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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CITY OF PUYALLUP,

APPELLANT,

v.

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

RESPONDENTS.

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JOINT BRIEF OF RESPONDENTS

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## STATEMENT OF THE CASE

The City of Puyallup filed this appeal challenging the trial court's order on remand from this Court's decision in *City of Puyallup v. Pierce County*, 8 Wn. App.2d 323, 438 P.3d 174 (2019). That prior appeal presented a jurisdictional dispute between Pierce County and the City of Puyallup for exclusive authority to conduct the required State Environmental Policy Act<sup>1</sup> ("SEPA") review of and require an Environmental Impact Statement ("EIS") for a commercial warehouse development proposed by respondents Knutson Farms, Inc. and Running Bear Development Partners, LLC (collectively "Knutson"). The proposed development, known as the Knutson Farms Industrial Park, is wholly located within unincorporated Pierce County, and the County is the permitting authority for the proposed development.

More specifically, the questions previously presented were whether the City qualified as an "agency with jurisdiction" as defined by SEPA, and if so, whether the City could only assume the status of Lead Agency under WAC 197-11-948 and require an EIS after a Determination of Nonsignificance ("DNS") as opposed to a Mitigated Determination of Nonsignificance ("MDNS"). In October 2016, Thurston County Superior Court Judge Lanese ruled on summary judgment that the City did not

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<sup>1</sup> Chapter 43.21C RCW.

qualify as an “agency with jurisdiction” and, thus, could not assume the status of Lead Agency under WAC 197-11-148. As a result, the trial court ruled that the City’s attempt to assume Lead Agency status was void, and it dismissed the City’s lawsuit. 8 Wn. App. 2d at 326, 330.

This Court disagreed, holding that the City did qualify as an agency with jurisdiction because of its approval authority over the roads and sewer and water services that will serve the proposed industrial park. This Court further held that, under the plain meaning of WAC 197-11-948 and related regulations, the City, as an agency with jurisdiction, could assume Lead Agency status following issuance of an MDNS and require an EIS. 8 Wn. App at 351-52. Accordingly, this Court reversed the trial court’s summary judgment and remanded “for action consistent with this opinion.” *Id.* at 352.

Separate from the City’s lawsuit seeking declaratory judgment that it was qualified to assert Lead Agency status for the SEPA review of this project, the City also filed administrative appeals with the Pierce County Hearing Examiner challenging the County’s MDNS, as well as the County’s decision to provide preliminary approval the Knutson’s short plat application. (*See* CP 55, 103. *See also* CP 45-46.) After the trial court made its summary judgment ruling, the Hearing Examiner commenced review of the City’s appeals. The Examiner was made aware of the City’s

lawsuit, the trial court's summary judgment ruling and that the matter was further appealed to and pending before this Court. (CP 57.) But the Examiner noted that "the City did not apply for a stay of the Superior Court Order. Therefore, the Examiner became involved in this matter in October, 2017." (CP 57, *see also* CP 103-104.)

The City's appeal culminated in an extensive public hearing that commenced on July 16, 2018 and concluded on July 26, 2018. (CP 58.) After considering the substantial testimony, that included County reviewing staff and expert testimony presented by both the City and Knutson, as well as more than 450 exhibits (CP 58), the Examiner issued decisions on the City's appeals on November 21, 2018.<sup>2</sup> (*See* CP 51-86, 87-98, 99-115.) The Examiner affirmed the County's MDNS, but imposed additional traffic mitigation as well as other mitigation measures. (CP 114-15.) The Examiner also affirmed the County's preliminary approval of Knutson's proposed commercial short plat, but subject to the Examiner's additional conditions to mitigate project impacts. (CP 81-83.) The City appealed the Examiner's decisions denying the City's appeals under the

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<sup>2</sup> At the same time, the Examiner also issues a decision approving a requested shoreline substantial development permit for the proposed stormwater outfall for the Knutson Farms Industrial Park. (CP 121-39.) The required public hearing for the shoreline permit was consolidated with the City's appeals as required by chapter 36.70B.

Land Use Petition Act, chapter 36.70C RCW.<sup>3</sup> (CP 141-57.)

Significant to this appeal, Knutson's proposed industrial park had been subject to review for a substantial period of time before the County issued the MDNS in April 2017 and the City first asserted Lead Agency status in May 2017. 8 Wn. App.2d at 326-29. The original complete application was submitted to the County in November 2014. *Id.* at 326. In 2016, after receiving critical comments from multiple commenting agencies, Knutson submitted a revised application reducing the size of its project and moving it further away from the Puyallup River. *Id.* at 328, n.

3. This Court noted:

As required by the Pierce County Code and the County's environmental review under SEPA, the Applicants obtained and submitted professionally prepared studies analyzing the potential impacts and mitigation measures including a traffic impact analysis; a critical areas assessment report; flood surveys and studies including a flood boundary delineation survey, conceptual flood plain compensatory storage plan, compensatory flood plain volume table, and flood plain cross sections; a preliminary storm drainage report; and a geotechnical engineering report.

8 Wn. App. at 328.

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<sup>3</sup> The City's subsequent LUPA appeal was filed under Pierce County Superior Court cause no. 19-2-06362-4. By agreement of the parties, that LUPA appeal has been stayed pending resolution of this appeal

In the course of the review leading up to the MDNS, the preliminary shot plat approval and the City's administrative appeals, the County made many decisions regarding the project that were not SEPA-related or SEPA dependent. The City challenged some of those non-SEPA decisions in their administrative appeal. For example, the County decided that Knutson's application qualified for an extension under Title 18F, Pierce County Code ("PCC"). The City challenged that decision, albeit unsuccessfully, asserting that the application did not qualify for extension, and had thus expired. (CP 59-61.) The City also claimed that Pierce County improperly interpreted and applied its own local code as set forth in Title 18E PCC that governs the location of and development allowed in the channel migration zone ("CMZ") and/or flood zones.<sup>4</sup> (CP 78-80.)

The County decisions with regard to the CMZ were purely questions of code interpretation and wholly unrelated to SEPA, but nonetheless important to determining the scope and location of the project. The decision regarding extension of the application was also strictly a matter of interpretation of the Pierce County Code and, of course, determined whether review of the project would even continue. The City

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<sup>4</sup> Another County decision wholly unrelated to SEPA was the County's decision that the stormwater outfall that will serve the Knutson Farms Industrial Park does not require an shoreline conditional use permit. (*See* CP 127.)

continues to challenge the County's decisions on these non-SEPA issues in their pending LUPA appeal. (*See* CP 154-55.)

This Court's decision on the SEPA jurisdictional dispute was issued in April 2019, after the Examiner issued its decisions on the City's administrative appeals. After the Supreme Court rejected respondents' petition for review and a mandate was issued, the parties returned to the Thurston County Superior Court for entry of an order consistent with this Court's decision. Unfortunately, another dispute arose regarding the terms of the order.

Respondents accepted the majority of the City's proposed Order on Remand. Respondents agreed to the provision acknowledging and confirming the City's status as Lead Agency, and likewise agreed to the provision requiring preparation of an EIS before further review of and decisions on the project may proceed. (*See* CP 43, 158.) Respondents objected, however, to the following language proposed by the City:

3. All County reviews, decisions, permits, and approvals related to the Knutson Farms project are null and void *ab initio*. The underlying review processes may be recommenced once the Final EIS is issued by the City of Puyallup. Until then, all County reviews, decisions, permits, and approvals for the Knutson Farms warehouse project are on hold.

(CP 43.)

Respondents challenged the above language is overly broad.

Respondents proposed the following alternate language:

3. Decisions by Pierce County based upon the MDNS issued for the Knutson Farms warehouse project are null and void, and the applications are returned to the status of pending applications. Pierce County shall issue no final decisions on the Knutson Farms warehouse project until an EIS is completed.

(CP 159, 184.) Respondents offered *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993), in support of their position. (CP 161, 163-83.)

The trial court accepted respondents' proposed alternative order (CP 196-99), and this appeal followed (CP 200-205).<sup>5</sup>

### ARGUMENT

The trial court properly rejected the City's proposed order as the proposed language was overly broad. Respondents agree that this Court's decision serves to void the MDNS, replacing it with a Determination of Significance ("DS"), and also serves to void the County's preliminary approval of the commercial short plat. Respondents likewise agree that completion of an EIS by the City is required before the County may again consider whether approval of commercial is appropriate.

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<sup>5</sup> The City infers that the trial court acted improperly when he elected to sign respondents' proposed order based upon the briefing submitted (CP 1-195) and without oral argument. But Thurston County Local Rule LR 7(b)(6) confers the trial court discretion in this regard. Local Rule 7(b)(6) provides: "Motions scheduled on the civil motion calendar are heard with oral argument, unless otherwise directed by the court."

But if accepted, the City's proposed order would void not only those County decisions, but would void any and all prior decisions related to the permit applications, regardless of whether these interim decisions customarily made in permit review were SEPA related or otherwise dependent upon SEPA review. Moreover, the proposed order would also void and exclude from consideration all prior review of the permit applications. It would reset all review of the project at the beginning and would effectively **require** disregard of substantial, informative environmental study, which was tested through an extensive contested process.

The Pierce County Hearing Examiner decisions in the record describe some of the relevant procedural history for the permitting process that includes the extensive evidentiary hearing before the Examiner. Only one of the decisions addressed SEPA issues. (CP 99-115.) Two of the Examiner Decisions also addressed non-SEPA related issues, including interpretation of both procedural and substantive provisions of the Pierce County Code. (See CP 51-86, 121-36.) Under the City's proposed language, procedural decisions such as whether the permit application review period was extended consistent with the Pierce County Code would be void. Substantive decisions regarding the location and boundary of the CMZ and flood plain pursuant to the Pierce County Code, or regarding the

interpretation and application of Pierce County shoreline regulations and building codes as they apply to the Knutson project would likewise all be voided.

While it is appropriate for the Court to void final permit decisions (e.g. issuance of building permits, short plat approval) and to enjoin such action on such decisions until proper SEPA review is completed, none of the cases the City cites support the proposition that an improper SEPA decision should serve to erase all project review and all interim County decisions regarding application of its own Code.

Moreover, the SEPA regulations do not suggest that the remedy advocated by the City is required. WAC 197-11-070 sets the limits on government action while completion of the SEPA process, in this case preparation of an EIS, is pending. This regulation provides in relevant part:

(1) Until the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would:

(a) Have an adverse environmental impact; or

(b) Limit the choice of reasonable alternatives.

\* \* \*

(4) This section does not preclude developing plans or designs, issuing requests for proposals (RFPs),

securing options, or performing other work necessary to develop an application for a proposal, as long as such activities are consistent with subsection (1).

The County made many decisions in the course of its normal permit review process that neither adversely impacted the environment nor limited the alternatives that the City may consider in preparation of the EIS. Those decisions would not have been barred pending completion of an EIS, and cannot, therefore be deemed *ultra virus*. See *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 392 P.3d 1025 (2017). The trial court appropriately entered an order that exclusively voided only those decisions that were SEPA dependent.

To support its position, the City accurately quotes at page 13 of its brief the following passage from Professor Richard Settle's treatise *The Washington State Environmental Policy Act: A Legal and Policy Analysis*:

Since state and local agency authority to act is qualified by the requirements of SEPA, agency action attended by SEPA noncompliance is unlawful. The usual remedial result of a judicial determination of SEPA violation is simply invalidation of the agency action. Thus, action which was not preceded by a proper threshold determination process is invalid and the agency must begin the decision-making process anew; and action which a required EIS was inadequate or not prepared is rendered a nullity and

remanded for reprocessing in light of an EIS.  
(Emphasis added.)<sup>6</sup>

The City seizes upon the underscored phrase, repeating a portion of the phrase multiple times, and argues that the remedies available to a court are without nuance or consideration of the circumstances presented in the case. The treatise does not support the City's expansive position.

Notably, the City omits the sentence preceding the quoted passage from Professor Settle's treatise, which states: "Neither the statute nor Rules address legal remedies for SEPA noncompliance." More significantly, the City omits the sentences immediately follow the quoted passage that supports the trial court's order. Professor Settle continued:

In *King County v. Boundary Review Board*,<sup>7</sup> the court emphasized that action on the proposed annexation was enjoined until an EIS had been prepared. However, the Board was not required to revisit the entire annexation process. The court held it would be "sufficient for the Board to reopen its hearing for consideration of the EIS" after which the Board could reverse or affirm or modify the previous decision.<sup>8</sup> In several cases, the courts have held that minor

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<sup>6</sup> Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, Ch.20, § 20.09[1] at 20-38 (Matthew Bender 2019) (footnotes with citations omitted).

<sup>7</sup> 122 Wn.2d 648, 860 P.2d 1024 (1993).

<sup>8</sup> 122 Wn.2d at 653.

violations of SEPA were inconsequential and, thus, did not justify a remedy.<sup>9</sup>

Knutson is aware of no case law that provides that all prior permit review and interim review decisions must be abandoned following a reversal of a DNS. *King County v. Washington State Boundary Review Bd.* supports a contrary conclusion. The additional environmental review through the contemplated EIS must be appropriately considered in the County's final decision-making process. But the County is not required ignore or repeat all prior permit review.

The Order signed by the Court is also consistent with SEPA's purpose. The purpose of SEPA is to ensure that environmental considerations are efficiently integrated into the permit decision-making process such that permitting decisions are environmentally informed. *Save Our Rural Environment (SORE) v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983). But SEPA is not intended or "designed to usurp local decision making or to dictate a particular substantive result." *Id.* See also, *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). Likewise, it is not intended to duplicate review that already occurs through application of local regulations designed to protect the environment. *Moss*,

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<sup>9</sup> Respondents do not claim that this is a case of harmless error. Rather, respondents rely on the analysis set forth in *King County v. Boundary Review Board's* and considerations of efficiency and economy.

109 Wn. App. at 15. Thus, SEPA authorizes use and incorporation by reference of existing studies. *See* WAC 197-11-600, 197-11-635. Where efficiencies can be achieved they are encouraged under SEPA. Finally, it is not appropriate for SEPA to be employed simply as a tool to obstruct unpopular projects. *See Cougar Mountain Associate v. King County*, 111 Wn.2d 742, 749, 753-54, 765 P.2d 264 (1988); *Parkridge v. City of Seattle*, 89 Wn.2d 454, 466 (1978).

The City of Puyallup is now the lead agency for the SEPA review by virtue of its Notice of Assumption of Lead Agency Status and will be the lead in preparing the required EIS. But the City has not assumed the status of the permitting jurisdiction and it is not empowered to enjoin other processes and reviews pending its completion of the EIS, which to date, the City has yet to even commence.

The order on remand entered by the trial court appropriately voided the permit approvals that cannot be made until completion of the SEPA review and ensures that the EIS is infused into the County's permitting process without creating unnecessary inefficiencies.

Finally, as noted earlier, the City has filed a Land Use Petition Act (LUPA) appeal of the Examiner Decisions. (CP 141-57.) That action was stayed pending resolution of the appeals related to this action. Because the Examiner addressed non-SEPA related issues, it will facilitate efficiency

and administrative economy if the trial court may proceed in the LUPA action to resolve those non-SEPA related issues in the pending LUPA appeal as the Court did in *King County v. Washington State Boundary Review Board*, 122 Wn.2d at 668-669 (attached). The trial court's order on remand is consistent with this Court's decision and simultaneously allows the Pierce County trial court the opportunity, upon submission of appropriate briefing, to address whether it should or should not proceed with the pending LUPA appeal challenging the Examiner's non-SEPA related decisions to facilitate administrative economies.

#### CONCLUSION

Based on the foregoing, this Court should affirm the order entered by the trial court on remand.

Dated this 18<sup>th</sup> day of September, 2020.

Respectfully submitted,

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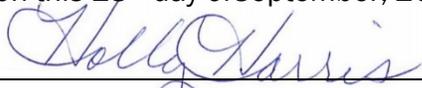
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 18<sup>th</sup> day of September, 2020, I caused true and correct copies of this document to be served on the parties listed below, via the method(s) indicated:

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DATED at Tacoma, Washington this 18<sup>th</sup> day of September, 2020.

  
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