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SUPREME COURT NO. _____

Court of Appeals No. 74327-9-I

CITY OF MULKITEO, a municipal corporation; and
SAVE OUR COMMUNITIES, a Washington non-profit corporation,

Appellants,
v.

SNOHOMISH COUNTY and
PROPELLER AIRPORTS PAINE FIELD, LLC, a Delaware LLC,

Respondents.

AMICI CENTER FOR ENVIRONMENTAL LAW & POLICY, FUTUREWISE, SPOKANE RIVERKEEPER AND WASHINGTON ENVIRONMENTAL COUNCIL'S REVISED MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

In fulfilling the goals of the Washington State Environmental Policy Act of 1971 ("SEPA"), timing is everything. *See* Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis §13.01[3] ("Early environmental review avoids the alternative evils of wasted planning for environmentally unacceptable proposals or environmental harm inflicted by projects which gained approval because of their irresistible momentum."). Timing is the difference between environmental review being a wasteful paper-pushing exercise or an opportunity for deliberate, informed decision-making.

To be sure, determining the appropriate timing of review can be difficult in some situations. Review must come early enough to inform, but not so early that the consequences of a proposal are difficult to identify. *See* Settle at §13.01[3]. But this case does not deal in that kind of nuance. This is not a case where the Court of Appeals was faced with a delicate policy question of whether requiring earlier review would undermine the quality of that review. Here there is a specific project proposal in a defined geographic location. Without question, Snohomish County ("County") could have engaged in meaningful environmental review at this time. Still, the Court of Appeals held that delayed review was permissible because the private actor – Paine Field to Propeller

Airport, LLC ("Propeller") – retained choice under the option contract pending environmental review. But Propeller is the wrong actor for the purposes of determining freedom of choice under SEPA. It is the County – the governmental body – that must remain free to adjust its behavior in response to environmental review. This much is settled law.

While this is not a difficult case, if allowed to stand the Court of Appeals decision has the potential to disrupt settled principles and create unnecessary confusion on fundamental aspects of SEPA: (1) that preserving the choice of the government, not the private actor, is the relevant inquiry and (2) that environmental review has to come at a time with the government decision-maker is in a position to make practical choices based on that review.

Review should be accepted because of the substantial public interest raised by this issue. *See* RAP 13.4(b)(4). This Court should also accept review because the Court of Appeals' decision conflicts with existing precedent. *See* RAP 13.4(b)(1), (2).

II. STATEMENT OF THE CASE

Amici adopt and incorporate the statement of the case as set forth in the City of Mukilteo and Save Our Communities' Petition for Review.

III. IDENTITY AND INTEREST OF THE AMICI

Amici incorporate their statements of interest as set forth in the Motion for Leave to File Brief of Amicus Curiae in Support of Petition for Review, filed concurrently with this brief.

IV. ARGUMENT

SEPA requires all government actors at the state and local levels to consider the environmental consequences of their decisions. RCW 43.21C.030. In doing so, SEPA advances the public interest in two fundamental ways – one procedural, one substantive. First, SEPA ensures government decisions are informed; that they are made through "deliberation, not default." *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn.2d 267, 272, 522 P.2d 674 (1976). Second, SEPA shapes the substantive outcome of government decision-making by empowering agencies to make choices that would protect the public's interest in a healthful environment. *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 63, 578 P.2d 1309 (1978) ("SEPA sets forth a state policy of protection, restoration and enhancement of the environment."); *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn. 2d 80, 392 P.3d 1025, 1030 (2017) ("The legislature enacted SEPA in 1971 to inject environmental consciousness in to governmental decisionmaking."); Settle

at §18-2 (Environmental review "expected to shape the substance of agency action.").

To achieve these procedural and substantive aims, environmental review must come at the earliest possible time – before the relevant government authority constrains its freedom to choose the optimal course of action. WAC 197-11-055(2) ("The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process."); *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 666, 860 P.2d 1024(1993) ("The point of an EIS is not to evaluate agency decisions after they are made, but rather to provide environmental information to assist with making those decisions.").

This case stands in remarkable contrast to settled law. The Court of Appeals held that the County could enter into an option to lease without engaging in environmental review even when doing so would leave a private actor with the unilateral choice of whether to expand Paine Field to commercial air service. In so holding, the Court of Appeals committed two fundamental and compounding errors. First the court improperly considered only whether the developer's choice to proceed with the project was preserved by the lease option. But it is governmental choice, not the choice of a private actor, that must be preserved pending

environmental review. Second, because it failed to focus on governmental choice, the decision below creates unnecessary conflict with a long line of SEPA cases that look not just to binding legal commitments but also to the momentum-inducing effect of early agency decisions when considering the appropriate timing of review.

A. The Timing of SEPA Must Preserve Governmental Choice Pending Environmental Review

Environmental review serves the purposes of SEPA only if the government has the freedom to impose mitigation, adopt more environmentally sensible designs, or even reject a proposed project based on the review. Without that freedom, environmental review is no more than a papering over of decisions already made.

In cases involving SEPA timing issues, Washington courts have consistently asked whether governmental choice is preserved pending environmental review. *Int'l Longshore and Warehouse Union v. City of Seattle*, 176 Wn. App. 512, 524, 309 P.3d 654 (2013) (whether a Memorandum of Understanding would have a "coercive effect" on City of Seattle, not on the private actor, before environmental review); *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 317, 230 P.3d 190 (2010) (considering whether the City of Seattle, not the federal authorities, bound its decision-making before review).

In *Columbia Riverkeeper*, this Court recently clarified that all state agencies with the potential to "approve, veto, and or finance all or part of the project" must remain free to choose. 188 Wn. 2d 80, 392 P.3d at 1028 (*quoting* WAC 197-11-070). The possibility that another agency, even one with a more prominent role in the decision-making process, could reject or place conditions on a project proposal did not excuse the Port of Vancouver from complying with SEPA. *Id.* at 1033. This Court turned to whether the lease agreement between the Port and Tesoro bound the Port. *Id*. at 1034. Rightfully, this Court did not concern itself with whether Tesoro made any binding commitments. Rather, this Court upheld delaying SEPA review because "the lease language plainly preserves the Port's ability to shape the final project in response to environmental review, for example by adopting additional mitigation measures, heightened insurance requirements, or modifying project specifications." *Id*. at 1035 (emphasis added). Though divided on the question of whether the lease agreement preserved enough choice through its claw back provisions, this Court unanimously identified the relevant question – whether the government choice was preserved.

By contrast, here the Court of Appeals answered the wrong question. At every point where it examines the issue of whether the County should have engaged in environmental review before giving

Propeller the option to lease, the court concludes that it was sufficient for Propeller – the private actor – to retain choice pending environmental review. *See e.g.,* Op. at 10 ("Whether Propeller decides to exercise the option and then execute the lease are decisions expressly reserved until after environmental review is complete.") (internal quotations omitted) (emphasis added); *Id.* at 13 ("The option makes clear that Propeller cannot exercise the option and execute the lease without first complying with a condition precedent to performance: completion of "a SEPA process."); *Id.* at 24 ("But as previously discussed, it is possible that Propeller and the County will not enter into a lease if Propeller does not exercise the option and execute the lease. Thus, it is not true that the County no longer has the choice of not entering into the lease just by executing the option agreement.")

Throughout its decision, the Court of Appeals misses the heart of the issue by focusing on the fact that the option does not bind Propeller. But the relevant inquiry is whether the option binds the County. Here, it does. In fact, the County Council's power to influence the terms of the project is greatest in its proprietary capacity. *See* Petition for Review at 3. Delaying review until after the County Council signed away its bargaining power was particularly critical to the loss of governmental choice here.

Left uncorrected this case departs from well-settled law and confuses the focus of SEPA's core inquiry. This Court should grant the petition to review to reaffirm the central principles that drive SEPA – namely that governmental choice must be preserved until alternatives can be evaluated.

B. The Timing of SEPA Review Must Preserve Actual Choice, Before A Project Is Driven By Its Own Momentum

When it comes to preserving governmental choice, the relevant question under SEPA is not simply whether the governmental actor has legally bound itself to a particular outcome. Rather, the "earliest possible time" requirement is meant to ensure that the government agency is still acting with an open mind, not just that it technically has the ability to react to review. That is why "environmental review can be required even when the government has not made a definite proposal for actual development of the property at issue." *See Magnolia*, 155 Wn. App. at 316, *citing Boundary Review Bd*., 122 Wn.2d at 664.

Indeed, environmental review must come before governmental inertia and incremental decision-making takes on its own momentum and drives the project forward. *See Boundary Review Bd*., 122 Wn.2d at 664 ("Even a boundary change, like this one, may begin a process of government action which can 'snowball' and acquire virtually unstoppable administrative inertia."). *See also* William H. Rodgers, *The Washington Environmental*

Policy Act, 60 Wash. L. Rev. 33, 54 (1984) (postponing review risks "a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds.").

That environmental review must come at the earliest time – when a range of options are still practically on the table – is also a hallmark requirement of SEPA's federal counterpart, the National Environmental Policy Act (NEPA), 42 U.S. Code § 4321 et seq. *See Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006) ("Federal regulations explicitly, and repeatedly, require that environmental review be timely."); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (NEPA review "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made."); *Conner v. Burford*, 848 F.2d. 1441, 1446 (9th Cir. 1988) ("The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they retain a maximum range of options."); *Save the Yaak Committee v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) ("Proper timing is one of NEPA's central themes.") *Cf. Eastlake Community Council v. Roanoke Associates*, 82 Wn.2d 475, 488 n.5, 513 P.2d 36 (1973) (Washington courts look to NEPA for guidance in construing SEPA).

Unlike some other SEPA or NEPA timing cases, this one is relatively straightforward. It does not involve a decision that would have only indirect land use consequences. *Cf. Boundary Review Bd.*, 122 Wn.2d at 664. It does not involve a closer-to-the-line inquiry where the contractual commitment contains a claw back provision. *Cf. Columbia Riverkeeper*, 188 Wn. 2d 80, 392 P.3d at 1034. This case presents the fairly simple context in which a governmental agency has bound itself without the benefit of environmental review, preserving choice only for a private actor with economic incentives to proceed regardless of the impacts. The simple context is precisely what makes this an important case to get right. If allowed to stand, this case undercuts the work that courts have done to balance timing of SEPA review with the sometimes competing goals of specificity, or to consider the line between remaining legally unbound but practically committed.

V. CONCLUSION

For these reasons, this Court should grant review of the Court of Appeals decision under RAP 13.4(b)(1), (2), and (4).

Respectfully submitted this 30th day of May, 2017,

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