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**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.

BRIEF OF APPELLANT CITY OF PUYALLUP

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

 A. Knutson Farms Industrial Park Proposal Background.....3

 B. Lawsuit Procedural Background.....10

V. ARGUMENT

 A. Standard of Review.....13

 B. SEPA Overview13

 C. Puyallup is an Agency with Jurisdiction Over the Knutson Proposal16

 1. Puyallup Is An Agency With Jurisdiction Because It Has Approval Authority Over the Proposal’s Roadwork and Water and Sewer Service16

 2. The SEPA Regulation Definition of “Agency With Jurisdiction” Includes Any Agency With Approval Authority Over Any Part of A Proposal: There Is No “Sufficiency” Test19

 3. Project Infrastructure Is “Part Of The Proposal” Under SEPA.....22

 D. WAC 197-11-948 Authorized Puyallup to Assume Lead Agency Status after Pierce County Issued a Mitigated DNS27

1.	The City Properly Followed the Lead Agency Assumption Process	27
2.	Assumption May Occur in Response to Any Form of DNS.....	28
3.	The Adequacy of An MDNS Has No Bearing on Whether An Agency Can Assume Lead Agency Status	35
E.	The Superior Court Erred By Considering the Settle Declaration.....	36
F.	Pierce County’s MDNS and Plat Approvals Are Invalid; An EIS Must Be Prepared Before Any Approvals are Issued and Any Decisions or Actions Taken.....	38
VI.	CONCLUSION.....	39

TABLE OF AUTHORITIES

CASES

Asarco, Inc. v. Air Quality Coal., 92 Wn.2d 685, 601 P.2d 501 (1979).....15

Bellevue Farm Owners Ass’n v. State of Washington Shorelines Hearings Bd., 100 Wn. App. 341, 997 P.2d 380 (2000).....16, 28

City of Bellingham v. DNR, PCHB Nos. 11-125 & 11-130, Order Granting Summary Judgment (April 9, 2012), 2012 WA ENV LEXIS 1133

City of Fed. Way v. Town & Country Real Estate, LLC, 161 Wn. App. 17, 252 P.3d 382 (2011).....29

Davies v. Holy Family Hosp., 144 Wn. App. 483, 183 P.3d 283 (2008).....13

Ebel v. Fairwood Park II Homeowners’ Ass’n, 136 Wn. App. 787, 150 P.3d 1163 (2007).....36

Juanita Bay Valley Community Ass’n v. City of Kirkland, 9 Wn. App. 59, 510 P.2d 1140 (1973).....39

King County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 860 P.2d 1024 (1993).....28, 34

LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 48, 331 P.3d 1147 (2014).....27

Moss v. City of Bellingham, 109 Wn. App. 6, 31 P.3d 703 (2001).....30

Murden Cove Pres. Asso v. Kitsap Cty., 41 Wn. App. 515, 704 P.2d 1242 (1985).....25

Nw. Steelhead & Salmon Council of Trout Unlimited v. Washington State Dep’t of Fisheries, 78 Wn. App. 778, 896 P.2d 1292 (1995).....33

<i>Noel v. Cole</i> , 98 Wn. 2d 375, 655 P.2d 245 (1982).....	39
<i>Repar v. DNR</i> , FPAB case no. 05-001, Order Granting Summary Judgment (June 28, 2005), 2005 WA ENV LEXIS 54.....	33
<i>Stanzel v. City of Puyallup</i> , 150 Wn. App. 835, 209 P.3d 534 (2009).....	19, 21
<i>State v. Clausing</i> , 147 Wn.2d 620, 56 P.3d 550, 555 (2002).....	37
<i>Stenger v. State</i> , 104 Wn. App. 393, 16 P.3d 655, 663 (2001).....	37
<i>Town of Concrete v. Skagit County</i> , SHB No. 96-18, Order Granting Summary Judgment (October 4, 1996), 1996 WA ENV LEXIS 253.....	33
<i>Washington Cedar & Supply Co. v. State, Dep't of Labor & Indus.</i> , 137 Wn. App. 592, 154 P.3d 287 (2007).....	35
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054, 1078 (1993).....	37
<i>Weden v. San Juan County</i> , 135 Wn.2d 678, 958 P.2d 273 (1998).....	27
<i>Weyerhaeuser v. Pierce Cty.</i> , 124 Wn.2d 26, 873 P.2d 498, 507 (1994).....	39
<i>Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima</i> , 122 Wn.2d 371, 858 P.2d 245 (1993).....	18, 21

STATUTES

REVISED CODE OF WASHINGTON

RCW 35A.14	4
RCW 43.21C.020.....	7, 13
RCW58.17.110	23, 26

WASHINGTON ADMINISTRATIVE CODE

WAC 197-11-050.....	13
WAC 197-11-060.....	25, 26
WAC 197-11-070.....	38
WAC 197-11-310.....	14, 30
WAC 197-11-315.....	5
WAC 197-11-330.....	14
WAC 197-11-340.....	7, 17, 28, 29, 30, 31, 32
WAC 197-11-350.....	14, 29, 30, 31
WAC 197-11-355.....	32
WAC 197-11-360.....	15
WAC 197-11-390.....	38
WAC 197-11-400.....	15
WAC 197-11-402.....	15
WAC 197-11-408.....	15
WAC 197-11-440.....	15
WAC 197-11-455.....	15
WAC 197-11-500.....	15
WAC 197-11-502.....	15
WAC 197-11-508.....	30
WAC 197-11-535.....	15
WAC 197-11-560.....	15
WAC 197-11-600.....	24, 25, 34
WAC 197-11-660.....	15
WAC 197-11-704.....	14, 24
WAC 197-11-714.....	2, 11, 16, 17, 19, 20, 21, 22
WAC 197-11-766.....	14, 29
WAC 197-11-784.....	14
WAC 197-11-797.....	5
WAC 197-11-800.....	24
WAC 197-11-942.....	17
WAC 197-11-944.....	7
WAC 197-11-948.....	1, 9, 10, 11, 16, 17, 25, 27, 28, 29, 31, 32, 34, 35, 36
WAC 197-11-960.....	5
WAC 197-11-970.....	30
WAC 197-11-985.....	1, 28

RULES

WASHINGTON RULES OF EVIDENCE

ER 70237

WASHINGTON COURT RULES

CR 5613

LOCAL CODES

PIERCE COUNTY CODE

PCC 18F.20.030.....23
PCC 18F.50.040.....23, 26

PUYALLUP MUNICIPAL CODE

PMC 11.04.01017
PMC 11.16.01018
PMC 11.16.02018
PMC 14.22.02018
PMC 14.22.05018, 21
PMC 21.1418

TREATISES

State Environmental Policy Handbook, Washington Department of Ecology, (updated 2003)25, 31
5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, (2013-2014 ed.)36

I. INTRODUCTION

The State Environmental Policy Act (SEPA) regulations authorize an “agency with jurisdiction” to assume “lead agency status” and order preparation of an environmental impact statement (EIS) when the original lead agency fails to do so. WAC 197-11-948. In this case, Pierce County failed to require an EIS for a 2.6 million square foot warehouse development. The warehouses, with parking lots and ancillary facilities, would cover over 100 acres immediately adjacent to the Puyallup River. The development depends on City infrastructure approvals including for roads, water, and sewer. The site is within the City’s Growth Management Act Urban Growth Boundaries. The City therefore exercised its WAC 197-11-948 authority and issued notices assuming SEPA lead agency status and requiring preparation of an EIS. WAC 197-11-985. At issue in this appeal is whether Thurston County Superior Court was correct in ruling on cross-motions for summary judgment that Pierce County was entitled to defy the City’s Notice of Assumption and to approve the project without preparation of an EIS.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendants’ summary judgment motion and denying the City of Puyallup’s summary judgment motion on the basis that the City is not an “agency with jurisdiction” and not

authorized to assume SEPA lead agency status. *See* Clerk’s Papers (CP) 852 (Order Granting Knutson Farms, Inc. and Running Bear Development Partners LLC’s Motion for Summary Judgment and Denying City of Puyallup’s Motion for Summary Judgment) at ¶ 3; Report of Proceedings (RP) 57-58.

2. The trial court erred in failing to conclude that an agency with jurisdiction can assume lead agency status over a proposal when the original lead agency has issued a SEPA mitigated determination of nonsignificance (MDNS). *See* CP 852 at ¶ 3; RP 57-58.

3. The trial court erred in considering over the City’s objections an attorney’s declaration offering opinions on the ultimate legal issues. *See* CP 852 at ¶ 2.

4. The trial court erred in denying the City of Puyallup’s motion for reconsideration of summary judgment. *See* CP 906 (“Order Denying Motion for Reconsideration”).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The City of Puyallup is the permitting and approval authority for road construction and improvements as well as water and sewer service on which the proposal depends. Is the City therefore an “agency with jurisdiction,” defined in SEPA regulation WAC 197-11-714(3) as “an

agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal)?" (Assignments of Error 1, 4.)

2. An MDNS is a type of determination of nonsignificance (DNS) under the SEPA regulations. WAC 197-11-948 allows an agency with jurisdiction over a proposal to assume lead agency status "upon review of a DNS." Could the City of Puyallup assume lead agency status over the Knutson proposal upon review of Pierce County's MDNS? (Assignments of Error 2, 4.)

3. Did the superior court err in considering on summary judgment a declaration from a lawyer hired by the moving party as an "expert" to offer legal opinions and advise the trial court how to rule on the ultimate legal issues? (Assignment of Error 3.)

IV. STATEMENT OF THE CASE

A. Knutson Farms Industrial Park Proposal Background

Knutson Farms, Inc. and Running Bear Development Partners, LLC (collectively, "Applicant") applied to Pierce County for approval to divide and develop what is currently farmland into an enormous warehouse, distribution, and freight movement complex, Knutson Farms Industrial Park. *See generally* CP 130-52. The site is an "environmentally sensitive" area, immediately adjacent to the Puyallup River and within its floodway. CP 139-40. It is also immediately adjacent to the City's limits

impervious surface/structure coverage of over 100 acres. CP 131, 148-49. Site development would require grading, paving (for truck and vehicle parking and maneuvering areas), substantial road construction and other road improvements, stormwater conveyances and outfalls, and water and sewer facility construction. CP 148, 597. Approximately 450,000 cubic yards of on-site material would be excavated and filled to prepare the building pads, paved areas and open space areas for development. CP 133.

All traffic to and from the proposed development would depend on the City's road network and on construction and improvements on City streets subject to City approval authority. *See* CP 597. The SEPA Environmental Checklist² for the project states that the project will include construction "along 5th Avenue S.E., 80th Street East and the portion of 134th Avenue East which will not to [sic] be vacated."³CP 144 (emphasis in original). These are City roads. CP 585. The project transportation impact analysis describes alterations to and construction of City roads,

² "Agencies shall use the environmental checklist substantially in the form found in WAC 197-11-960 to assist in making threshold determinations for proposals . . ." WAC 197-11-315(1). "Threshold determination' means the decision by the responsible official of the lead agency whether or not an EIS is required for a proposal that is not categorically exempt (WAC 197-11-310 and 197-11-330 (1)(b))." WAC 197-11-797. The environmental checklist form provided in WAC 197-11-960 is filled out by an applicant and then checked and adopted by the intake agency. The checklist consists of a series of questions to "identify impacts from your proposal (and to reduce or avoid impacts from the proposal, if it can be done) and to help the agency decide whether an EIS is required." WAC 197-11-960.

³ The "to" is a typographical error. There is a portion of 134th Ave East which will not be vacated. CP 143.

intersections, and sidewalks, including construction of an entirely new road and an entirely new traffic signal. CP 595-605.

The entire site is within the City's sewer service area. A substantial portion is in the City's water service area. CP 11, 55. The project SEPA Checklist lists "Sewer and Water Utility Permits by City of Puyallup" among the "government approvals or permits that will be needed for . . . [the] proposal." CP 131; *see also* CP 145 (listing the City of Puyallup as a provider of both water and sanitary sewer service for the project).

The City, through experts and counsel, submitted numerous comments to the County pointing out the need for an environmental impact statement (EIS) in light of the project's significant impacts on, among other things, the City's traffic and transportation network, the Puyallup River and floodplain, wetlands, wildlife habitat, groundwater, the planned pedestrian trail through the site, and the City's sewer and water systems. *E.g.*, CP 164-81, 589. Many other interested parties, including the Muckleshoot Indian Tribe and the Puyallup Tribe of Indians (PTI) submitted comments concerning the project's impacts and the shortcomings of the application in analyzing and addressing them. *See, e.g.*, CP 571-79 (MuckleshootTribe); CP 12, 56, 583 (Puyallup Tribe); *see also* CP 533-69 (petition from 1,600 citizens opposing proposal).

Concerned about how Pierce County was handling project review,

the City formally offered on June 22, 2016 to participate with the County as a SEPA “co-lead agency” under WAC 197-11-944.⁴ CP 170, 183. The City also cautioned the County that it would assume SEPA lead agency status under WAC 197-11-948 if necessary to ensure that the impacts of the proposal, mitigation, and alternatives were fully explored. CP 175, 178-79. Despite these and other warnings, the County declined the City’s request for co-lead agency cooperation. CP 183.

Subsequently, on April 26, 2017, the County issued a SEPA threshold determination titled “Mitigated Determination of Nonsignificance (MDNS).” CP 154-59. The MDNS stated that it was issued “under WAC 197-11-340(2)” and that the County “has determined that the proposal will not have a probable significant impact on the environment, and an Environmental Impact Statement (EIS) will not be required under RCW 43.21C.030(2) (c), only if the following conditions are met,” CP 154, 156 (emphasis in original).

The MDNS conditions pertain to traffic and to City roads and will require the Applicant to seek approval and permits from the City. At least four of the conditions require design and construction of changes to City roads and traffic signals, including construction of a new street and a new

⁴ WAC 197-11-944 states in relevant part: “Two or more agencies may by agreement share or divide the responsibilities of lead agency through any arrangement agreed upon.”

traffic signal, all of which would require City approval and in some instances partial funding. CP 154-55. Others only require the developer to contribute relatively small sums of money to the City for big ticket improvements on City roads. *Id.* None of these conditions were approved by the City.

As City Planning Director Tom Utterback later explained, the City had good reason to be concerned about the County's mitigated DNS:

16. It appeared throughout that the Defendants' approach continued to focus more on identifying an acceptable mitigation package within an MDNS context rather than taking a more comprehensive and public look at impacts, alternative configurations, and potential mitigation as would better occur in an EIS. Relative to the key issue of project traffic mitigation, the approach to date with affected jurisdictions has seemed to be more transactional in gauging a palatable dollar contribution sufficient to avert an EIS.

CP 588; *see also* CP 588-89 at ¶ 17; *see generally* CP 186-88, 581-90.

Despite the project's scope and location in an environmentally sensitive area, the MDNS does not address or impose mitigation conditions on other probable environmental impacts. In contrast, as Director Utterback observed, "An EIS would, among other things, provide a comprehensive public process for analysis of these questions." CP 589.

The issuance of the MDNS triggered a 14 day period in which another agency with SEPA jurisdiction could assume lead agency status

over the proposal and require an EIS.⁵ On May 10, 2017, the City did so, issuing a “Notice of Assumption of Lead Agency Status.” CP 186-8. The City also issued a SEPA “Determination of Significance and Request for Comments on Scope of EIS,” requiring preparation of an EIS. CP 190-91.

On May 16, 2017, the Pierce County Executive responded to the Puyallup City Manager that the “County clearly has jurisdiction and will not recognize the City’s extrajudicial action.” CP 193. The County then issued a May 22, 2017 “Written Order” purporting to approve the application for the Knutson project without regard to the EIS required by the City. CP 202-10. Among other things, the County Written Order requires the Applicant to make road improvements, including those subject to City, not County jurisdiction. *See* CP 204, 206.

The City filed two appeals, of the MDNS and of the Written Order, to the Pierce County Hearing Examiner. *See* CP 15, 58, 97. Both appeals included a reservation of rights and a statement of non-waiver. *Id.* These asserted that due to the City’s assumption of lead agency status, the County, including its hearing examiner, had no SEPA jurisdiction over the

⁵ WAC 197-11-948(1):

An agency with jurisdiction over a proposal, upon review of a DNS (WAC 197-11-340) may transmit to the initial lead agency a completed “Notice of assumption of lead agency status.” This notice shall be substantially similar to the form in WAC 197-11-985. Assumption of lead agency status shall occur only within the fourteen-day comment period on a DNS issued under WAC 197-11-340 (2)(a), or during the comment period on a notice of application when the optional DNS process in WAC 197-11-355 is used.

proposal and that the County's MDNS became null and void when the City assumed lead agency status. *Id.*

The Puyallup Tribe of Indians also appealed the County MDNS. CP 107. The City and PTI appeals are pending before the Pierce County Hearing Examiner and will not be heard until the latter part of July 2018.⁶

The County and the Applicant appealed the City's Assumption of Lead Agency Status and Determination of Significance to the Puyallup Hearing Examiner. Those appeals have been deferred. *See* CP 214-15, 217.

B. Lawsuit Procedural Background.

In light of the County's refusal to accept the City's WAC 197-11-948 assumption and the parties' conflicting appeals before different hearing examiners, the City on May 25, 2017 filed a Complaint and Petition in Thurston County Superior Court naming the County and Applicant as defendants. CP 7-19. The City's Complaint and Petition explained:

4.23 The City has therefore filed this lawsuit because the threshold fundamental jurisdictional issue is appropriately resolved in court now rather than left to competing appeals before local hearing examiners whose jurisdiction has been questioned by the parties and whose processes could result in conflicting rulings and years of delay in resolution.

⁶ An EIS, as required by the City in May, 2017, could have been completed well before July 2018.

CP 15. As relief, the City requested a declaratory judgment, an injunction, and a writ of prohibition. In particular, the City asked for rulings that: Pierce County had not had authority or jurisdiction as SEPA lead agency as of the date of assumption of SEPA lead agency status by the City; had no authority to approve the proposal in light of the City's assumption of SEPA lead agency status and determination that an EIS is required; and was not entitled to disregard the City's assumption of lead agency status. CP 9; *see also* CP 17-18 (detailing requests for relief).

The parties subsequently cross-moved for summary judgment concerning the validity of the City's SEPA lead agency assumption. *See* CP 101-23, 473-95, 496-98. The two primary legal issues presented were whether, as required in WAC 197-11-948, the City is an agency with SEPA jurisdiction under WAC 197-11-714(3), and whether an agency with jurisdiction over a proposal can assume SEPA lead agency status under WAC 197-11-948 after an MDNS is issued for the proposal.

The Applicant filed with its summary judgment motion a declaration from attorney Richard L. Settle, whom it had engaged through a private law firm. CP at 444-53. The declaration offered legal opinions and advice to the trial court on how to rule on the ultimate legal issues. The City filed an objection to the Settle declaration and asked the Court

not to consider it.⁷ CP 607-648; 803-08.

Oral argument on the motions was held on September 22, 2017. After argument concluded, Thurston County Superior Court Judge Chris Lanese immediately ruled from the bench that the City was not an agency with jurisdiction:

I find as a matter of law that the City is not an agency with jurisdiction and that renders moot the consideration of whether or not an MDNS is a DNS because that results in my needing to grant summary judgment in favor of the [Defendants] in this case.

. . . [B]ased on the authority presented and the arguments presented in this case, I find that the water, sewer, and roads are not a sufficient jurisdictional hook to give the City the authority it is seeking to assert in this case. Thus, I find that summary judgment is appropriate in favor of the respondents, and this case will be dismissed accordingly.

RP 57-58. The court confirmed that everything had been considered, including the Settle declaration, in reaching this decision. RP 59; *see* CP 850 (order listing declaration as document considered).

On October 6, 2017, the trial court entered Defendants' proposed written order, denying the City's summary judgment motion and granting Defendants' motion entirely. CP 849-54.

The City moved for reconsideration. CP 857-65. Reconsideration was denied on October 26, 2017. CP 906. The City then timely appealed.

⁷ Mr. Settle is the author of a SEPA Treatise. However, his Treatise does not support the Applicant/County arguments concerning SEPA lead agency assumption.

CP 907-917.

IV. ARGUMENT

A. Standard of Review.

Summary judgment orders are reviewed *de novo*. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008) (citation omitted). When reviewing an order granting summary judgment, the Court of Appeals “engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Id.* Summary judgment is proper when there are no genuine factual disputes and where the moving party is entitled to judgment as a matter of law. CR 56(c).

B. SEPA Overview.

The State Environmental Policy Act declares that “each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.” RCW 43.21C.020(3). In protecting that right, SEPA mandates procedures for review of environmental impacts by a “lead agency.” *See* WAC 197-11-050. Among these procedures is a requirement that the lead agency make a “threshold determination” on whether a “proposal which meets the definition of action” will have

probable significant adverse environmental impacts.⁸ *See* WAC 197-11-310; WAC 197-11-330. Even “proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts.” WAC 197-11-330(5).

A lead agency’s threshold determination is documented in either a determination of nonsignificance (DNS) or a determination of significance (DS). WAC 197-11-310(5). Where appropriate and consistent with WAC 197-11-350, mitigation measures may also be imposed to reduce impacts so as to support issuance of a DNS instead of a DS. A DNS containing mitigation measures is referred to as a “mitigated DNS” or “MDNS.” WAC 197-11-350; WAC 197-11-766.

The requirements for a mitigated DNS are in a single short regulation, WAC 197-11-350. In issuing a mitigated DNS, an agency need only state that with the mitigation measures it has chosen there are no longer any probable significant adverse impacts. No public hearing or published responses to public and agency comments are required for a mitigated DNS.

In contrast, an EIS must inform decision makers and the public by

⁸ Proposal means a “proposed action,” including “any actions proposed by applicants.” WAC 197-11-784. An “action” is broadly defined under SEPA and includes any private activities “that will directly modify the environment.” WAC 197-11-704(2)(a)(i).

impartially discussing significant environmental impacts. WAC 197-11-400(2). It further must examine reasonable alternatives. WAC 197-11-402(1); WAC 197-11-408(1); WAC 197-11-440(5), (6). Preparation of an EIS through this process is required before an agency can exercise full SEPA substantive authority. See, e.g., WAC 197-11-660(1)(f)(i).

The process for preparation of an EIS after agency issuance of a DS is robust and interactive. WAC 197-11-360. There are prescribed scoping procedures to determine what should be addressed in the EIS and there are specific EIS content requirements. WAC 197-11-408; WAC 197-11-440. There are requirements for wide circulation of an EIS; for public access to the data underlying the draft EIS; for a public hearing; for formal comments on the draft EIS by the public as well as local, state, and federal agencies and tribes; for lead agency consideration of the comments, with responses by the lead agency published in the final EIS. See, e.g., WAC 197-11-440(2)(k); WAC 197-11-440(7); WAC 197-11-455; WAC 197-11-500; WAC 197-11-502(5); WAC 197-11-502(6); WAC 197-11-502(7); WAC 197-11-535(2)(b); WAC 197-11-560; see generally WAC 197-11-455.

SEPA's policy is to ensure "full disclosure of environmental information so that environmental matters can be given proper consideration during decision making" *Asarco, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 700, 601 P.2d 501, 512 (1979). This policy "is

thwarted whenever an incorrect ‘threshold determination’ is made.” *Id.*

To address this situation, the SEPA regulations provide that, after a lead agency has issued a DNS, an “agency with jurisdiction” over the proposal may assume lead agency status and make its own threshold determination, issuing a DS requiring preparation of an EIS. WAC 197-11-948.

C. Puyallup Is An Agency With Jurisdiction Over The Knutson Proposal.

1. Puyallup Is An Agency With Jurisdiction Because It Has Approval Authority Over The Proposal’s Roadwork And Water And Sewer Service.

The SEPA regulations’ definition of “agency with jurisdiction” is broad and inclusive:

‘Agency with jurisdiction’ means an agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal). The term does not include an agency authorized to adopt rules or standards of general applicability that could apply to a proposal, when no license or approval is required from the agency for the specific proposal. The term also does not include a local, state, or federal agency involved in approving a grant or loan, that serves only as a conduit between the primary administering agency and the recipient of the grant or loan. Federal agencies with jurisdiction are those from which a license or funding is sought or required.

WAC 197–11–714(3) (emphasis added.) As this Court has held, “[a]n agency has jurisdiction if it must issue permits or approvals for the project.” *Bellevue Farm Owners Ass’n v. State of Washington Shorelines*

Hearings Bd., 100 Wn. App. 341, 353, 997 P.2d 380 (2000) (emphasis added) (citing WAC 197-11-714(3)). There can be multiple agencies with jurisdiction over a single proposal. *See, e.g.*, WAC 197-11-340(2)(a)(i); WAC 197-11-942; WAC 197-11-948.

The City of Puyallup is an agency with jurisdiction over the Knutson proposal because it has authority to approve, veto, or finance parts of the proposal. One such example of jurisdiction concerns the proposal's transportation network improvements. Access for the proposed project depends on the City's road network. The Applicant proposes to alter and construct City roads, intersections, and sidewalks. CP 595-605. These parts of the proposal are reflected in the County's MDNS. CP 154-56. The Puyallup Municipal Code is not unusual in requiring that, to make any such alterations or improvements, the Applicant must obtain approvals from the City:

No person, firm, corporation or other legal entity shall excavate, tunnel under, fill in, grade, pave, level, alter, construct, repair, remove or excavate any pavement, sidewalk, crosswalk, curb, driveway, gutter, sewer, water main or any other structure or improvement located over, under or upon any public street, highway, avenue, alley or public right-of-way within the city limits of the city of Puyallup without first obtaining a written permit to do so from the city engineer.

PMC 11.04.010. The Puyallup Municipal Code also requires permits for other transportation-related improvements and activities stemming from

the Applicant's proposal, including clearing and grading to construct a new street, chapter 21.14 PMC, and vehicular use of City curbs or sidewalks. PMC 21.14; PMC 11.16.010; PMC 11.16.020.

The City's authority to approve, veto, or finance sewer and water service for the Knutson proposal provides two additional, independent bases for the City's status as an "agency with jurisdiction." The entire project site is within the City's sewer service area, and a significant portion of the property is within the City's water service area. The Applicant's SEPA Checklist expressly calls out water and sanitary sewer service from the City of Puyallup as among the "government approvals or permits that will be needed for . . . [the] proposal." CP 145. Puyallup Municipal Code mandates that an "applicant that seeks water or sewer service from the city outside Puyallup's city limits, but within the city's service area, shall submit a written application to the city for such service." PMC 14.22.020. The City can grant or deny such applications, and additionally has the authority to impose reasonable service conditions. PMC 14.22.050;⁹ *see also Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12*

⁹ PMC 14.22.050 states:

- (1) Upon submission of a completed application, provision of any required additional information or studies, payment of the application fee, payment of costs and expenses, or arrangements for payment that satisfy the city, the director of development services or designee shall administratively approve or deny the application for service.
- (2) The director or designee shall have authority to impose any reasonable

v. *City of Yakima*, 122 Wn.2d 371, 383, 858 P.2d 245 (1993) (upholding city’s condition that landowners sign a petition in support of annexation before city would extend sewer service); *Stanzel v. City of Puyallup*, 150 Wn. App. 835, 852, 209 P.3d 534 (2009) (“an exclusive provider of sewer service may impose reasonable conditions on its service agreement, including conditions beyond its capacity to provide service”).

In sum, the City is an “agency with jurisdiction” over the Knutson proposal because it has authority to approve, veto, or finance parts of the proposal, including roads, intersections, sidewalks, sewer, and water.¹⁰

2. The SEPA Regulation Definition Of “Agency With Jurisdiction” Includes Any Agency With Approval Authority Over Any Part Of A Proposal: There Is No “Sufficiency” Test.

The superior court apparently based its summary judgment decision on a sufficiency test in which simply meeting the WAC 197–11–714(3) definition of “agency with jurisdiction” was not enough:

“[T]he water, sewer, and roads are not a *sufficient*

service conditions, and require the applicant to enter into a utility extension agreement. An applicant or service recipient shall fully satisfy any such service conditions, and perform its obligations under any such agreement. If a service recipient fails to continue to satisfy any condition of service, or breaches the agreement, then the city may terminate service after providing notice and a reasonable opportunity to cure, and pursue all remedies that exist in law or in equity.

¹⁰ The City’s SEPA jurisdiction over the Knutson proposal is also established by its authority over the proposal’s stormwater drainage infrastructure. The City raised this issue in its motion for reconsideration citing statements by Applicant’s counsel during the summary judgment hearing that the Knutson project would use a City-owned stormwater pipeline and outfall over which the City has SEPA jurisdiction. *See* CP 857-87, 899-905.

jurisdictional hook to give the City the authority it is seeking to assert in this case.”

RP at 58 (emphasis added). In doing so the court accepted the Applicant’s argument that “Puyallup’s limited authority, over a small portion of improvements (road improvements), as compared of [sic] the overall project, that only arises due to required mitigation, should not confer Puyallup status that would allow it to usurp the County’s status as Lead Agency for this proposal wholly located in its jurisdiction.” CP 494.

However, WAC 197-11-714(3) does not allow for such a balancing or sufficiency test. It clearly states that the authority to approve all **or part** of a proposal creates jurisdiction; it contains no caveats about the scope, size, importance, or nature of the part of the proposal over which the agency has approval authority. It does not exclude parts of the proposal that may be labeled as mitigation.¹¹ Nor does it require an agency to issue a minimum number of permits or licenses to have jurisdiction.

The only substantive exclusion, in the regulation’s second sentence, is that “agency with jurisdiction” does “not include an agency authorized to adopt rules or standards of general applicability that could apply to a proposal, *when no license or approval is required from the*

¹¹ In this case, some City road improvements were offered by the Applicant or required by the County as mitigation, but others are simply necessary for any vehicle to get to and from the site.

agency for the specific proposal.” WAC 197-11-714(3) (emphasis added).

¹²This exclusion does not say when “insufficient licenses or approvals are required.” Under the regulation’s plain language, only the absence of any license or permit authority over any part of a proposal results in exclusion from “agency with jurisdiction” status. In any event, the City has unquestionable authority over multiple approvals for important aspects of the Knutson project, involving City roads, and City sewer and water service.

WAC 197-11-714(3) also does not make a distinction among *types* of approvals. Defendants argued in superior court that sewer and water permits were not a sufficient basis for jurisdiction because they are “ministerial.” CP 494-95. But WAC 197-11-714(3) makes no such distinction. Perhaps the superior court’s oral ruling reference to “sufficient jurisdictional hook” was shorthand for such a “ministerial” analysis. In any event, the City’s authority is not just as a rubber stamp. It has discretion to impose conditions as a prerequisite to providing sewer or water service, and it can withhold service if those conditions are not met. *See* PMC 14.22.050; *City of Yakima*, 122 Wn.2d 371; *Stanzel*, 150 Wn.

¹² Confirming the regulation’s broad scope, WAC 197-11-714(3) explicitly calls out an exclusion for agencies acting only as loan or grant conduits. The inclusive language of the regulation would have otherwise recognized such agencies’ as having SEPA jurisdiction even though they had no permit authority and were not approving use of or investing their own funds.

App. 835. The City’s authority with regard to its own roads is even more fundamental.

3. Project Infrastructure Is “Part Of The Proposal” Under SEPA.

Again, “‘Agency with jurisdiction’ means an agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal).” WAC 197-11-714(3) (emphasis added). Defendants asserted in superior court that road “improvements are not part of the proposal itself.”¹³ They insisted that “the City has . . . looked beyond the proposal itself to attempt to establish jurisdiction over the Knutson Farms project;”¹⁴ and argued that the “road construction itself is not part of the Knutson Farms proposal.”¹⁵

Although the superior court did not explain its ruling in any depth, the summary judgment outcome suggests that the court may have accepted such contentions that roadwork and water and sewer service extensions necessary for the Knutson project are not a “part of the proposal” for purposes of SEPA review and WAC 197-11-714(3). This represents significant legal error. Plat applications in Pierce County, as everywhere else, must include any proposed construction, reconstruction,

¹³ CP 690.

¹⁴ CP 770.

¹⁵ CP 894.

or other improvements to roads, intersections, and utility networks. *See* PCC 18F.20.030(A)(1)(e) (requiring preliminary plats to include “[a]ll adjoining public and private roads, proposed roads with identifying name and locations, and right-of-way dimensions.”); PCC 18F.20.030(B)(1)(f) (requiring preliminary plat map to include “[a]ll utility providers and type of access.”); *see also* PCC 18F.50.040(B)(4) (“Short subdivisions and large lot divisions shall be reviewed to determine compliance with standards for roads, . . . water supply, existing sanitary sewage disposal”); PCC 18F.50.040(D) (requiring “appropriate provisions” for, among other things, streets or roads, alleys, potable water supplies, and sanitary wastes for short subdivisions and large lot divisions); RCW 58.17.110 (same). The pretense that roads, water service, and sewer service are not part of a plat application is inconsistent with these basic Code requirements. Acceptance of this pretense would mean that infrastructure would be considered “part of the project” under the Pierce County Code, but not “part of the proposal” under SEPA, a prescription for needless incongruity and dysfunction.

The City pointed out in superior court that the elements of the project that Defendants argue are not “part of the proposal” accordingly would not be covered by the County’s April 26, 2017 SEPA threshold determination. *See* CP 862. Therefore, the City would have to issue its

own SEPA threshold determination for those elements of the project. *Id.*¹⁶ Defendants’ response underscored the incongruity created by the superior court decision. Defendants argued that separate SEPA review, for example, of project construction and alteration of City roads would not be necessary: “As required by WAC 197-11-600, the City will use the County’s MDNS” when “the City approves road improvements that will be constructed as mitigation for the Knutson Farms project.” CP 894.

But that only makes sense until one reads the regulation Defendants cite, WAC 197-11-600. It provides that an agency (here it would be the City) must use a prior SEPA determination by another agency (here it would be the County) unchanged – but only if the City is acting on the same proposal: “Any agency acting on the same proposal shall use an environmental document unchanged.” (emphasis added). WAC 197-11- 600(3). Here, Defendants have vehemently argued that the work within the City’s jurisdiction is not part of the proposal on which the County issued a mitigated DNS.

Either the work in question is part of the proposal for SEPA purposes and therefore supports the City’s lead agency status assumption for the entire proposal, or for SEPA purposes it is not part of the proposal

¹⁶ Constructing roads and water and sewer infrastructure requires SEPA review—and a threshold determination(s)—by some agency because such activities “modify the environment” and do not fall under SEPA’s categorical exemptions. See WAC 197-11-704(2)(a)(i); WAC 197-11-800.

before the County, WAC 197-11-600 does not apply, and the work is subject to separate, independent City SEPA review.

Such segmented, piecemeal SEPA review of the overall project is precisely what SEPA mandates against. “Piecemeal review is impermissible where a ‘series of interrelated steps [constitutes] an integrated plan’ and the current project is dependent upon subsequent phases.” *Murden Cove Pres. Asso v. Kitsap Cty.*, 41 Wn. App. 515, 526, 704 P.2d 1242 (1985) (alteration in original) (quoting *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 345, 552 P.2d 184 (1976)). This explains why an agency with jurisdiction over *part* of a proposal can assume lead agency status for the *entire* proposal under WAC 197-11-948—to avoid fragmentary SEPA review.

WAC 197-11-060(3)(b) states:

Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. . . . Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:

- (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
- (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation

See also SEPA Handbook, Department of Ecology, at § 2.3.1,

<https://fortress.wa.gov/ecy/publications/documents/98114.pdf>, (“actions are related if they are dependent on each other, so that one will not happen without the other.”).¹⁷

The Knutson project’s roadwork and sewer and water services are “closely related,” in fact integral to the overall proposal. The massive warehouse distribution center, which will depend on heavy truck traffic, cannot exist without significantly altering the City’s existing roads and constructing new City roads and traffic signals; nor can it exist without water or sewer service. State law, Pierce County Code, and the County’s Written Order approving the Knutson preliminary short plat require, per the plat statute and County Code, “appropriate provisions” for roads, transit, sanitary sewer, and water for this Knutson development. *See* RCW 58.17.110; PCC 18F.50.040(D); CP 204. In light of the interdependent nature of these required parts of the project, SEPA mandates their evaluation as part of the overall proposal, not as separate proposals. In contrast, the summary judgment ruling ensures that SEPA review of the Knutson project will be fragmented.

¹⁷ The SEPA regulations allow “phased” environmental review in certain limited circumstances not applicable here. *See* WAC 197-11-060(5). Notably, phased review is “not appropriate when . . . [i]t would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts.” WAC 197-11-060(5)(d). At any rate, the County has not stated that this project is under “phased review,” a requirement for such review to occur. *See* WAC 197-11-060(5)(e).

D. WAC 197-11-948 Authorized Puyallup To Assume Lead Agency Status After Pierce County Issued A Mitigated DNS.¹⁸

1. The City Properly Followed the Lead Agency Assumption Process.

WAC 197-11-948(1) provides that an agency with jurisdiction over a proposal can assume lead agency status “upon review of a DNS”:

An agency with jurisdiction over a proposal, upon review of a DNS (WAC 197-11-340) may transmit to the initial lead agency a completed ‘Notice of assumption of lead agency status.’ This notice shall be substantially similar to the form in WAC 197-11-985. Assumption of lead agency status shall occur only within the fourteen-day comment period on a DNS issued under WAC 197-11-340 (2)(a), or during the comment period on a notice of application when the optional DNS process in WAC 197-11-355 is used.

The Washington Supreme Court’s explanation of this provision is directly applicable here:

SEPA Rules allow an agency which is “dissatisfied” with a lead agency’s DNS to assume lead agency status and make its own threshold determination. WAC 197-11-600(3)(a); WAC 197-11-948. Under the SEPA Rules, therefore, nonlead agencies are not constrained to accept a lead agency DNS but instead may make an independent determination as to whether they are “dissatisfied” with the lead agency’s decision. Boundary review boards and other

¹⁸ Because review of a summary judgment is de novo, where an issue of law is raised, briefed and argued but not decided by the trial court, an appellate court may resolve the issue on review and affirm or reverse the summary judgment as appropriate. *See Weden v. San Juan County*, 135 Wn.2d 678, 695-96, 958 P.2d 273 (1998); *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 71, 331 P.3d 1147 (2014). The superior court said it did not reach the issue of whether an agency with jurisdiction can assume lead agency status where an MDNS is issued because the issue was moot in light of resolution of the “agency with jurisdiction” question. RP 57-58. Nonetheless, for the sake of judicial economy and efficiency and because the question was fully briefed below, this Court should resolve the MDNS issue and order summary judgment for the City.

agencies subject to SEPA requirements should use this authority to ensure proper compliance with SEPA.

King County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 661 n.7, 860 P.2d 1024 (1993).

This Court has similarly stated: “If another agency assumes lead status under WAC 197-11-948(1), the new lead agency can review the underlying materials and reverse the first lead agency’s DNS. The new lead agency can then order preparation of an EIS. WAC 197-11-948(2).” *Bellevue Farm Owners*, 100 Wn. App. at 352 n.26 (2000).

The City of Puyallup, as an agency with jurisdiction, properly followed the lead agency assumption process. The County issued its MDNS for the Knutson proposal on April 26, 2017. The City had until May 10, 2017, fourteen days after issuance of the MDNS, to assume lead agency status. After concluding that the proposal would continue to have significant adverse impacts on the environment despite the MDNS conditions, the City, “dissatisfied,” issued its assumption notice within the required time and in the required form. *See* WAC 197-11-985. As the new lead agency, the City had authority to issue a DS for the proposal, requiring an EIS. It did so in accordance with WAC 197-11-340.

2. Assumption May Occur in Response to Any Form of DNS.

Defendants below acknowledged that the City had followed the

correct assumption procedure. But they contended that their mitigated DNS was somehow excluded from the assumption process because it included mitigation conditions. *E.g.*, CP 489-492.

Defendants' argument has been based on the WAC 197-11-948 reference to WAC 197-11-340 which generally concerns DNS procedures, but does not cite WAC 197-11-350 concerning MDNSs in particular. Defendants have suggested that this somehow means that WAC 197-11-948 does not authorize SEPA lead agency assumption for any proposal for which a mitigated DNS has been issued.

However, a mitigated DNS, also known as an MDNS is a type of DNS. The SEPA regulations define an MDNS: “Mitigated DNS” means a DNS that includes mitigation measures and is issued as a result of the process specified in WAC 197-11-350.” WAC 197-11-766. (emphasis added).¹⁹ The definition is unambiguous and conclusive.

Additional SEPA regulations confirm that an MDNS is simply a type of DNS. WAC 197-11-340, twice cited in the assumption regulation, WAC 197-11-948, explicitly identifies a “DNS under WAC 197-11-350,” *i.e.*, an MDNS, as a type of DNS. *See* WAC 197-11-340(2)(a)(iv).

¹⁹ *Accord City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 40, 252 P.3d 382 (2011) (“SEPA administrative rules define an ‘MDNS’ as ‘a DNS that includes mitigation measures.’ WAC 197-11-766. When Town & Country appealed Tacoma’s issuance of the MDNS, it was contesting a particular type of DNS, namely a ‘mitigated’ DNS.”) (alterations removed).

WAC 197-11-310(5) states that “[a]ll threshold determinations shall be documented in” a DNS or a DS—it does not list an MDNS as an option or cite WAC 197-11-350. *See also Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001) (“WAC 197-11-310(5) mandates that ‘[a]ll threshold determinations shall be documented in: (a) a determination of nonsignificance (DNS) or (b) a determination of significance (DS).’”).

Likewise, WAC 197-11-508 requires the Department of Ecology to prepare a SEPA Register for “notice of all environmental documents,” and does not distinguish between MDNSs and DNSs, referring only to “DNSs under WAC 197-11-340(2).”

The DNS form in WAC 197-11-970 similarly does not distinguish between DNSs and MDNSs, stating that when a “DNS is issued under WAC 197-11-340(2)” the notice and comment period is fourteen days. Under Defendants’ logic, the form’s failure to cite WAC 197-11-350 means that there is no notice and comment period for an MDNS, when that is plainly not the case, per WAC 197-11-340(2)(a).

Defendants’ contrived distinction between a mitigated DNS, which they say is not eligible for assumption, and a DNS issued pursuant to WAC 197-11-340(2), which even under their contrivance is assumption eligible, is also undercut by their own (County) April 26, 2017 MDNS. It does not refer to WAC 197-11-350 at all. Instead it states, twice, that it is

“issued under WAC 197-11-340(2)”—the same regulation explicitly called out in WAC 197-11-948 that the Defendants acknowledge is associated with a DNS eligible for assumption. *See* CP 156.

The Department of Ecology’s official SEPA Handbook further verifies that an MDNS is simply a type of DNS: “A determination of nonsignificance . . . (DNS) is issued when the responsible official has determined that the proposal is unlikely to have significant adverse environmental impacts, or that mitigation has been identified that will reduce impacts to a non-significant level.” *SEPA Handbook*, Department of Ecology, at § 2.8²⁰ (emphasis added).

WAC 197-11-340(2) delineates procedures applicable when a DNS is issued. For example, WAC 197-11-340(2) requires that an agency not act upon a proposal for fourteen days after the date of issuance of a DNS. This provision applies to any proposal listed under WAC 197-11-340(2)(a). WAC 197-11-340(2)(a)(iv)) specifically lists a “DNS under WAC 197-11-350;” WAC 197-11-350, in turn, is titled “Mitigated DNS.”

WAC 197-11-948’s citation to WAC 197-11-340, but not WAC 197-11-350, is not meant to exempt from lead agency assumption proposals for which a mitigated DNS has issued. Instead, the citation recognizes that the process that triggers the fourteen-day period for

²⁰ <https://fortress.wa.gov/ecy/publications/documents/98114.pdf>

assuming lead agency status—”review of a DNS”—occurs under WAC 197-11-340, which encompasses MDNSs.

WAC 197-11-948(1) authorizes lead agency assumption “during the comment period on a notice of application when the optional DNS process in WAC 197-11-355 is used.” Under this optional WAC 197-11-355 DNS process, the lead agency must “[l]ist in the notice of application the conditions being considered to mitigate environmental impacts, if a mitigated DNS is expected,” and then send the notice of application to agencies with jurisdiction. WAC 197-11-355(2)(b), (d). A lead agency using this optional DNS process must inform other agencies with jurisdiction of the mitigation conditions because that information will aid those agencies in deciding whether to assume lead agency status. WAC 197-11-355(3) states that an agency with jurisdiction may “assume lead agency status during the comment period on the notice of application (WAC 197-11-948).” Thus, when the optional DNS process is used, an agency with jurisdiction can assume lead agency status even when the initial lead agency has announced that “a mitigated DNS is expected.”

Courts addressing DNSs and MDNSs have never suggested that a distinction exists between the two for purposes of lead agency assumption. To the contrary, in a case involving an MDNS, the Court of Appeals declared that “the City was authorized to impose conditions on the project

to mitigate environmental impacts. Upon reviewing the City's DNS designation, the Department had the option to assume lead agency status. WAC 197-11-948(1).” *Nw. Steelhead & Salmon Council of Trout Unlimited v. Washington State Dep’t of Fisheries*, 78 Wn. App. 778, 787, 896 P.2d 1292 (1995) (emphasis removed).

Decisions from state adjudicatory boards likewise confirm that an agency can assume lead agency status upon review of an MDNS. *Town of Concrete v. Skagit County*, SHB No. 96-18, Order Granting Summary Judgment (October 4, 1996), 1996 WA ENV LEXIS 253, at *23 (“As the environmental review in this case resulted in one DNS and two MDNS documents, [the Town of] Concrete had three separate opportunities to file the requisite notice of assumption of lead agency status”); *Repar v. DNR*, FPAB case no. 05-001, Order Granting Summary Judgment (June 28, 2005), 2005 WA ENV LEXIS 54, at *21 (stating in case involving MDNS that other agencies “had legal option[] . . . to assume lead agency status and make an independent environmental review within the context of the project review process. WAC 197-11-948”); *City of Bellingham v. DNR*, PCHB Nos. 11-125 & 11-130, Order Granting Summary Judgment (April 9, 2012), 2012 WA ENV LEXIS 11 at *14 (explaining in case involving MDNS that “[o]ther agencies with jurisdiction have the opportunity to comment on the threshold determination, and can assume

lead agency status during the 14 day comment period.”).

Defendants’ interpretation of WAC 197-11-948 would render the assumption regulation a virtual nullity because it would allow an initial lead agency to preclude assumption by including marginal, even illusory, mitigation in its threshold determination. Under Defendants’ interpretation, a mitigated DNS that includes even a single common temporary mitigation condition—for example regulating dump truck dust during construction—would automatically preclude another agency with jurisdiction, concerned about long term traffic impacts or water quality, from assuming lead agency status and requiring an EIS. In other words, an agency that disagrees with an MDNS may be just as “dissatisfied,” if not more so, by a mitigated DNS, as it would be by a DNS without mitigation conditions.

WAC 197-11-948 has been in effect for over three decades. Its purpose and import have not changed since the Washington Supreme Court described it as allowing “an agency which is ‘dissatisfied’ with a lead agency’s DNS to assume lead agency status and make its own threshold determination. WAC 197-11-600(3)(a); WAC 197-11-948.” *King County*, 122 Wn.2d at 661 n.7. There is no basis for varying from the Supreme Court’s interpretation that “Under the SEPA Rules, therefore, nonlead agencies are not constrained to accept a lead agency DNS but

instead may make an independent determination as to whether they are ‘dissatisfied’ with the lead agency’s decision” and may use the authorization for assumption “to ensure proper compliance with SEPA.” *Id.*

To be consistent with the Washington Supreme Court’s guidance on the context and purpose of WAC 197-11-948, and in light of the text of the assumption regulation and the SEPA regulations as a whole, this court should reject the Defendants’ contrived argument and apply the assumption regulation without exception. *See Washington Cedar & Supply Co. v. State, Dep’t of Labor & Indus.*, 137 Wn. App. 592, 600, 154 P.3d 287 (2007) (courts interpret regulations “in the light of the [relevant] statutes and regulations as a whole”).

3. The Adequacy of An MDNS Has No Bearing on Whether An Agency Can Assume Lead Agency Status.

Defendants argued in superior court that the City should not be allowed to assume lead agency status because the County’s mitigated DNS was the result of comprehensive analysis on a par with EIS analysis, and could survive any challenge in an appeal of the MDNS to the County Hearing Examiner. *E.g.*, CP 504-06, 698-99. But whether a mitigated DNS could survive such a challenge is not a consideration under WAC 197-11-948. Nothing in WAC 197-11-948 requires an agency assuming lead

agency status to first litigate the shortcomings of the mitigated DNS.²¹ Likewise, the County was incorrect in its superior court argument that an agency must propose “new or different mitigation measures” instead of assuming lead agency status and requiring preparation of an EIS. *See* CP 664. WAC 197-11-948 unconditionally authorizes an agency with jurisdiction to assume lead agency status if it is dissatisfied after review of the DNS.

E. The Superior Court Erred By Considering the Settle Declaration.

The superior court erred here by considering, over the City’s objection, a lawyer’s opinion on a dispositive issue of law. The Settle declaration offered no facts that “would be admissible in evidence” per CR 56(e). Instead, the Applicant’s motion cited the declaration as *legal* authority. CP 607-48; 803-08.

Legal opinions are inadmissible as evidence. *See Ebel v. Fairwood Park II Homeowners’ Ass’n*, 136 Wn. App. 787, 790-91 150 P.3d 1163, 1165 (2007) (“Courts will not consider legal conclusions in a motion for summary judgment.”). An expert’s legal opinion is inadmissible specifically “because it does not ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” Karl Tegland, Wash. Prac.,

²¹ Although not relevant on the legal issue presented, here the City had good reason to be dissatisfied with the County’s mitigated DS. *See* CP 186-88, 581-90.

Courtroom Handbook on Evidence, § 704:5, at 346 (2013-2014 ed.) (quoting ER 702).²²

Permitting experts to testify on the law usurps the role of a trial judge. *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550, 555 (2002). “Each courtroom comes equipped with a ‘legal expert,’ called a judge” *Id.* Accordingly, expert witnesses “may not offer opinions of law in the guise of expert testimony.” *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655, 663 (2001); *see also Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054, 1078 (1993) (“Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony.”) (emphasis in original).

The Settle SEPA Treatise does not provide support for the Defendants’ arguments, which is presumably why the declaration was commissioned. Further, based on documents obtained by subpoena issued in response to Applicant’s submission of the declaration, what was presented as a neutral assessment of the law by the declarant was actually a paid advocacy piece drafted predominantly by Applicant’s attorneys. CP

²² ER 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

783-808.²³

The declaration could not assist the court in understanding the evidence or determining an issue of fact. It was commissioned to offer legal opinions to persuade the court on the ultimate *legal* issue and should not have been considered.

F. Pierce County’s MDNS and Plat Approvals Are Invalid; An EIS Must Be Prepared Before Any Approvals Are Issued and Any Decisions Or Actions Taken.

The County’s defiance of the City’s lead agency assumption and Determination of Significance requiring preparation of an EIS violated WAC 197-11-390(2)(b) which enjoins that an initial lead agency’s threshold determination “[s]hall not apply if another agency with jurisdiction assumes lead agency status under WAC 197-11-948.” Once an EIS is required, agencies are prohibited until a final EIS has issued from taking any action that would have an adverse environmental impact or limit the choice of reasonable alternatives for the proposal. WAC 197-11-070(1). The County violated this regulation as well in defying the City’s assumption of lead agency status and approving the plat application.

Such actions by the County were ultra vires, invalid and void ab

²³ The engagement between the law firm and the Applicant, executed July 11, 2017, and the accompanying law firm “Terms” sheet are a legal services agreement, not an expert witness agreement. They promise, e.g., “responsive and vigorous representation” at a rate of \$540 per hour. CP 786-90.

initio. See *Noel v. Cole*, 98 Wn. 2d 375, 378-80, 655 P.2d 245 (1982); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73-74, 510 P.2d 1140 (1973); see also *Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 42, 873 P.2d 498, 507 (1994) (“The trial court’s invalidation of the conditional use permit must be upheld in light of the inadequate EIS.”).

V. CONCLUSION

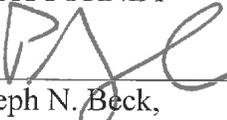
This Court should reverse the trial court’s summary judgment ruling and order grant of summary judgment for the City invalidating the County’s actions in defiance of the City’s assumption, enjoining/prohibiting the County from exercising SEPA lead agency status over the proposal, and barring further County actions on the proposal until a final EIS has been issued by the City and all legal requirements for application review have been met.

Dated this 5 day of February, 2018.

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CITY ATTORNEY

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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.

On February 5, 2018, I caused true and correct copies of the foregoing document to be delivered to the parties listed below via United States mail, first class postage prepaid, and via email:

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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 5th day of February, 2018, at Seattle, Washington.



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