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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.

AMICUS BRIEF BY CITIES OF SHORELINE AND ELLENSBURG

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I. INTRODUCTION

For decades, the implementing rules for the State Environmental Policy Act (SEPA) contained in WAC 197-11 have included a provision for assumption of lead agency status by another agency with jurisdiction over a proposal or a part of a proposal. This option has been maintained through various revisions of the underlying statute and the rules. It has also been acknowledged repeatedly in case law. Its inclusion in the rules has been an important safeguard for impacted jurisdictions to ensure that an initial SEPA lead agency does not ignore or miss issues when making a SEPA determination.

The reading of WAC 197-11-948 advocated by the Respondents here would eliminate that safeguard, not by amendment of the statute or rule, but by a contorted interpretation.

II. AMICI INTERESTS

The City of Shoreline and the City of Ellensburg (collectively “Cities”) are municipal corporations of the State of Washington required to administer and comply with the State Environmental Policy Act (“SEPA”), Chapter 43.21C RCW. Both Cities have had experience with projects that simultaneously implicate both county and city permits and accordingly have substantial relevant interest and expertise. The Cities are particularly concerned that the safeguard for cities embodied in WAC 197-11-948 not be effectively interpreted into non-existence.

The Cities are also concerned that the extremely narrow reading of “agency with jurisdiction” advocated by Respondents will distort other aspects of the SEPA process and result in unintended adverse consequences.

III. ISSUE ADDRESSED BY THIS AMICUS BRIEF

Whether the lower court incorrectly added a type of balancing test that requires a “substantial jurisdictional hook” in order to be considered an “agency with jurisdiction” for purposes of WAC 197-11-948, WAC 197-11-714(3) and other SEPA rules.

IV. STATEMENT OF THE CASE

The cities adopt the City of Puyallup’s Statement of the Case.

V. ARGUMENT

A. WAC 197-11-948 is Unambiguous and Should be Applied as Written

The wording of the SEPA rules at the heart of the issue here is clear. WAC 197-11-948 states:

“Assumption of lead agency status”

(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.

The directive in this rule is unambiguous: It allows for substitution of (assumption by) a new SEPA lead agency, which must be an “agency with jurisdiction” over the proposal in place of what WAC 197-11-948 pointedly characterizes as the “initial lead agency.” (Emphasis added). The Respondents have sought to ignore the plain language of this rule by asking this Court to instead rely on their policy arguments rather than the express language of the rule. The policy rationale that has been offered for an interpretation, however, would effectively render assumption of SEPA lead agency status a nullity.

The fundamental problem with the Respondents’ argument and the lower court ruling is that it eliminates a key point of accountability in the SEPA process. Respondents’ logic would allow an initial lead agency – through oversight, neglect or other factors – to effectively minimize or ignore impacts of a proposal and/or fail to require adequate mitigation. This risk is particularly acute when the likely impacts will occur in significant part in another jurisdiction, not within the initial lead agency’s jurisdictional boundaries, or where different jurisdictions have varying interests and levels of interest in a particular proposal.¹

The SEPA rules provide an effective, orderly, and timely remedy in such circumstances as well as provisions for resolving differences. But Respondents

¹ For example, the City of Shoreline has experience with a very major project for which a County is the lead agency, but for which all access and significant services will be provided by and through the City which is located immediately adjacent to the project in a different County. Another example is a city street that will require improvements to serve as access for vehicles and transit to a future Shoreline Sound Transit Light Rail station where the street abuts Shoreline but the actual jurisdiction over the street is currently shared by Seattle, King County and WSDOT.

take the position that Washington cities should be relegated to an initial lead agency's administrative appeal process, as if municipal agencies with jurisdiction have no more right or authority in the SEPA process than private citizen appellants. However, the SEPA rules, as a whole, and WAC 197-11-948 in particular, clearly state that municipalities, as agencies with jurisdiction, may choose to play a greater role. Requiring an additional showing before being able to assume lead agency status is therefore not only contrary to the plain language of the WAC rules, it is also inconsistent with the purpose of SEPA, which is to identify impacts to the environment as early as possible in the development process.

B. WAC 197-11-714(3) is Also Unambiguous and Should be Applied as Written, Particularly in Light of Unintended Consequences that would Otherwise Result.

SEPA grants the right to assume lead agency status from an "initial lead agency" to all "agencies with jurisdiction." WAC 197-11-714 defines "Agency with jurisdiction" as:

- (3) . . . 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. * * *

This definition is explicitly broad and only precludes "standards of general applicability that could apply to a proposal *when there is no requirement of a license or approval*" (emphasis added). While WAC 197-11-932, for example, uses a geographical test for an initial lead agency determination, a subsequent assumption of SEPA lead agency status under WAC 197-11-948 includes no such

test. All that is required under the WAC 197-11-714(3) definition is some authority over just a part of a proposal.

By injecting a requirement that there be a “*sufficient* jurisdictional *hook*” [emphasis added] in order to be considered an “agency with jurisdiction,” the lower court’s ruling injects a balancing test into the rule which does not exist, and leaves a cloud of confusion over non lead agencies being able to assume lead agency status. RP 57-58. The lower court did not define what it meant by “sufficient” but only made a conclusory statement that certain aspects of the proposal (“water, sewer, and roads”) necessary to mitigate the project’s impacts were not “sufficient hooks” to assert lead agency status. *Id.*

In addition to going beyond the plain language of the rule, the lower court’s decision appears to ignore, or at least discount, the fact that modifications to the City’s roads, an MDNS condition, will require permission from the City of Puyallup to facilitate the proposal.² The lower court’s conclusion, therefore, leaves cities and other jurisdictions guessing exactly what type of “authority” is “sufficient” enough for assumption of lead agency status. Such uncertainty will create confusion and unforeseen results in many circumstances beyond the specific facts of this one case. Is the sufficiency determination to be done on a case by case

² Additionally, WAC 197-11-760 defines license to mean “**any form of written permission** given to any person, organization, or agency to engage in any activity, as required by law or agency rule. A license **includes all or part of an agency permit, certificate, approval, registration, charter, or plat approvals or rezones to facilitate a particular proposal.** The term does not include a license required solely for revenue purposes.” (Emphasis added.)

basis, and if so, how? Also, the definition of “agency with jurisdiction” applies to the entirety of the SEPA rules, resulting in additional confusion over those other provisions as well. *See, e.g.*, WAC 197-11-158(4), 305(1)(b)(ii), 340(2)(a)(i), 340((3)(c), 640, 835(2), 440(5)(b)(iii), 455(1)(b), 455(1)(c), and 922.

The Respondents argue that to be an “agency with jurisdiction,” a city or other local government must not just meet the WAC 197-11-714(3) requirement for authority over any part of a proposal, but must also demonstrate that the authority sufficiently outweighs that of the initial lead agency. But, as noted above, there is no such test in the rules or case law; and, such rating and weighing of agencies’ relative interests would be arbitrary and could also impact other provisions that reference or include “agencies with jurisdiction.” It would also leave open the question of how to weigh interests or authority, and whether others could challenge an agency’s SEPA decision on the separate basis that it was made by an agency without “sufficient” jurisdiction, even in situations where all of the agencies agreed to lead status. The actual definition of “agency with jurisdiction” does not allow for such evasions and challenges. By contrast, the approach adopted by the Respondents, opens the door to such potential consequences.

VI. CONCLUSION

Recently this Court observed in *Lands Council v. Washington Parks and Recreation Commission*, 176 Wn. App. 787, 807–08, 309 P.3d 734, 744–45 (2013), that SEPA has for over 40 years been a primary means by which Washington governments carry out their mandate to protect the environment. Here,

the lower court has artificially inserted a “sufficiency” test into a definition that has functioned without incident for decades. Ratification of the lower court’s decision will create uncertainty and disruption in application of the SEPA regulatory scheme that by and large has functioned well over several decades. Doing so would also be a disservice to the environment and all Washington “agencies with jurisdiction” that are bystanders to this dispute, but will be impacted by its outcome.

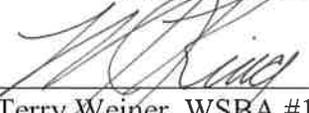
Dated this 15th day of June, 2018.

CITY OF SHORELINE



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Shoreline City Attorney

CITY OF ELLENSBURG

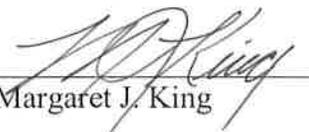


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DECLARATION

Margaret J. King declares under penalty of perjury under the laws of the State of Washington that the facts as stated in the foregoing motion are true and correct.

Dated this 15th day of June, 2018 at Shoreline, Washington.



Margaret J. King

DECLARATION OF SERVICE

On said day below, I electronically filed this document with the Court of Appeals, Division II, and served a true and correct copy of this document to the following parties through their counsel of record via e-service and email:

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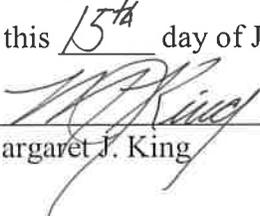
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Margaret J. King

CITY OF SHORELINE

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