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Court of Appeals
Division II
State of Washington
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NO. 51501-6-II

**COURT OF APPEALS, DIVISION II,
STATE OF WASHINGTON**

CITY OF PUYALLUP,

Appellant,

v.

**PIERCE COUNTY, KNUTSON FARMS, INC.,
and RUNNING BEAR DEVELOPMENT PARTNERS, LLC,**

Respondents.

**APPELLANT CITY OF PUYALLUP'S ANSWER TO AMICUS
BRIEF BY BUILDING INDUSTRY ASSOCIATION,
WASHINGTON REALTORS®, AND TACOMA PIERCE COUNTY
ASSOCIATION OF REALTORS®**

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT

 A. Amici Focus on SEPA Regulations Concerning Identification of the SEPA Initial Lead Agency Rather Than the Regulation Concerning the Process for Subsequent Assumption of Lead Agency Status Which Is the Subject of This Appeal1

 B. This Appeal Does Not Concern Finality of A Land Use Decision2

 C. Vesting Does not Apply: This Case Does Not Concern What Code Applies to A Project3

 D. Amici's Mistaken Assertion of a Protocol Breach In the City's Suggestion of Co-Lead Agency Status, Rejected by the County, Has No Bearing On the Assumption Question.....3

III. CONCLUSION.....5

TABLE OF AUTHORITIES

CASES

1. *Snohomish County v. Pollution Control Hr'gs Bd.*, 187
Wn.2d 346, 358-359, 386 P.3d 1064, 1069-1070 (2016)3

REGULATIONS

WASHINGTON ADMINISTRATIVE CODE

2. WAC 197-11-948.....1, 2, 3
3. WAC 197-11-985.....2

I. INTRODUCTION

The BIA/Realtors/TPCAR (“Amici”) Amicus Brief sows confusion rather than clarifies. As explained below, this appeal is not about the finality of a land use decision. It does not concern vesting. And it does not arise under the SEPA regulations governing identification of an initial SEPA lead agency.

II. ARGUMENT

A. **Amici Focus on SEPA Regulations Concerning Identification of the SEPA Initial Lead Agency Rather Than the Regulation Concerning the Process for Subsequent Assumption of Lead Agency Status Which Is the Subject of This Appeal**

The SEPA regulations include two processes. One, described by Amici, involves the selection of an initial SEPA lead agency and the criteria for doing so. However, there is a second, subsequent process established in the SEPA regulations for assumption of lead agency status by an “agency with jurisdiction.” The second, subsequent process is explicitly not governed by the criteria applicable to selection of the initial lead agency. Instead it is governed by WAC 197-11-948.

Amici offer extensive analysis of the regulations applicable to determination of an initial lead agency. They then argue that these initial lead agency determination criteria represent a “clear mandate” that Puyallup cannot overcome. See, e.g. Amicus Br. at 11. However, the

“initial” label¹ necessarily means that there can be a subsequent lead agency. Again, the process for subsequent assumption of lead agency status is governed by WAC 197-11-948.

Amici do not acknowledge or address the case law, including from the Washington Supreme Court and this Court, concerning SEPA lead agency assumption under WAC 197-11-948. The cases do not look to initial lead agency criteria; instead they confirm that a “dissatisfied” agency may assume SEPA lead agency status under WAC 197-11-948. Op Br. 27-28, 32-34. The “mandate” to which Amici refer does not apply to assumption by a “dissatisfied” agency, which is governed by a discrete regulation as confirmed by the case law.

B. This Appeal Does Not Concern Finality of A Land Use Decision

Amici apparently disagree with the framework for subsequent substitution for the initial lead agency. They complain that it may interfere with “finality” citing a plethora of cases concerning final land use decisions and appeals. But determination of a SEPA lead agency is not a final land use decision on an application. It is a procedural decision that is explicitly made subject to change under the longstanding SEPA

¹ The term “initial lead agency” is explicitly used by the SEPA regulations. See, e.g., WAC 197-11-948(1); WAC 197-11-985. WAC 197-11-948(2) also uses the term “first lead agency.”

regulation, WAC 197-11-948.² If Amici believe that the regulation is problematic, their remedy is not in asking this Court to override it.

C. Vesting Does Not Apply: This Case Does Not Concern What Code Applies to A Project

Amici also extensively cite to land use vesting case law. However, these cases have no application here. Vesting concerns what code or regulations will govern, not who will supervise SEPA review. Further the Washington Supreme Court has held unequivocally that vesting is a matter of statute, not as Amici appear to suggest, a matter of common law or due process. *Snohomish County v. Pollution Control Hr'gs Bd.*, 187 Wn.2d 346, 358-359, 386 P.3d 1064, 1069-1070 (2016).

Amici cite no statute concerning vesting in determining a SEPA lead agency. There is none. Further, vesting does not even bear on what SEPA policies and regulations apply, let alone which lead agency will apply them. *Snohomish County v. Pollution Control Hr'gs Bd.*, *supra*, 187 Wn.2d 346 at 365, 369-70.

D. Amici's Mistaken Assertion of a Protocol Breach in the City's Suggestion of Co-Lead Agency Status, Rejected by the County, Has No Bearing On the Assumption Question

The Amicus Brief complains, citing to three letters among seventeen

² Per WAC 197-11-948 a SEPA threshold determination does not become final unless 14 days have passed since its issuance and no other agency with jurisdiction has assumed lead agency status. Amici's arguments regarding finality ignore this basic premise that the SEPA regulations expressly recognize.

exhibits to a summary judgment declaration, that when Puyallup, as a first resort, proposed to Pierce County to work cooperatively as co-lead agencies, the City did not explain to Pierce County the basis for the proposal. Amicus Brief at 10-11. However, the SEPA regulations do not require particular protocols for a proposal to cooperate as co-lead agencies. Even if they did, the exhibits cited by Amici demonstrate that the City offered ample explanation. Further, the County's own SEPA Checklist had long since acknowledged the City's involvement, the basis for the City's proposal to work together cooperatively as co-lead agencies. Op. Br. 5-6.

In any event, the City fully complied with all procedures and protocols under the assumption regulation which is the actual subject of this appeal. The County could have had no question about the basis for the City's assumption. It was for example explained by the Puyallup City Manager in a May 23, 2017 letter to the Pierce County Executive, responding to the County's defiance of the City's assumption notice:

Under SEPA, an agency is "an agency with jurisdiction" when it has authority to approve, veto, or finance all or part of a proposal. And a proposal is broadly defined. In this case, the City of Puyallup has jurisdiction, i.e., authority for key decisions, including, but not necessarily limited to permitting or approvals related to sewer, water and streets.

CP195. The County knew what was at stake for the City when it declined

to agree to a co-lead agency arrangement and when it later refused to recognize the City's assumption of lead agency status.

III. CONCLUSION

The Amici inappropriately rely on policy arguments in asking this Court to effectively overturn the regulation on lead agency assumption that has consistently been cited with approval by every court and board that has considered it. The Amici incorrectly attempt to impose on the question of SEPA lead agency status assumption criteria that concern determination of an initial SEPA lead agency. The Amici make vesting and finality arguments that ignore the nature of a SEPA lead agency determination (it is not a final land use decision) and mistake the vesting doctrine as applicable to SEPA and to SEPA lead agency determinations when it is not.

Dated this 21st day of June, 2018.

EGLICK & WHITED PLLC



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CITY OF PUYALLUP
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CERTIFICATE OF SERVICE

I, Fred Schmidt, certify that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

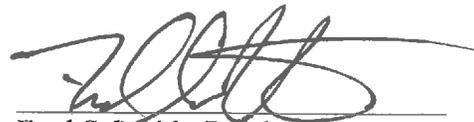
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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June 21, 2018 - 4:32 PM

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