 19 (ILWU) commenced the suit to invalidate the memorandum.²⁴ This court determined that the memorandum did not constitute a project action, because it, by itself, had "no environmental impact, either down the road or immediately. . . . All that has happened so far in terms of SEPA is a decision about the process that will be used to make a decision."²⁵ This court explained:

The memorandum is a binding agreement as to the process the parties will follow to complete necessary reviews, including environmental reviews, fulfill conditions precedent and, as appropriate, approve the transaction documents defined in the agreement. But many of its terms become obligations of the parties only after several contingencies occur. Future decisions by the city and county whether to invest in [the] project site are expressly reserved until after review under SEPA. The memorandum makes clear that the city and county will not commit to this project until

²¹ Id. at 514, 519.

²² Id. at 517.

²³ Id.

²⁴ Id. at 518.

²⁵ Id. at 522.

each has analyzed the environmental impacts of the proposed arena, including “consideration of one or more alternative sites.”^[26]

More importantly, this court stated:

The memorandum does not predetermine where an arena will be built or even that an arena will be built at all. Whether the city and county will agree to [the] proposal is a decision expressly reserved until after environmental review is complete. Because there has not yet been a government “action” as that term is defined by SEPA, the courts are not a forum for the union’s opposition to [the] proposal.^[27]

This court further stated that the memorandum “does not limit or control future decisions the city and county may be called upon to make. It is not ‘binding’ as that word is used in Magnolia.”²⁸ Rather, the memorandum “is best understood as a preliminary step taken by the city and county to set forth an arena proposal that is sufficiently definite to allow further study, including preparation of a meaningful environmental impact statement.”²⁹

Here, the option does not constitute a project action under WAC 197-11-704(2)(a)(ii). The option is not a decision to “[p]urchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.”³⁰ Rather, the option grants Propeller a contractual right to enter the airport property to conduct feasibility studies and the

²⁶ Id. at 516.

²⁷ Id. at 514.

²⁸ Id. at 523.

²⁹ Id. at 521.

³⁰ WAC 197-11-704(2)(a)(ii).

right to exercise the option to lease the property at a later time. In short, it precedes the possibility that a lease may follow.

Importantly, the option is not a project action because it is similar to the memorandum of understanding discussed in Int'l Longshore & Warehouse Union, Local 19. Like the memorandum in that case, the option "is a binding agreement as to the process the parties will follow" during the option's term.³¹

The option provides that it "may be exercised following completion of environmental review as provided in paragraph 7" ³² Paragraph 7 states that the "[e]xercise of the Option *and* execution of the lease are subject to compliance with RCW 43.21C . . . ('SEPA')." ³³

Further, the option provides:

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.³⁴

The terms of the option make clear that Propeller can neither exercise the option nor execute the lease until the completion of "a SEPA process."³⁵ This contractual provision is an express condition precedent to exercise of the option. Thus, the County's execution of the option "is best understood as a preliminary

³¹ Int'l Longshore & Warehouse Union, Local 19, 176 Wn. App. at 516.

³² Clerk's Papers at 77.

³³ Id. at 78 (emphasis added).

³⁴ Id. at 79.

³⁵ Id. at 78.

step taken by the [C]ounty to set forth [a lease] that is sufficiently definite to allow further study, including preparation of a meaningful environmental impact statement.”³⁶ Whether Propeller decides to exercise the option and then execute the lease are “decision[s] expressly reserved until after environmental review is complete.”³⁷ Thus, the County’s execution of the option does not constitute a project action.

Mukilteo argues that the option is a project action under WAC 197-11-704(2)(a)(ii) because it is a decision to enter into a lease. Not so.

This argument mischaracterizes the distinctive legal natures of the option to lease and the lease itself. They are not the same.

An option conveys no legal or equitable interest in the real property that is the subject of the option prior to its exercise.³⁸ It is merely a contractual right to be exercised in accordance with its terms.³⁹

In contrast, a leasehold is an estate in land, giving a tenant the right of possession of the real property during the term of the lease.⁴⁰ Thus, a lease is not merely a contractual right but an estate in land.

In this case, Exhibit B to the option is the unsigned proposed lease that would be executed upon exercise of the option in accordance with the terms of

³⁶ Int’l Longshore & Warehouse Union, Local 19, 176 Wn. App. at 521.

³⁷ Id. at 514.

³⁸ See 11 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 96.05(b), at 582-83 (3d ed. 2015).

³⁹ See Pardee v. Jolly, 163 Wn.2d 558, 568, 182 P.3d 967 (2008).

⁴⁰ See 17 WILLIAM B. STOEBCUK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 6.2, at 310 (2d ed. 2004).

the option. Attaching this exhibit to the option is necessary to comply with the requirements for specific performance of a contract to lease real property.⁴¹

Other than the requirement of specificity just explained and the statute of frauds for certain agreements regarding real property, the lease has no other present effect. It may only have a future effect when and if SEPA compliance is met prior to both the exercise of the option and signing of the lease by the parties.

Accordingly, Mukilteo's contention that the option is a decision to enter into a lease is not helpful to a proper analysis of whether approval of the option is a project action. It is not a lease and it is not any of the other types of transactions that the plain words of the statute specify. And the option is merely a contract, giving no present rights in the property described in Exhibit B to the option.

Mukilteo also relies on Columbia Riverkeeper v. Port of Vancouver USA⁴² and Magnolia Neighborhood Planning Council to argue that the option still constitutes a project action, even if it is a preliminary step to entering into the lease. It claims the option represents a decision on a specific construction and operation project in a specific location. Mukilteo also relies on the "binding" terminology used in those cases to further argue that the County committed itself to entering into the lease and "has no option to not sign the [l]ease as [it] is, if

⁴¹ Kruse v. Hemp, 121 Wn.2d 715, 722-23, 853 P.2d 1373 (1993) ("A contract to enter into a future contract (*i.e.*, an option contract) must specify all of the material and essential terms of the future contract before a court may order specific performance.") (citing Hubbell v. Ward, 40 Wn.2d 779, 785, 246 P.2d 468 (1952)).

⁴² 189 Wn. App. 800, 357 P.3d 710 (2015), review granted sub nom. Columbia Riverkeeper v. Port of Vancouver, 185 Wn.2d 1002 (2016).

Propeller decides to go ahead with its plans.”⁴³ Reliance on those cases is misplaced because they are distinguishable.

In Columbia Riverkeeper, the Port executed a lease agreement, and Division Two of this court stated that “upon certification by the Council[,] the lease agreement essentially will be binding on the Port.”⁴⁴ And in Magnolia Neighborhood Planning Council, the City’s redevelopment plan constituted “an agency decision to purchase, sell, lease, transfer, or exchange publicly owned land”⁴⁵ This court also stated that the City’s approval of the plan had a “binding effect” because once adopted by the federal government as a condition of transfer of the property, it would bind the City as to its use of that property.⁴⁶

Here, even if we assume that the option involves a decision on a specific project in a defined geographic area under WAC 197-11-704(2)(a), the option is not a lease, sale, transfer, or purchase agreement. And WAC 197-11-704(2)(a) states that “Projects ***include and are limited to*** agency decisions to . . . [p]urchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.”⁴⁷ That is not the nature of this transaction in this case. Thus, this option does not fall within this definition while the actions taken in Columbia Riverkeeper and Magnolia Neighborhood Planning Council did.

⁴³ Brief of Appellants at 26; see also Reply Brief of Appellants at 16.

⁴⁴ Columbia Riverkeeper, 189 Wn. App. at 813-15.

⁴⁵ Magnolia Neighborhood Planning Council, 155 Wn. App. at 314.

⁴⁶ Id. at 317.

⁴⁷ (Emphasis added.)

Mukilteo also attempts to distinguish the memorandum of understanding in Int'l Longshore & Warehouse Union, Local 19 from the option in this case.

Mukilteo specifically argues that the option “does not establish a process to make a future decision” regarding the lease terms or whether to lease Paine Field.

While the memorandum of understanding is not an option to lease property, the underlying principles of Int'l Longshore & Warehouse Union, Local 19 control here. The memorandum provided that “[f]uture decisions by the city and county whether to invest in [the] project site are expressly reserved until after review under SEPA.”⁴⁸ And this court stated that “[t]he memorandum makes clear that the city and county will not commit to this project until each has analyzed the environmental impacts of the proposed arena”⁴⁹

Similarly, in this case, the option explicitly provides that “a SEPA process must be completed prior to [the] exercise of the option and execution of the [l]ease.”⁵⁰ Thus, the option makes clear that Propeller cannot exercise the option and execute the lease without first complying with a condition precedent to performance: completion of “a SEPA process.”⁵¹

Mukilteo also argues that the memorandum of understanding “did not represent a definite proposal that could be sufficiently reviewed” while the lease

⁴⁸ Int'l Longshore & Warehouse Union, Local 19, 176 Wn. App. at 516 (emphasis omitted).

⁴⁹ Id.

⁵⁰ Clerk's Papers at 78.

⁵¹ Id.

“already exists” in this case and may be “reviewed at this stage.”⁵² But the existence of an unsigned lease attached to the option is immaterial. The option to lease is at issue in this case, not the lease, which may never be signed by the parties.

Lastly, Mukilteo relies on National Environmental Policy Act (NEPA) cases to support its argument, where federal courts have held that an agency must prepare an environmental assessment “before ‘making an irreversible and irretrievable commitment of resources.’”⁵³ Whether an agency action constitutes an irreversible and irretrievable commitment of resources turns on whether that action “‘reserve[s] to the government the absolute right’ to prevent the use of the resources in question.”⁵⁴

Mukilteo relies on these cases to argue that the option is subject to environmental review. It specifically argues that once Propeller executes the option, the County “will have no choice but to execute the lease, despite the information developed during the SEPA process,” because the option does not “reserve any authority . . . to the County Council to reject or modify the lease based upon the environmental review.”⁵⁵

But as previously stated, the issue is whether the County improperly executed the option without first preparing an EIS, not whether the County

⁵² Brief of Appellants at 28-29.

⁵³ Ctr. for Env'tl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1006 (9th Cir. 2011) (quoting Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000)).

⁵⁴ Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998) (alteration in original) (quoting Conner v. Burford, 848 F.2d 1441, 1449 (9th Cir. 1988)).

⁵⁵ Brief of Appellants at 31.

retains authority after Propeller exercises the option and executes the lease. What happens after Propeller exercises the option upon completion of the “SEPA process” is immaterial to what is presently before this court.

Further, the County’s decision to execute the option does not constitute an irreversible and irretrievable commitment of resources because the option grants Propeller only “an exclusive right and option to negotiate and enter into a lease of the [p]roperty.”⁵⁶ Under the option, the County “agrees that it will not initiate, solicit, negotiate, or pursue with any third party any inquiry, proposal or offer relating to sell, agree to sell, transfer, lease, assign or encumber the [p]roperty except with respect to a [l]ease transaction with Propeller.”⁵⁷ This demonstrates that the County has not committed any resources to Propeller and need not reserve the absolute right to prevent the use of the property at issue.

In sum, the approval of the option to lease is not a project action, either under the plain words of the statutes or controlling case law. We reject the arguments to the contrary.

SEPA Exemption

Mukilteo also argues that the County’s decision to execute the option is not exempt from SEPA compliance under WAC 197-1-800(5)(c) because the property’s use will change. We disagree.

WAC 197-11-800 provides categorical exemptions from threshold determinations and the EIS requirement, subject to WAC 197-11-305. WAC 197-

⁵⁶ Clerk’s Papers at 77.

⁵⁷ Id.

11-800(5)(c) pertains to certain real property transactions that are exempt, such as:

[l]easing, 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^[58]

Here, the option to lease falls squarely within the above emphasized language. It is neither a lease nor an easement. The contract does give Propeller the authority to enter the property to conduct the feasibility studies defined in the option. But the property use remains unchanged. This falls expressly within the exemption.

Mukilteo argues that the property use will change. In doing so, it misapplies controlling law. As we previously discussed in this opinion, the option to lease does not create an interest in the airport property. The option is merely a contract that may give rise to the later execution of a lease in the form of Exhibit B to the option to lease.

Nevertheless, Mukilteo argues on the basis of potential changes in the property's use if Propeller ever executes the ***lease***, following timely exercise of the option. Specifically, Mukilteo focuses on the lease terms and argues that the "use of the public property subject to the Lease will change drastically."⁵⁹ For instance, Mukilteo asserts that the construction and operation of a commercial passenger terminal "is not 'essentially the same' as the property's current use as

⁵⁸ (Emphasis added.)

⁵⁹ Brief of Appellants at 33.

a paved lot.”⁶⁰ While this may be true, it is also immaterial. That is because this argument focuses on what may happen after a lease is executed, not what happens during the term of the option.

The lease is not at issue in this case. The question is whether the use of the property will remain essentially the same as the existing use during the **option’s** term, not the lease term. Because there is no dispute that the terms of the option do not change the use of the property during the option’s duration, the exemption under WAC 197-11-800(5)(c) applies. But the exemption application is subject to the terms of the exception to the exemption that we next address.

Exception to SEPA Exemption

Mukilteo next argues that the option to lease is not exempt from SEPA under WAC 197-11-305(1)(b)(i). We again disagree.

WAC 197-11-305(1) states, in relevant part:

If a proposal fits within any of the [exemption] provisions . . . , the proposal **shall** be categorically exempt from threshold determination requirements . . . **except** as follows: . . . (b) The proposal is a segment of a proposal that includes (i) A series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not
^[61]

According to WAC 197-11-305(1), SEPA will apply if the “total effect” of a series of related actions “creates [a] probability of significant adverse environmental impact.”⁶²

⁶⁰ Id.

⁶¹ (Some emphasis added.)

⁶² 24 TIM BUTLER & MATTHEW KING, WASHINGTON PRACTICE: ENVIRONMENTAL LAW AND PRACTICE § 19.24, at 291 n.1 (2d ed. 2007).

Mukilteo specifically argues that the “[o]ption, the [l]ease, subsequent project permits, and ultimately, the construction and operation of the terminal and other related facilities” are a series of actions fundamentally related to each other.⁶³ It further argues that the “decisions to approve permits for construction and operation of a new commercial passenger terminal are not categorically exempt from SEPA.”⁶⁴ Thus, it argues that the option is not exempt from SEPA.

The County and Propeller do not address this argument. But we do.

As WAC 197-11-305(1) makes clear, the purpose of the exception is to preclude those related actions, the “total effect” of which creates a “probability of significant adverse environmental impact.”⁶⁵ As we see it, this regulation is not intended to be an exception that swallows the rule of exemption that would otherwise apply.

To read this regulation as Mukilteo suggests necessarily would require that we conclude that there is a probability of significant adverse environmental impact on this record. The undisputed fact is that compliance with SEPA is a condition precedent both to exercise of the option and to execution of the lease that may follow. Mukilteo’s effort to avoid the distinctions between the option to lease and the lease to require a premature SEPA examination is unpersuasive.

⁶³ Brief of Appellants at 36.

⁶⁴ Id.

⁶⁵ 24 WASHINGTON PRACTICE: ENVIRONMENTAL LAW AND PRACTICE § 19.24 at 291 n.1.

Snowball Effect

Mukilteo also argues that the County's decision to execute the option "improperly builds momentum" towards "subsequent permit decisions."⁶⁶ We disagree.

In King County v. Boundary Review Board for King County, the supreme court explained that "[o]ne of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences."⁶⁷ The court further explained how decisions impact this purpose:

Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land-use changes would occur as a direct result of a proposed government action. Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decision-makers need to be apprised of the environmental consequences before the project picks up momentum, not after.^[68]

Mukilteo relies on this statement to argue that the County's decision to execute the option "and its attendant [l]ease" "improperly builds momentum" towards "subsequent permit decisions."⁶⁹ It further argues that "SEPA's objective

⁶⁶ Brief of Appellants at 41-42.

⁶⁷ King County v. Wash. State Boundary Review Bd. for King County, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993).

⁶⁸ Id. at 664 (citation omitted).

⁶⁹ Brief of Appellants at 37, 41-42.

to assure fully informed decisions by completing environmental review as early as possible will not be attained” if we affirm the trial court’s decision.

But in Int’l Longshore & Warehouse Union, Local 19, this court concluded that the memorandum of understanding “[wa]s not an ‘action’ because by itself it ha[d] no environmental impact, either down the road or immediately. Under SEPA, there is no snowball. All that has happened so far in terms of SEPA is a decision about the process that will be used to make a decision.”⁷⁰

Similarly, we conclude “there is no snowball [effect]” in this case.⁷¹ All that has happened is the County’s decision to execute an option, which may result in a lease. The option specifically provides that a SEPA process must be completed prior to the exercise of the option and execution of the lease that may follow.

We note that Mukilteo fails to claim any environmental impact resulting from the County’s execution of the option to lease. Rather, Mukilteo alleges “significant adverse impacts to the surrounding community” resulting from the *lease*. This again illustrates Mukilteo’s failure to distinguish between the two documents and their legal effect.

Where a proposed action “‘change[s] neither the actual current uses to which the land was put nor the impact of continued use on the surrounding environment,’ that action is not a major action significantly affecting the

⁷⁰ 176 Wn. App. at 522.

⁷¹ Id.

environment and an EIS is not required.”⁷² Because Mukilteo fails to show that the option either changes the current use of the property or impacts the continued use on the surrounding environment, we reject its argument.

Reasonable Alternatives

Mukilteo argues that the County violated WAC 197-77-070 because the option “limited the choice of reasonable alternatives available to [the County].” We disagree.

WAC 197-11-070 applies during the SEPA review process before an EIS is issued.⁷³ In relevant part, WAC 197-11-070(1)(b) provides that “[u]ntil 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 . . . [l]imit the choice of reasonable alternatives.” WAC 197-11-070 also provides that it does not preclude developing plans or securing options “as long as such activities are consistent with subsection (1).”⁷⁴

A reasonable alternative is “an action that could feasibly attain or approximate a proposal’s objectives, but at a lower environmental cost or decreased level of environmental degradation. Reasonable alternatives may be

⁷² Chuckanut Conservancy v. Wash. State Dep’t of Nat. Res., 156 Wn. App. 274, 285, 232 P.3d 1154 (2010) (quoting ASARCO Inc. v. Air Quality Coal., 92 Wn.2d 685, 706, 601 P.2d 501 (1979)).

⁷³ Pub. Util. Dist. No. 1 of Clark County, 137 Wn. App. at 161.

⁷⁴ WAC 197-11-070(4).

those over which an agency with jurisdiction has authority to control impacts, either directly, or indirectly through requirement of mitigation measures.”⁷⁵

Here, the parties dispute whether the option limits the County’s choice of reasonable alternatives during SEPA review.

This court concluded that the memorandum of understanding for an arena in Int’l Longshore & Warehouse Union, Local 19 did not limit the city’s and county’s choice of alternatives.⁷⁶ We determined that the memorandum “d[id] not preclude consideration of alternate sites during SEPA review; indeed, it expressly anticipates that the review process will consider at least the alternative of [the] Seattle Center as well as a ‘no action’ alternative.”⁷⁷ We further stated that “[i]f a proponent for an arena at an alternative location comes forward, the memorandum will not prevent the city and county from evaluating or pursuing the alternative proposal. It keeps the governments’ options open while the environmental impact of [the] proposal is being studied.”⁷⁸

The reasoning in Int’l Longshore & Warehouse Union, Local 19 applies in this case. The option grants Propeller the right to enter the property to conduct studies, at Propeller’s cost, to determine the property’s suitability for Propeller’s proposed use. Further, the option requires that “a SEPA process” be completed before Propeller can exercise the option and execute the lease. Nothing in the

⁷⁵ WAC 197-11-786.

⁷⁶ 176 Wn. App. at 525.

⁷⁷ Id.

⁷⁸ Id.

record suggests that the County's execution of the option would coerce it to execute the proposed lease with Propeller simply because the County executed the option agreement.

Additionally, the option does not explicitly preclude or limit the County's consideration of alternatives available for Paine Field. The option specifically provides that if Propeller does not execute and deliver the proposed lease in order to exercise the option, the County and Propeller may "subsequently negotiat[e] and execut[e] a lease of the [p]roperty on terms acceptable to both parties." It is also possible that Propeller and the County will not to enter into a lease at all if the SEPA process is not completed, or if Propeller does not exercise the option or execute the lease. Thus, nothing in the option coerces the County to execute the proposed lease with Propeller.

In sum, the option does not violate WAC 197-11-070(1)(b) because it does not "limit the choice of reasonable alternatives" available to the County during SEPA review. Further, WAC 197-11-070(4) states that it does not preclude developing plans or securing options "as long as such activities are consistent with subsection (1)."⁷⁹ Because the County secured the option with Propeller, which does not "limit the choice of reasonable alternatives" available to the County during SEPA review, WAC 197-11-070(1)(b) does not apply to prohibit the County's execution of the option.

Mukilteo argues that "upon entering into the [o]ption, the County no longer has the option of not entering into the [l]ease. If Propeller exercises its option

⁷⁹ WAC 197-11-070(4).

rights, the County will be legally bound to enter into the [l]ease.”⁸⁰ Mukilteo also states that the County may only enter into a lease “that is substantially in the form of the lease attached to the [o]ption.”⁸¹ Thus, Mukilteo argues that the option “absolutely limits the choice of reasonable alternatives available” to the County.⁸²

But as previously discussed, it is possible that Propeller and the County will not enter into a lease if Propeller does not exercise the option and execute the lease. Thus, it is not true that the County no longer has the choice of not entering into the lease just by executing the option agreement.

Mukilteo also asserts that “[t]o argue that the County[’s] *lease* decision does not predispose or coerce the subsequent permitting decision ignores land use permitted and political realities.”⁸³ Mukilteo further argues that alternatives “are now unavailable to the County—regardless of any information later generated in the SEPA process—because the terms of the [l]ease are set in stone.”⁸⁴ But Propeller has neither exercised the option nor executed the lease. Thus, the lease and subsequent permitting decisions allegedly coerced from the lease are not at issue.

⁸⁰ Reply Brief of Appellants at 13.

⁸¹ Id.

⁸² Id. at 12-13.

⁸³ Id. at 18-19 (emphasis added).

⁸⁴ Brief of Appellants at 40.

Proprietary Decision

Mukilteo argues that SEPA applies to all agency actions, including proprietary actions. We agree.

In the order granting summary judgment, the trial court stated:

Mukilteo further asserts that the proprietary arm of the County, in entering into the Option Agreement, will not have the benefit of [the] County's regulatory SEPA review. While this argument may be true, it exceeds the scope of this Court's legal review of whether or not the County violated SEPA when it executed the Option Agreement.^[85]

The County and Propeller do not contest Mukilteo's assertion. We assume there is no basis to do so and agree with Mukilteo on this point.

Because WAC 197-11-704 does not differentiate between regulatory and proprietary actions, there is no basis in the statutory language for making this distinction. Thus, we conclude that SEPA applies to proprietary agency decisions.

SNOHOMISH COUNTY CODE

Mukilteo finally argues that the County violated SCC 15.04.040(3) "by taking action" on the option without providing a statement of available options. Although the County did not expressly comply with this ordinance, it did so substantially. There was no error requiring reversal.

Washington courts interpret statutes to determine and apply the legislature's intent.⁸⁶ The legislature's intent is solely derived "from the statute's

⁸⁵ Clerk's Papers at 651.

⁸⁶ See Segura v. Cabrera, 184 Wn.2d 587, 593, 362 P.3d 1278 (2015).

plain language, considering the text of the provision at issue”⁸⁷ We must “look to the statute’s plain and ordinary meaning, reading the enactment as a whole, [and] harmonizing its provisions by reading them in context with related provisions.”⁸⁸ We must also avoid absurd results when interpreting statutes.⁸⁹

Statutory interpretation is a question of law that we review de novo.⁹⁰

These same principles apply to interpretation of county ordinances.⁹¹

SCC 2.10.010(12) governs the County’s “[a]pproval of all licenses to occupy, use or access the Snohomish County Airport and all airport leases.”⁹² It states, in relevant part:

[I]n 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 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.^[93]

⁸⁷ Id. at 591.

⁸⁸ Id. at 593.

⁸⁹ State v. Larson, 184 Wn.2d 843, 851, 365 P.3d 740 (2015).

⁹⁰ W. Plaza, LLC v. Tison, 184 Wn.2d 702, 707, 364 P.3d 76 (2015).

⁹¹ Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014).

⁹²

<http://www.codepublishing.com/WA/SnohomishCounty/html1113/SnohomishCounty02/SnohomishCounty0210.html#2.10.010> (last visited January 3, 2017). SCC 2.10.010(12) is now SCC 2.10.010(14) on the Snohomish County Code website. The language has remained the same. For consistency with the parties’ briefs, this opinion will continue to refer to SCC 2.10.010(12).

⁹³ SCC 2.10.010(14), <http://www.codepublishing.com/WA/SnohomishCounty/html1113/SnohomishCounty02/SnohomishCounty0210.html#2.10.010> (last visited January 3, 2017).

SCC 15.04.040 governs the airport manager's authority and states that "the airport manager shall be the executive manager of the airport and shall be responsible for the management and operation of the airport" ⁹⁴ SCC

15.04.040(3) provides:

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(14), **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.^[95]

Here, no written evaluation of the relative merits of available options to the proposal accompanied the council executive's approval recommendation. The question is what effect the absence of such documentation has on the County's decision to approve the option to lease certain airport property.

Substantial compliance may be found "where there has been compliance with the statute albeit with procedural imperfections."⁹⁶ Under the substantial compliance doctrine, a party complies with statutory requirements by satisfying "the substance essential to the purpose of the statute."⁹⁷ This court "may invoke

⁹⁴ SCC 15.04.040(1), <http://www.codepublishing.com/WA/SnohomishCounty/html/SnohomishCounty15/SnohomishCounty1504.html#15.04.040> (last visited January 3, 2017).

⁹⁵ <http://www.codepublishing.com/WA/SnohomishCounty/html/SnohomishCounty15/SnohomishCounty1504.html#15.04.040> (last visited January 3, 2017) (emphasis added).

⁹⁶ Cont'l Sports Corp. v. Dep't of Labor & Indus., 128 Wn.2d 594, 602, 910 P.2d 1284 (1996).

⁹⁷ In re Estate of Burton v. Didricksen, 189 Wn. App. 630, 637, 358 P.3d 1222 (2015) (quoting Crosby v. Spokane County, 137 Wn.2d 296, 302, 971 P.2d 32 (1999)).

the doctrine where a party has 'substantially complied with the requirements crucial to the underlying design intended by the legislature.'"⁹⁸

Here, the record demonstrates the County's substantial compliance with SCC 15.04.040(3) due to the briefings evidenced in Bill Dolan's declaration, discussed below. Surely, the County would have asked for more information if it felt that alternatives were not explored.

Dolan, Deputy Director-Airfield at Paine Field, testified in his declaration that the "executive and airport staff discussed various alternatives of accommodating commercial air service at Paine Field . . . in public and executive session[s] with the [C]ounty council . . ."⁹⁹ Dolan further testified that the evaluation of alternatives included "the risks and advantages of a county-built terminal, an airline-built terminal, public-private partnerships, and a lease to a [third] party as proposed by Propeller. The executive provided updates to council at public and executive sessions regarding the status of air service negotiations with Propeller."¹⁰⁰

Dolan also testified that "the executive and airport staff informed council in executive session that the terms of the option with Propeller kept [C]ounty financial and operational risk to a minimum, required environmental review

⁹⁸ Id. (quoting Murphy v. Campbell Inv. Co., 79 Wn.2d 417, 422, 486 P.2d 1080 (1971)).

⁹⁹ Clerk's Papers at 659.

¹⁰⁰ Id.

before a lease could be signed¹⁰¹ and was consistent with the [C]ounty's federal grant obligations."¹⁰¹

According to Dolan, the County had this information because the "executive and airport staff discussed various alternatives of accommodating commercial air service at Paine Field . . . in public and executive session[s] with the [C]ounty council" ¹⁰² Dolan also specifically identified the alternatives, such as "a county-built terminal, an airline-built terminal, public-private partnerships, and a lease to a [third] party as proposed by Propeller."¹⁰³ Because the County had this information, this discussion satisfied "the substance essential to the purpose of [SCC 15.04.040(3)]."¹⁰⁴

While there was a technical noncompliance with SCC 15.04.040(3) and Mukilteo seeks to void the option, it cites no authority that would require us to void the County's actions. Accordingly, we decline to do so.

We affirm the order granting summary judgment.

Cox, J.

WE CONCUR:

Trickey, ACT

Schneider

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Burton, 189 Wn. App. at 637 (quoting Crosby, 137 Wn.2d at 302).

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

February 27, 2017

Dennis Dean Reynolds
Dennis D Reynolds Law Office
200 Winslow Way W Unit 380
Bainbridge Island, WA 98110-4932
dennis@ddrlaw.com

James Laurence Maynard
Snohomish Co Airport Deputy Prosecutor
3220 100th St SW Ste A
Everett, WA 98204-1303
jim.maynard@snoco.org

David Alan Bricklin
Bricklin & Newman, LLP
1424 4th Ave Ste 500
Seattle, WA 98101-2258
bricklin@bnd-law.com

Brian Trevor Hodges
Pacific Legal Foundation
10940 NE 33rd Pl Ste 210
Bellevue, WA 98004-1432
bth@pacificlegal.org

CASE #: 74327-9-1
City of Mukilteo et al, Appellants v. Snohomish County et al, Respondent's

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Reporter of Decisions

APPENDIX B

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

CITY OF MUKILTEO and SAVE OUR
COMMUNITIES,

Appellants,

v.

SNOHOMISH COUNTY and PROPELLER
AIRPORTS PAINE FIELD LLC,

Respondents.

No. 74327-9-1

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellants, City of Mukilteo and Save Our Communities, have moved for reconsideration of the opinion filed in this case on January 23, 2017. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 27th day of February 2017.

For the Court:

Cox, J.

Judge

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

2011 MAR 29 PM 4:28
COURT OF APPEALS
STATE OF WASHINGTON

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)
)
COUNTY OF KING)

ss.

I, BRYAN TELEGIN, under penalty of perjury under the laws of
the State of Washington, declare as follows:

I am an attorney with 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 Petition Review to be served on:

James L. Maynard
Snohomish County Prosecuting Attorney
Civil Division, Airport Office
Snohomish County Airport at Paine Field
3220 – 100th Street SW, Ste. A
Everett, WA 98204-1390
(Attorneys for Snohomish County)

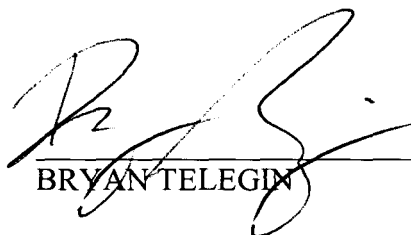
By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express Mail
 By E-Mail to jim.maynard@co.snohomish.wa.us

Dennis D. Reynolds
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(Attorneys for Propeller Airports Paine Field LLC)

By United States Mail
 By Legal Messenger
 By Facsimile to (206) 780-6865
 By Federal Express/Express Mail
 By E-Mail to dennis@ddrlaw.com; christy@ddrlaw.com;
jon@ddrlaw.com

DATED this 29th day of March, 2017, at Seattle,

Washington.


BRYAN TELEGIN