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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 94437-7

Court of Appeals No. 48423-4-II

(Thurston County Superior Court Cause No. 15-2-00527-5)

JOHN ROSKELLEY, FAYETTE KRAUSE, SPOKANE AUDUBON SOCIETY, SPOKANE MOUNTAINEERS, AND THE LANDS COUNCIL,

Petitioners,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION, AND MT. SPOKANE 2000,

Respondents.

RESPONDENT MT. SPOKANE 2000'S RESPONSE TO MOTION FOR INJUNCTIVE RELIEF

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I. IDENTITY OF RESPONDING PARTY

Respondent Mt. Spokane 2000, a Washington non-profit corporation ("MS2000"), is the concessionaire that operates the Mt. Spokane Ski and Snowboard Park ("Ski Facility") located in Mt. Spokane State Park ("State Park").

Petitioners in this case request an injunction pending the resolution of this case from the Court to enjoin MS2000 from commencing a two-year, two-phase expansion of the Ski Facility on 279 acres of the State Park that would include the construction of seven new ski runs ("First Phase") and an accompanying chair lift ("Second Phase") (collectively, "Expansion"). In order to complete the Expansion before its permits expire, MS2000 must commence work on August 1, 2017. Accordingly, MS2000 is ready, able, and willing to begin construction immediately when the restrictions on the Expansion are lifted on August 1, 2017.

The Expansion was authorized by fellow Respondent Washington State Parks and Recreation Commission (the "Commission") after the Commission classified the 279 acres adjacent to the Ski Facility as "Recreation" in a November 20, 2014 Decision ("Decision") and approved the associated Plan of Development which allowed MS2000 to harvest 59 acres of trees and 15 acres of grading. The Expansion will be constructed in an area known as the Potential Alpine Ski Expansion Area ("PASEA"), an

approximately 800 acre area situated directly to the north and west of the Ski Facility. The well-reasoned, balanced Decision was preceded by years of planning, public meetings, comments and studies of the impacts of the Expansion.

II. RELIEF REQUESTED

A. PETITIONERS' REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

Petitioners request injunctive relief pending the outcome of the case. In order for this relief to be granted, Petitioners bear a high hurdle. First, they must establish that the Court will accept review of the unpublished opinion of Division II under the standards set forth under RAP 13.4(b). Second, even if the Court accepts review, the Commission's actions will be reviewed under the arbitrary and capricious standard. It is undisputed that this is a narrow and deferential standard with a low probability of success.

Petitioners' requested relief places the Expansion in jeopardy. It bars MS2000 from proceeding with a lawful timber harvest under a permit issued by Spokane County on January 22, 2016 ("Timber Permit"). MS2000 has just two short windows in which to complete the First Phase, which must commence on August 1, 2017, and the Second Phase because the Timber Permits (along with the associated grading and building permits) expire in early 2019. This injunction request has the potential to

jeopardize the completion of the expansion by MS2000 within the time permitted under the Timber Permits. It is imperative that the harvest commence immediately on August 1 in order for MS2000 to complete the Expansion. MS2000 requests that no injunctive relief be granted.

B. MS2000 REQUESTS A BOND OR OTHER SECURITY IN THE AMOUNT OF $854,000 IF PETITIONERS' REQUEST IS GRANTED.

Irrespective of the intention of the Petitioners or their financial ability to post security, the damage to MS2000 is real. If the Petitioners' injunction is granted, MS2000 will no longer be able to use their preferred two-phase construction process set to begin on August 1, 2017. First, if MS2000 is enjoined, the earliest MS2000 will be able to proceed will be after a decision by the Court to not accept review of the case. Even the slightest delay has the potential to cost MS2000 precious time before adverse weather conditions make work under the Timber Permits impossible. If the case is accepted, MS2000 will be enjoined from proceeding until after the Court issues a final opinion. The delays caused by Petitioners' requested injunctive relief, no matter how quickly the case is resolved, results in substantial lost revenue to MS2000. As outlined in the expert report prepared by Sno-engineering, Inc. ("SE Group"), attached to the Declaration of Edward S. Beeler, ("Beeler Decl."), a one-year delay of Expansion construction costs MS2000 between $854,000

to $1,033,000 in lost revenue. If Petitoners' request for injunction pending the outcome of the appeal is granted, MS2000 requests that Petitioners' be required to post a bond or other security in the amount of not less than $854,000 before July 31, 2017 to offset all damages caused by their injunctive relief, including attorneys' fees and costs, otherwise the injunction should be immediately dissolved.

III. RELEVANT FACTS

A. MS2000 INCORPORATES THE RECITATION OF FACTS AS SET FORTH IN ITS ANSWER TO PETITION FOR REVIEW.

To avoid duplication, MS2000 incorporates the facts as set forth in its Answer to Petition for Review filed with the Court on May 26, 2017.

B. PETITIONERS' REQUESTED INJUNCTIVE RELIEF INTERFERES WITH THE THOROUGHLY CONSIDERED EXPANSION.

1. MS2000 is Fully Prepared to Begin Construction.

MS2000 is a non-profit corporation. It operates the Ski Facility pursuant to a Concession Agreement with the Commission. *Declaration of Brad McQuarrie ("McQuarrie Decl."),* ¶¶ 2-3. MS2000 takes all of the revenue it produces and pays a portion to the Commission (concessionaire rent) and the remaining amount is directed towards enhancing skiing operations in the community. *Id.* at ¶ 33.

The Commission's Decision provided for three separate classifications in the PASEA, including a 279 acre area classified as

"Recreation" allowing for alpine skiing. After the classification, the Commission voted on and approved MS2000's Plan of Development to expand the Ski Facility. *Id.* at ¶¶ 11-12. The Plan of Development authorized the construction of seven runs and a single chair lift within the 279 acre area. *Id.* at 12. Under the Plan of Development, only 59 acres of clearing and 15 acres of grading would occur. *Id.* at 14.

The Plan of Development's restrictions are designed to provide for a maximum level of environmental protection and mitigate the impacts of construction. *Id.* at ¶ 15. The Plan of Development requires MS2000 to secure all permits prior to the commencement of construction activities. *Id.* at ¶ 16. In addition to the permitting requirement, the Plan of Development does not allow for work to occur between March 1 and July 31. *Id.* at ¶ 17. The Plan of Development specifically states:

> To the greatest extent possible, the plan will minimize environmental impacts. No work may take place during sensitive wildlife breeding seasons (March 1 – July 31, based on recommendations from the Washington Department of Fish and Wildlife).

Id. at ¶ 17 (emphasis added).

On January 22, 2016, MS2000 received approval from Spokane County to clear the ski trails, grade, and construct the chairlift. *Id.* at ¶ 19. These permits incorporate the restrictions of the Plan of Development. *Id.* at ¶ 19, Ex. A.

The Lands Council challenged the permits to the Spokane County Hearing Examiner. *Id.* at ¶ 18, Ex. B. On August 15, 2016, the Spokane County Hearing Examiner affirmed the permits, but added a requirement that MS2000 (i) obtain a permit from DAHP for disturbing archeological resources, (ii) receive approval of its wetland buffer averaging, and (iii) confirm the date on the construction plans. MS2000 has accomplished all of these tasks. *Id.* at ¶ 20, Ex. D, ¶ 21, Ex. E.

All of the permits issued by Spokane County are time sensitive and expire three years after the date of issuance. *Spokane County Code* 3.02.020(c), 3.19.070. While the permits may be extended for one (1) additional 180 day period, the approval of that extension lies solely within the direction of the Director of Spokane County's Department of Building and Planning. *Id.*

2. MS2000 is Fully Mobilized to Proceed with the Expansion.

In anticipation of the construction season, MS2000 mobilized to begin First Phase construction activities on August 1. *Id.* at ¶¶ 24, 25, 31, 35. It had surveyed the cut limits for the ski runs. *Id.* at ¶ 28. It has transported the chairlift up to the top of the mountain and rented equipment costing it $82,000. *Id.* at ¶ 27. If it does not proceed immediately, MS2000 must "demobilize" and incur these costs again. *Id.*

MS2000 has the intended goal of completing the timber harvest to allow for use of the ski runs during the 2017 - 2018 ski season. *Id.* at ¶ 29. Based upon MS2000's tree harvesting projections, if started on August 1, 2017, the 59 acres could be timely cleared this season before being unable to do so due to weather conditions. *Id.* MS2000 anticipated that the construction of the Second Phase chairlift could potentially begin before the March 1, 2018 construction restriction (although final elements of the chairlift construction may be postponed until after July 31, 2018), and be completed for the 2018 - 2019 ski season. *Id.* at ¶ 31.

The most disastrous event is that MS2000 is unable to begin by August 1, 2017 and the First Phase and Second Phase prior to January 22, 2019 and is not able to receive any time extension on its Permits. *Id.* at ¶ 32. In such a scenario, MS2000 runs the risk that the Expansion will ultimately not be able to proceed. MS20000 has expended significant sums of money, time and energy attempting to improve the Ski Facility without any type of benefit to itself, the Commission or the public. *Id.* at ¶ ¶ 34-35.

3. <u>The Expansion Area is Critical for the Safety of the Public</u>.

The Expansion is also important for public safety reasons. AR00793. The PASEA (especially the undeveloped "backside" of Mt. Spokane) is a popular back country skiing destination and requires the Mt. Spokane Ski Patrol ("Ski Patrol") to provide emergency response to lost and

injured skiers on a weekly basis. *Declaration of Nathan G. Smith,* ¶ 2, Ex. A (*Declaration of John Nelson*)("Nelson Decl."), ¶ ¶ 3-8. During the 2015 - 2016 ski season were 30 *documented* searches for lost skiers in the PASEA. *Id.* at ¶ 7. The Ski Patrol believes the Expansion can greatly reduce the potential for injury or loss of life in the increasingly used PASEA, and any continued delay subjects Ski Facility customers and Ski Patrol members to "unnecessary heightened risk." *Id.* at 9-10; AR00793, AR00068, AR00189.

C. THE INJUNCTION DEPRIVES MS2000 AND THE COMMISSION OF SIGNIFICANT REVENUE.

As outlined in the SE Group's expert report, "Existing and Future Operating Evaluation for Mt. Spokane Ski and Snowboard Park" ("Evaluation"), the Expansion will create additional annual revenue ranging between $317,000 and $1,033,000 once it is complete. *Declaration of Edward Beeler* ("Beeler Decl."), ¶ 7, Ex. B.[1] The Evaluation focuses upon the increased carrying capacity of the Expansion, potential increase in operating season length, future utilization, past financial performance of the ski facility, and comparisons to the National Ski Areas Association's Economic Surveys of similar sized facilities in the Pacific Northwest region. *Id.* at in 9-10. Based upon SE Group's expert analysis, the Expansion

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[1] The Evaluation was relied upon by MS2000 when Petitioners sought an injunction before Division II in early 2016. The assumptions, conclusions, and calculations of Mr. Beeler remain the same, such that the years set forth in the Evaluation could be projected out into the future. *Beeler Decl.,* ¶ 8.

is a "game changer," as it will effectively enhance years when there is an adverse snow condition by allowing the Ski Facility to operate during periods with low snow fall while serving the growing demand for a proximate and quality ski experience for residents of the Spokane, Washington market area. *Id.* at ¶ 11.

The SE Group's analysis considers a two-phase, two-year development process based upon MS2000's implementation of the Plan of Development. *Id.* at ¶ 12. SE Group projects that the First Phase should increase the total usage of the Ski Facility by 5,000 additional patrons and additional revenue of $131,000.[2] *Id.* at ¶ 13; *Evaluation,* pgs. 3, 8.

The Evaluation assumes the Second Phase will be fully ready the season following the First Phase. *Id.*; *Evaluation,* pgs. 3-4, 8. The SE Group expects that upon completion, the Expansion will produce, on an annual basis, between 14,000 to 34,000 additional skiers, creating additional revenue of between $317,000 and $1,033,000. *Id.*

Any injunction means that MS2000 will not be able to complete the timber harvesting under the Timber Harvest Permits and will lose potentially $131,000 in revenue from the 2016-2017 season, and then potentially between $186,000 and $902,000 from the 2018-2019 season for

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[2] The Evaluation employs a "contribution margin," representing the net proceeds to MS2000 after deducting applicable operating costs, including concessionaire fees payable to the Commission.

a total loss of between $317,000 and $1,033,000.[3] *Id.* While projecting that the low end of the contribution margin from the completed Expansion could be $317,000, it is SE Group's professional opinion that the likely contribution margin, and therefore total losses, will range between $845,000 and $1,033,000. *Id.* At ¶ 13; *Evaluation*, pg. 4.

IV. DISCUSSION

A. LEGAL STANDARD.

The Court should refrain from enjoining the Expansion without conducting a thorough balance of the interests presently at stake. *See Wash. Fed'n of State Emp. v. State,* 99 Wn.2d 878-88, 665 P.2d 1337 (1983). Here, the balance of equities requires that the injunction be denied because (1) as stated in the answers to the Petition for Review filed by the Commission and MS2000, Petitioners fail to satisfy any of the standards set forth in RAP 13.4(b), (2) the Petitioners failed to meet the requirement that they will likely prevail on the merits (especially when the standard of review is arbitrary and capricious), (3) MS2000's income loses – based upon expert analysis – is estimated to be $854,000 to $1,033,000, and (4) the Ski Facility customers and Ski Patrol members are placed at continued risk each year the Expansion is delayed.

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[3] These figures subtract the projected revenue of the completed First Phase ($131,000) from the projected revenues of the completed Second Phase, $317,000 to $1,033,000, as the entire development will be pushed back at least one year.

B. PETITIONERS' MOTION SHOULD BE DENIED AS THE EQUITIES DO NOT FAVOR THE PETITIONERS

1. Petitioners Satisfy None of the Criteria for the Court to Accept Review.

Before considering whether Petitioners have any likelihood of prevailing on the merits of the case, the Court should first consider whether it is likely the Petition for Review is going to be granted. The standards set forth in RAP 13.4(b) are prescriptive and Petitioners satisfy none of them, thus their request for injunctive relief should denied.

As stated in the answers filed by both the Commission and MS2000, there is no conflict between Division II's unpublished opinion and either prior Supreme Court or Court of Appeals decisions as required by RAP 13.4(b)(1) and (2). *MS2000 Answer*, p. 12-17 Likewise, there is no substantial public interest in the Decision requiring review by the Court as required by RAP 13.(b)(4). *MS2000 Answer,* p. 17-19. Petitioners inability to satisfy any of the criteria set forth in RAP 13.4(b) means that their request for injunctive relief should be denied.

2. Petitioners Cannot Meet the Requirement that they will Likely Prevail on the Merits.

Assuming, *arguendo,* that the standards of RAP 13.4(b) can be met, Petitioners cannot satisfy the requirement that they will likely prevail on the merits. The Commission is tasked with the dual mission of protecting resources of the system while providing for recreational use by the public.

See RCW 79A.05. An important tool utilized by the Commission to facilitate this mission is the land classification process, whereby the Commission assigns various land classifications to either protect resources or to provide for recreational uses. WAC 352-16-020 authorizes the Commission to engage in a planning process to classify *and reclassify* its lands; it does not require any particular result. *Id.*

The Commission considered the area's historic use as an alpine skiing destination and carefully considered the impact to the habitat in the area. AR00865, AR00859, AR00863. Years of studies (including the preparation of an Environmental Impact Statement ("EIS")), twelve rounds of public comments, numerous public hearings, and a prior court proceeding passed before the Commission arrived at the Decision. AR00066, AR00580, AR00069, AR00010. True to its mission of balancing the community's recreational needs with habitat protection, the Commission chose a land classification for the PASEA that allowed for the Expansion of the Ski Facility with stringent restrictions, while preserving the majority of the PASEA. AR00799, AR00812.

The standard of review applied to the merits of this review is arbitrary and capricious. An "agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. WUTC,* 148 Wn.2d 887, 905, 64

P.3d 606 (2003). When there is room for two opinions, a reviewing court will not substitute its own judgment for the agency, but the agency action must be taken after due consideration of the facts and circumstances. *Hillis v. Dep't of Ecology,* 131 Wn.2d 373, 383, 932 P.2d 139 (1997). The Commission's carefully considered Decision was not arbitrary or capricious.

At the outset, it is important to note that the Decision is not governed by the Administrative Procedures Act and its formulaic requirements, as acknowledged by the Petitioners through their presentation of this appeal as a constitutional writ - a limited remedy available only when there are no other challenges that can be presented. Rather, here, the Decision is subject only to review under the inherent authority of the Court afforded by the Washington State Constitution, Art. IV, Section 6.

Petitioners contend that the Court of Appeal's decision was incorrect in concluding that the Commission's land classification policy did not dictate a particular result or that the Commission deviated from or ignored subsection D and E of its own land classification policy. The Commission is not required to walk through each subsection of each policy on the record to demonstrate its application, nor can the Petitioners point to any authority requiring such an exercise. There is no compelling language within the policy controlling the outcome of the classification. The first

inquiry is therefore limited to this: does the totality of the Commission's decision making process demonstrate that the policy was considered and applied? The answer is unequivocally yes.

The second inquiry is did the Policy Mandate that there would be a particular outcome. The answer is unequivocally no.

First, the Commissioners reviewed and considered the EIS, which cites the policy several times. AR00020, AR00079, AR000532, AR00579. Second, the policy was specifically cited by Petitioners' counsel during public comment the day before the Commission made its Decision. AR00691. Third, the Commissioners actually addressed the policy the next day immediately before beginning its oral decision. AR00754-755. It defies logic to argue that the policy was not considered when the *last action* carried out by the Commission before making its oral decision was to inquire about the policy and for the seven gathered Commissioners to listen as the policy was read aloud. *Id.*

As discussed in MS2000's Answer to Petition for Review, the policy contains no prescriptive language that dictates a particular outcome. The Commission was interpreting its own policy, and the Commission is entitled to deference in its interpretation. *Postema v. PCHB,* 142 Wn.2d 68, 86, 11 P.3d 726 (2000). It also, under the rules of statutory construction, was not mandated to reach any particular outcome.

The Petitioners have failed to meet the facial requirement that they will likely prevail on the merits, and the request for injunctive relief should be denied accordingly.

2. Any Further Delay of the Expansion Deprives MS2000 of Significant Revenue.

The Decision was carefully considered by the Commission. The Court must similarly consider the significant damage caused to MS2000 if Petitioners' injunctive relief is granted and weigh (i) the difficult challenge threshold to the Court even accepting review and (ii) the very challenging standard of review. *Kucera v. Dept. of Transp,* 140 Wn.2d 200, 209 (2000). Injunctive relief under RAP 8.3 is to be exercised "with caution" and only in those instances where it is necessary to preserve the fruits of the appeal in the event the appeal should prove successful. *Shamley v. City of Olympia,* 47 Wn.2d 124, 126, 286 P.2d 702 (1955).

The Petitioners' requested injunctive relief will delay the Expansion by *at least* one year while the case proceeds forward. Therefore, MS2000 will lose $131,000 in revenue next year, and then between $854,000 and $1,033,000 the year after. A one-year delay in the Expansion will also cost the State of Washington significant concession fees. The delay of the completion of the First Phase will result in a loss of $7,400, and the delay

of the completion of the Second Phase could result in the loss of up to $51,680. *Evaluation,* pg. 10.

3. The Public Interest in Safety Favors the Expansion.

An important consideration when allowing authorizing of the Expansion was the improvement of access to the "backside" of the mountain for Ski Patrol. AR00793. During the 2015-2016 ski season there were 30 *documented* searches for lost skiers in the PASEA. *Nelson Decl.,* ¶ 3-8. The sooner MS2000 can begin to manage the Expansion area the sooner the public interest can be better served.

The public interest in safety weighs heavily in favor of quickly completing the Expansion and should be given considerable weight by the Court.

C. IF GRANTED, PETITIONERS' INJUNCTIVE RELIEF SHOULD BE CONDITIONED ON THE REQUIREMENT TO PROVIDE SECURITY.

MS2000 will suffer significant harm if the project is delayed. MS2000 stands ready to begin the First Phase of the Expansion and begin harvesting timber on August 1, 2017. Setting aside, for the time being, whether such injunction is proper, no such injunction should be issued without Petitioners posting a sizeable bond. There is nothing extraordinary about the injunction sought by Petitioners requiring any deviation from the

practice requiring a bond pursuant to RAP 8.3. The damage caused to MS2000 by an injunction is real.

The Court will "ordinarily condition the order [for injunction] on furnishing a bond or other security." RAP 8.3. This requirement equates to the mandatory requirements of RCW 7.40.080 requiring the imposition of a bond or other surety before the court grants a preliminary injunction, absent limited circumstances allowing for the waiver of security. RCW 7.40.080; *See also Irwin v. Estes,* 77 Wn.2d 285, 461 P.2d 875 (1969) (stating that the giving of a bond is a "condition precedent" to an injunction and that the court "is not at liberty to disregard such statute").

MS2000 will be damaged as a result of the issuance of an injunction, and those damages are measured in terms of an expertly calculated monetary amount. *See generally, Evaluation; see also Confederated Tribes of Chehalis Reservation,* 135 Wn.2d at 758 ("[I]f the harm occasioned by appellate delay can be measured in terms of a monetary amount, then a bond is appropriate."). This injunction bond assures that the affected party will be able to "recover all damages ... which *might* accrue by reason of the injunction or the restraining order, and that the fund shall be readily available." *Cheney v. City of Mountlake Terrace,* 20 Wn. App. 854, 857, 583 P.2d 1242 (1978) (emphasis added) (internal citation omitted).

The security the Court requires is the only relief available to MS2000. *Swiss Baco Skyline Logging Co. v. Haliewicz,* 14 Wn. App. 343, 347, 541 P.2d 1014 (1975). The security should "account for all the various damages [the party] might suffer pending appeal." *Boeing v. Sierracin Corp.,* 108 Wn.2d 38, 64, n. 4, 738 P2d 665 (1987).

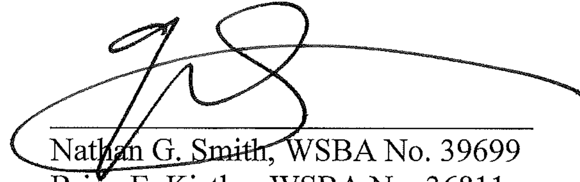
SE Group projects that the completed Expansion will result in 115,000 to 120,000 additional skier visits per year, and $854,000 to $1,033,000 in contribution margin to MS2000. *Evaluation,* pg. 4. Based upon SE Group's expert analysis, the Court should require the posting of a bond in the amount of between $854,000 and $1,033,000 to cover MS2000's lost revenue, damages, and other costs based upon a one-year delay of the Expansion. *Id.*

V. CONCLUSION

The Petitioners have requested an injunction in a case where it is nowhere near certain that the Court will even consider their case and, if the case is accepted, the standard of review is narrow and is highly deferential to the Commission. The balance of equities do not favor the imposition of an injunction. The injunction, if imposed, will result in significant revenue losses for MS2000, and Petitioners should therefore be required to post security in the amount of not less than $854,000 prior to July 31, 2017 in order for their relief to be effective.

DATED this 19th day of July, 2017.

KUTAK ROCK LLP



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PROOF OF SERVICE

I CERTIFY that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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

DATED this 19th day of July, 2017, at Spokane, Washington.

Terry L. Strothman

KUTAK ROCK LLP

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